

UGANDA / JUDGMENT

Ssejemba v Attorney General (Constitutional Petition No. 37 of 2014) [2021] UGCC 28 (5 October 2021) [2021] UGCC 28

COURT

Constitutional Court of Uganda

BEFORE

Barishaki, JA, Kibeedi Mutangula, JCC, Musoke,
JCC, Mulyagonja, JCC, Egonda-Ntende, JCC

CASE / FILE NUMBER

Constitutional Petition No. 37 of 2014

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IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 037 OF 2014

**Coram: Justice F. M. S Egonda Ntende, Elizabeth Musoke, Cheborion Barishaki,
Muzamiru Kibeedi, Irene Mulyagonja, JJCC**

\$10\$

SSEJEMBA ISRAEL ::::::::::::::::::::::::::::::**VERSUS****ATTORNEY GENERAL ::::::::::::::::::::::::::::::****JUDGEMENT OF CHEBORION BARISHAKI, JCC****Background**

The Petitioner received summons on the 16th of October 2014, in Small Claim No. 107 of 2014; Kawuma Male v Ssejemba Israel, issued by the

Chief Magistrates Court in Makindye in which the Claimant sought to \$20\$ recover a sum of shs. \$9,523,400/\$ = from the Petitioner.

The Petitioner then contacted M/s Ekirapa and Company Advocates to represent him against the said claim but was informed that the law firm

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could only advise him on how to handle the claim, because the said S lawyers would not appear in Court to represent him since Advocates were barred by Rule 8(2) and (3) of the Judicature (Small Claims Procedure) Rules 2011 from making any appearance in such matters.

Upon perusing the small claims procedure rules and guidelines, the Petitioner discovered that the decision of the Magistrate under the S Judicature (Small Claims Procedure) Rules is a final judgment and no appeal therefrom could be preferred. Further that only a review of the said decision was acceptable and such review is heard and determined by the same Magistrate with no legal representation.

- The Petitioner thus filed this Petition under Article 137(3) of the 15 Constitution seeking declarations that the Judicature (Small Claims Procedure) Rules, 2011 contravene the right to appeal under Article 139(2) of the Constitution, Section 16(1) of the Judicature Act Cap 13, Section 220(1) of the Magistrates Courts Act Cap 16; and the non-derogatory right
- to a fair hearing guaranteed under Article 28 of the Constitution for failure to provide for a right to legal representation during trial, review and appeal. The grounds upon which the petition is based are set out in the Petition and supported by an affidavit in support affirmed the petitioner by Ssejemba Israel dated the 15th day of December, 2014 and another deposed by Ochen Ochama Francis Xavier on the same date. S

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The respondent filed an Answer to the Petition supported by an affidavit S deposed by Kukunda Claire, a State Attorney in the Attorney General's Chambers dated 5th January 2015, and an additional affidavit deposed by Her Worship Lilian Bucyana dated 22nd July 2019.

At conferencing and upon consultation with counsel for all parties, the following issues were framed for determination by Court: S

- 1. Whether the Petition discloses any issues for constitutional

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interpretation;
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- 2. Whether the Judicature (Small Claims Procedure) Rules, 2011 violate the Petitioner's constitutional right to appeal guaranteed under Article 139(2) of the Constitution of Uganda, section 16(1) of the Judicature Act Cap 13 and section 220(1) of the Magistrates Courts Act Cap 16;
- 3. Whether the provisions of the Judicature (Small Claims Procedure) Rules, 2011 contravene the right to fair hearing guaranteed under Article 28 of the Constitution by failing to provide for legal representation by an aggrieved person during hearing; and
- 4. Whether the Petitioner is entitled to the reliefs sought.

Representation

\$15\$

\$20\$

At the hearing of the Petition, the Petitioner was represented by learned \$25\$ Counsel Obiro Ekirapa while Ms. Goretti Arinaitwe, Senior State Attorney at the Attorney General's Chambers appeared for the Respondent.

Counsel for the parties with leave of Court, were allowed to proceed by way of 5 of written submissions filed in Court.

Submissions

\$25\$

Mr. Ekirapa argued issues 1, 2, 3 and 4 concurrently. On her part Ms. Arinaitwe replied to issues 1, 2, 3 and 4 only in the same order they were

made. I shall resolve the issues in the order they were argued. \$10\$

On the first issue; as to whether the Petition discloses any issues for constitutional interpretation, counsel for the Petitioner submitted that the Petition was brought under Article 137(3) of the Constitution and referred court to Ismail Serugo v Kampala City

- Council, Constitutional Appeal No. 2 of 1998 and Baku Raphael & \$15\$ Obiga Kania v Attorney General, Constitutional Appeal No. 1 of 2003, for the proposition that a petition brought under Article 137 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 with which the act or omission is alleged to be \$20\$ inconsistent.

Counsel further submitted that according to paragraphs 2(a) and 3(a) of the Petition, the failure of the Judicature (Small Claims Procedure) Rules, to provide for the right to appeal against the decision of the trial Magistrate violated Article 139(2) of the Constitution, section 16(3) of the Judicature Act Cap 13 and section 220(1) of the Magistrates Courts Act Cap 16.

- 5 Further that, according to paragraphs 2(b) and 3(b) of the Petition, the Judicature (Small Claims Procedure) Rules violated Article 28 of the Constitution by failing to provide for legal representation. In Counsel's view, the Petition sufficiently disclosed issues that warrant constitutional interpretation by this Court.
- \$10\$ On the second issue, it was counsel for the Petitioner's contention that according to the Judicature (Small Claims Procedure) Rules and User's Guidelines thereunder, the decision of the Magistrate is final and there is no right of appeal against such decision. This, in Counsel's view is a violation of the right of appeal provided under the Constitution, the Judicature Act and the Magistrates Courts Act. 15

Counsel further contended that the Rules do not allow a Party to the small claim to challenge the decision of the Magistrate and the right to review which is provided for under Rule 30 thereof does not offer the same safe guards as an appeal would. Counsel referred Court to the decision in

20 Odinga & Others v Nairobi City Council [1990-1994]1 EA 482 for the proposition that Rules which court made under an Act cannot defeat or override the provisions of the Act and further that an Act of Parliament cannot be amended by subsidiary legislation.

In reply, Counsel for the Respondent conceded that generally there was no \$25\$ right of appeal against the decision of a Magistrate Grade 1 or of a Chief Magistrate to the High Court under the Judicature (Small Claims

- Procedure) Rules but contended that a right of appeal is a creature of S statute and cannot be inferred or implied. Counsel referred court to Rapheal Baku Obudra and Obiga Kania v the Attorney General Supreme Court Constitutional Appeal No. 1 of 2005 to buttress the proposition that it is trite law that there is no inherent appellate jurisdiction.
- Counsel for the respondent further referred Court to paragraphs 6 and 7 \$10\$ of the Respondent's additional affidavit in reply deponed by Her Worship, Lilian Bucyana where she defined an appeal to mean a complaint to a superior court of an injustice committed by an inferior court. The said deponent further referred court to Rule 4(4) of the Judicature (Small Claims Procedure) Rules and deposed that a party aggrieved by the \$15\$ decision of a magistrate in small claims could refer the grievance to a superior court that is to say the High Court for reconsideration through the superior court's exercise of its supervisory powers over small claims under the Rules. That the Petitioner had not exploited this remedy.
- Counsel submitted that the Judicature (Small Claims Procedure) Rules are \$20\$ meant to resolve non-controversial small disputes and referred court to Rule 5 of the said Rules which bars contentious matters such as family disputes over management of the estate, claims against Government, divorce petitions, cases involving validity of a will among others and contended that the framers of the Rules were alive to the fact that the said \$25\$ Rules would be applied to clear cases that could be handled quickly and efficiently.
- S Moreover, according to Counsel, an aggrieved person still had an opportunity to apply for review under Rule 30 of the Judicature (Small Claims Procedure) Rules and the original decision of the Magistrate was thus not final as submitted by the Petitioner.
- In rejoinder, it was submitted for the Petitioner that the notion that the \$10\$ supervisory powers bestowed on the High Court over matters and claims in Magistrates' courts were equivalent to the right of appeal was misconceived. Counsel referred Court to Section 17(1) of the Judicature Act Cap 13 which provides for the supervisory powers of the High Court and contended that the said section was distinct from Section 16 of the 15 Judicature Act Cap 16 which provides for the appellate jurisdiction of the High Court. In Counsel's view, the supervisory powers are administrative

- in nature and not judicial and the High Court cannot transform its supervisory powers into judicial powers of an appellate nature to pass judgment.
- \$20\$ Counsel further submitted that the nature of cases before the small claims courts albeit being non-contentious cannot take away the right of appeal of a litigant and further argued that the contention that an aggrieved person could apply for review did not infer a right of appeal.

Counsel referred Court to Rule 30 of the Small Claims Procedure Rules and submitted that the right to apply for review only arose under three \$25\$ instances that is to say; where an applicant was absent when judgment

- was granted; where judgement was void and/or obtained by fraud, 5 common mistake and discovery of new evidence; and where there were latent errors in the judgment. In counsel's view, the restrictions under Rule 30 Supra, do not allow an applicant to challenge the decision of the Magistrate as would an appeal.
- Counsel concluded that the option of review did not offer the same or \$10\$ similar safeguards to a party who feels aggrieved by the decision of a magistrate. Counsel reiterated his earlier submissions and prayed that Court finds and declares that the Small Claims Rules violate the Constitution and Parliamentary enactments which provide for the right of 15 appeal.

On the third issue, counsel for the Petitioner contended that the provisions of the Judicature (Small Claims Procedure) Rules, contravene the right to a fair hearing guaranteed under Article 28 of the Constitution by failing to provide for legal representation for an aggrieved person during hearing. Counsel referred court to paragraphs 6 to 11 of the Affidavit in support of the Petition deposed by the Petitioner wherein he stated that upon being summoned under Claim No. 107 of 2014, he tried to seek legal representation from M/s Ekirapa and Company Advocates but was only advised on how to handle the claim himself. The said lawyers informed him that they could not appear in his matter since this would contravene

\$25\$

Rule 8(2) of the Judicature (Small Claims Procedure) Rules which bar the S appearance of lawyers in small claims matters.

Counsel referred court to **Prudential Insurance Company v Small Claims** Court of the City and County of San Francisco (1946) Cal. App 2d 379 $\rm{for}$ the proposition that depriving a litigant of the right to counsel is a violation of the due process and that in both civil and criminal matters, the right to a fair hearing includes the right to appear by counsel and the arbitrary refusal of such a right is a violation of the due process.

\$25\$

Counsel further referred Court to the decision in **Roberts v Anderson** 66 F.2d 874, to say that the right to a fair hearing includes the right to the assistance of counsel of one's own choice. Further that the right to appear by Counsel at one's own expense is a right that should not be done away with by the Small Claims Procedure Rules. In Counsel's view, the ability to make a written statement of defence and prepare witnesses requires a certain degree of mental preparedness that may not be in the capacity of every litigant.

Counsel further referred court to **Charles Harry Twagira v Uganda** Supreme Court Criminal Appeal No. 27 of 2003, where it was held that one of the tenets of a fair hearing is being afforded an opportunity to challenge the other party by cross-examination. He referred court to Regulation 24 of the Small Claims Procedure Rules which prohibits cross examination and submitted that by denial thereof, the right to a fair hearing was greatly

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compromised. Counsel stated that this was in further contravention of Article 44 of the Constitution which makes the right to a fair hearing nonderogable.

Counsel further referred Court to Article 40(2) of the Constitution which provides that every person has a right to practice his or her profession and to carry on any lawful occupation, trade or business. Further that according to section 11(3) of the Advocates Act Cap 267, any Advocate with a practicing certificate in force is entitled to practice in the High Court or in any court subordinate to the High Court. In Counsel's view, the failure of the Rules to acknowledge legal representation violated Article 40 of the

Constitution and section 11(3) of the Advocates Act and only a law amending the Advocates Act can bar advocates from appearing before Courts of Judicature.

Counsel for the Respondent disagreed. It was submitted in reply that the Rules Committee chaired by the Chief Justice was at all material times

- aware of the principle of fair hearing when it designed the Small Claims Procedure Rules. According to Counsel, the principle of fair hearing is not premised on legal representation but rather on partiality and fairness of the court in permitting the parties before it to adduce evidence unhindered by technicalities.
- Counsel referred court to Rule 25 of the Judicature (Small Claims Procedure) Rules and submitted that the said rule provides for an

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impartial and fair hearing where each party is given an opportunity to be heard expeditiously and without undue regard to the technical rules of evidence and procedure.

Counsel referred Court to **Mpungu & Sons Transporters Ltd v Attorney General & Anor** SCCA No. 17 of 2001 which cited **Russell v Norfolk** [1949] 1 ALLER 109, for the proposition that the requirements of natural justice must depend on the circumstances of the case, the nature of inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with

and so forth.

Counsel further referred to **Godfrey Nyakaana v the National Environment Management Authority and Others** SCCA No. 005 of 2011 where court \$15\$ emphasized the cardinal rule of the right to fair hearing and stated that each case must be examined on its own facts and set of circumstances to determine the test which is whether the person was accorded a reasonable opportunity to be heard and/or present his side of the case.

Counsel referred court to Harlsbury's Laws of England 5th Edition 2010,

\$20\$ *Vol 1 para 639* with regard to *the audi alteram partem rule* which provides that no person shall be condemned unless that person has been given prior notice of allegations against him/her and a fair opportunity to be heard as a fundamental principle of justice. According to Counsel, the right to a fair hearing is different from a right to legal representation and \$25\$ a fair hearing can be attained even without legal representation of the parties involved. Further, counsel contended that Article 28 of the

Constitution only mandates a right to legal representation under Clause \$\mathsf{S}\$ 3(d) and (e) where a person is charged with a criminal offence.

Counsel concluded that the Small Claims Procedure is a unique intervention intended to improve judicial effectiveness and efficiency and under Rule 26 thereof, where court is of the opinion that a case contains complex questions of law and fact which cannot be adjudicated upon by

it, it shall suspend the proceedings and the claimant may institute a fresh action in another court with competent jurisdiction.

In rejoinder, counsel for the Petitioner contended that Article 28 provides that a person is entitled to a fair, and speedy hearing before an impartial

court. Further that the right to appear by Counsel at one's expense is a 15 right that can only be taken away by statute.

Counsel further contended that the case of **Charles Harry Twagira v *Uganda*** (supra) which was relied upon by the Respondent provided for the opportunity to challenge evidence by cross-examination and that by denying this, the right to a fair hearing is compromised.

On the fourth issue, it was submitted that the Petitioner was entitled to reliefs sought under Paragraph 4 of the Petition including a declaration that the Judicature (Small Claims Procedure) Rules contravene the right of appeal under Article 139(2) of the Constitution and sections 16 (1) of the Judicature Act Cap 13 and section 220(1) of the Magistrates Court Act

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\$25\$

Cap 16; and a declaration that the Rules contravene the right to a fair \$\overline{5}\$ hearing by barring Advocates from appearing before small claims courts.

Counsel for the Respondent disagreed and submitted that the Respondent had demonstrated that the Small Claims Rules are not inconsistent with any provisions of the Constitution cited or at all, and that the said Rules

are intended to enhance access to justice in monetary claims below UGX. \$10\$ \$10,000,000/\$ = (Uganda Shillings Ten Millions only) arising from simple transactions and further that the exclusion of lawyers was intended to expedite and reduce costs of litigation within the meaning of Article 126(b) and (e) of the Constitution.

Resolution 15

\$25\$

In determining constitutional matters, this Court derives its mandate from Article 137 of the Constitution which provides:

"(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.

- \$(3)\$ A person who alleges that
- a) an Act of Parliament or any other law or anything in or done under the authority of any law; or
- b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this constitution,

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may petition the constitutional court for a declaration to that effect, and for redress where appropriate.

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

- a) grant an order of redress: or
- b) refer the matter to the High Court to investigate and determine the appropriate redress."

Principles of constitutional interpretation

- Some of the time-tested principles of constitutional interpretation, which 15 are relevant to the determination of the Petition have been laid down in several decided cases by the Supreme Court, this Court, and courts in other common wealth jurisdictions and expounded in legal literature of persuasive authority.

- \$20\$ This Court had the opportunity of reiterating the said principles in Constitutional Petition No. 016 of 2013, Hon. Lt. Rtd. Saleh Kamba & Anor vs. Attorney General & Others where it stated;
- \$i.\$ The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent 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 Supreme Court Presidential Election Petition

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No. 2 of 2006, (Rtd) Dr. Col Kiiza Besigye v Y. K. Museveni and Brigadier Henry Tumukunde v The Attorney General and Another Supreme Court Constitutional Appeal No.2 of 2006,

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\$10\$

- In determining the constitutionality of legislation, its purpose and ii. effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality of either \$an\$ unconstitutional purpose or an unconstitutional effect animated by the object the legislation intends to achieve. See *Attorney General* \$v\$ Salvatori Abuki Constitution Appeal No. 001 of 1998.
- The entire Constitution has to be read together as an integral whole iii. and no particular provision destroying the other but each sustaining 15 the other. This is the rule of harmony, the rule of completeness and exhaustiveness. See P. K Ssemwogerere & Another v. Attorney General, Constitutional Appeal No. 001/2002 (SC) and The Attorney General of Tanzania v. Rev. Christopher Mtikila [2010] E. A 13.
- A constitutional provision containing a fundamental human right is \$20\$ \$iv.\$ a permanent provision intended to cater for all times to come and therefore should be given a dynamic, 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 25 Livingstone and 6 Others v The Attorney General and Another, Constitutional Petition No. 001 of 2005 (CA) and Dr. Kiiza Besigye, page 15 of 39

\$\mathsf{S}\$ Constitutional Petition No. 1 of 2006 (CA) and South Dakota v South Carolina 192 U. S. A 268, 1940.

- Where words or phrases are clear and unambiguous, they must be \$\mathbf{V}_{-}\cdot\cdot\$ given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense.

- 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 *Major General David Tinyefuza versus The Attorney General*, Constitution Petition No. 001 of 1996.
- The history of the Country and the legislative history of the 15 vii. Constitution is also relevant and a useful guide in constitutional interpretation. See *Okello Okello John Livingstone and 6 others Versus the Attorney General & Another*, Constitutional Petition No. 4 of 2005 (CA).
- 20 viii. The National Objectives and Directive Principles of State Policy in the Constitution are also a guide in the interpretation of the Constitution.

Bearing in mind the above principles of constitutional interpretation, I shall now proceed to consider submissions of Counsel for all the parties,

the evidence and authorities before us and relate them to the law and the issues raised in the said Petition.

Issue 1: Whether the Petition discloses any issues for constitutional interpretation;

The Petitioner submitted that the Petition disclosed issues for Constitutional interpretation. The gist of his contention in issue 1 was that the Judicature (Small Claims Procedure) Rules, 2011 violate the Petitioner's constitutional rights to appeal and legal representation guaranteed under Articles 139(2) and 28 of the Constitution respectively. As earlier stated under Article 137(3), a person who alleges that an Act of

Parliament or any other law or anything in or done under the authority of any law; or any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.

Counsel for the Respondent did not make any submissions regarding this issue. I have reviewed the Petition, affidavits in support thereto and the affidavits in reply. In paragraphs 2(a) and 3(a) of the Petition, the Petitioner contended that the failure of the Judicature (Small Claims Procedure) Rules, to provide for the right to appeal against the decision of the trial

Magistrate violates Article 139(2) of the Constitution, and further that, according to paragraphs 2(b) and 3(b) of the Petition, the said Rules violate

- Articles 28 and 44 of the Constitution. Mr. Ochen Ochama Francis Xavier in his supplementary affirmation in support of Petition under paragraph 12 also submitted that the refusal of legal representation under the Rules violated his right and other lawyer's rights to practice their profession provided under the Constitution by refusing legal representation.

- I find that the allegations set out in the Petition do sufficiently disclose \$10\$ issues that merit constitutional interpretation and consideration by this Court.

The first issue is thus answered in the affirmative.

Issue 2: Whether the Judicature (Small Claims Procedure) Rules,

2011 violate the Petitioner's constitutional right to appeal \$15\$ guaranteed under Article 139(2) of the Constitution of Uganda, section 16(1) of the Judicature Act Cap 13 and section 220(1) of the Magistrates Courts Act Cap 16;

The gist of the Petitioner's contention in the second issue is that by failing

- to provide for a right of appeal, the Judicature (Small Claims Procedure) \$20\$ Rules contravene the provisions of Article 139(2) of the Constitution, section 16(1) of the Judicature Act and section \$220(1)\$ of the Magistrates Courts Act. Further that the Rules do not allow a litigant to challenge the decision of the Magistrate and the right to review which is provided for
- under Rule 30 thereof does not offer the same safe guards as an appeal \$25\$ would.
- Counsel for the Respondent submitted that the right of appeal is a creature \$\mathsf{S}\$ of statute and referred Court to Rule 4(4) of the Small Claim Rules which creates a mechanism for an aggrieved party to refer any such grievance to the High Court for reconsideration through the exercise of its supervisory powers. Counsel faulted the petitioner for not exploiting this remedy yet
- \$10\$ he ought to have done so since he was dissatisfied with the decision of the trial Magistrate.

An appeal is the process by which cases are reviewed by a higher authority where parties request for a formal change to an official decision. Appeals function both as a process for error correction as well for clarifying and

interpreting the law. An appeal is defined at page 105 of the Black's Law 15 Dictionary, 8th Edition (2004) as a proceeding undertaken to have a decision reconsidered by a higher authority.

The same Law Dictionary defines review to mean consideration; inspection or re-examination of a subject or a thing.

\$20\$ The Respondent's contention that there is no need to provide for appeal since the Rules provide for a review process is thus incorrect in law for a review does not amount to an appeal. I am persuaded by learned counsel for the Petitioner's submission that the right to apply for review does not in itself infer a right of appeal. Under Rule 30 of the Small Claims \$25\$ Procedure Rules, the right to apply for review only arises where an applicant was absent when judgment was granted; where judgement was

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- void and/or obtained by fraud, common mistake, discovery of new new evidence; and where there were latent errors in the judgment. This cannot be said to be equivalent to the right to appeal as set out in Article 139(2) of the Constitution, section 16(1) of the Judicature Act and Section 220(1) of the Magistrates Courts Act.
- It is trite that an appeal is a creature of statute which cannot be inferred or implied and a court can only exercise appellate jurisdiction where that jurisdiction expressly provided by statute. A party who seeks to avail himself or herself of the right of appeal must strictly comply with the conditions prescribed by the Statute. See *Hamam Singh and Co. v Javda*

Karsan (1953) 20 EACA 17 at 18; and Baku Raphael Obudra and Another v Attorney General Supreme Court Constitutional Appeal No. 001 of 2005.

Counsel for the Petitioner repeatedly contended that the supervisory powers bestowed on the High Court over matters and claims in Magistrates' courts under Rule 4(4) are not equivalent to the right of appeal.

Rule 4(4) of the Judicature (Small Claims Procedure) Rules states:

Establishment of Small Claims Procedure

\$20\$

(4) The High Court shall have general powers of supervision over matters/claims in Magistrates courts.

Under section 17(1) of the Judicature Act, the High Court has supervisory powers over Magistrates courts. Sub-section (2) thereof provides that:

17. Supervision of Magistrates court

(1) ...

- (2) With regard to its own procedures and those of the Magistrates courts, the High Court shall exercise its inherent powers to prevent abuse of the process of court by curtailing delays, including the power to limit and stay delayed prosecutions as may be necessary for achieving the ends of **justice**. [Emphasis, added.]

I am inclined to agree with counsel for the Petitioner that the supervisory powers conferred on the High Court by Rule 4 (4) of the

- Judicature (Small Claims Rules) and section 17 (1) of the Judicature Act are administrative in nature and are meant to streamline processes in the Magistrates court. It would be incorrect to say that a party could rely on this provision to overturn a decision of a court issued in finality. Exercise of those administrative powers cannot be

- said to amount to an appeal. \$20\$

Counsel for the Respondent argued that given the nature of cases before the small claims courts which are generally non-contentious, the framers of the Rules did not find it necessary to provide for an appellate process. The nature of the case/claim cannot take away the right of appeal of a

litigant where such right is provided for under the Constitution or statute. \$25\$

\$10\$

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- \$\overline{5}\$ Counsel for the Petitioner submitted that the failure of the Judicature (Small Claims Procedure) Rules 2011 to provide for a right of appeal contravenes section 16 of the Judicature Act and section 220 of the Magistrates Courts Act as well as Article 139(1) of the Constitution and that it is unconstitutional to that extent.
- The Constitution, the Judicature Act and the Magistrates Courts Act 10 under which the Small Claims Procedure Rules were made, all provide for appeals from decisions of the Magistrates Courts.

Article 139 of the Constitution provides that:

139. Jurisdiction of the High Court

- 15 (1) The High Court shall subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law.
- (2) Subject to the provisions of this Constitution and any other \$20\$ law, the decisions of any court lower than the High Court shall be appealable to the High Court.

The Appellate jurisdiction of the High Court provided in Section 16 of the Judicature Act is subject to the Constitution, this Act or any other law. The section provides that:

\$\overline{25}\$ \$H\$ the High Court shall have jurisdiction to hear and determine appeals which lie to it by virtue of any enactment from

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decisions of Magistrates courts and other subordinate courts in the exercise of their original appellate jurisdiction." (Emphasis added)

Under section 220 (1) (a) of the Magistrates Courts Act, an appeal shall lie from the decrees or any part of the decrees and from the orders of a magistrate's court presided over by a chief magistrate or a magistrate grade 1 in the exercise of its original civil jurisdiction to the High Court.

Section 229 of the Magistrates Courts Act provides that;

229. Appeals under other written law.

$\$S$

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Insofar as the context allows, and notwithstanding the provisions of any

written law in force on the date of the coming into force of this Act 15 providing for an appeal to the High Court, those provisions shall be read as providing for an appeal to the appropriate court under this Act.

The Respondent argued that the overriding policy by the Rules Committee of the Courts of Judicature chaired by the Chief Justice was to expedite

the determination of the small claims so as to settle them expeditiously $\$20$ and in finality without having recourse to a higher court.

The petitioner alleges that the entire provisions of the Judicature (Small Claims Procedure) Rules are unconstitutional. However, throughout his submissions he challenges only a few rules therein.

I am alive to the objective behind the enactment of the Judicature (Small $\$25$ Claims Procedure) Rules and the success this scheme has registered. The

Rules Committee in omitting to provide for an appeal on the judgment of $\$S$ the magistrate and instead providing for review under Rule 30 may have intended that the Magistrates Court was to be the last court in small claim matters.

In the Indian case of *Agarwal Ayengar & Co. v. State A. I. R. 1951*

Bom. 397 where the question considered was whether under the doctrine $\$10$ of implied powers the delegate can assume more powers than those conferred expressly, Court noted that:

> "it is a well-known doctrine in England that the delegate is entitled to do not only that which is expressly authorised but also that which is reasonably incidental to or consequential upon that which is in *terms authorized." (Emphasis added)*

Section 40 of the Judicature Act establishes the Rules Committee and its functions are set out under section 41 thereof which provides that:

- (1) The Rules Committee may, by statutory instrument, make rules for regulating the practice and procedure of the Supreme Court, the Court of Appeal and the High Court of Uganda and for all other courts in Uganda subordinate to the High Court.
- (2) Without prejudice to the general application of subsection (1), the Rules Committee may make rules of court under that subsection for-

\$20\$

\$25\$

(g) regulating and prescribing the method of pleading, practice and procedure of the court, including all matters connected with forms to be used and fees to be paid; ...

The small claim rules make no mention of the aspect that the judgment of the court is final as alleged by the petitioner. However,

\$10\$ I note that there is no express mention of the right of appeal under the Judicature (Small Claims Procedure) Rules. The rules only make express mention of the parties right to apply for review of the Court's judgment.

A review cannot be equated to or be a substitute for an appeal. 15 Appeals are essential to ensure that Justice is done and the principal reason for having appellate courts is to provide an opportunity for several minds to check the trial decisions made by one mind. See R. Stern, Appellate Practice in the United States 358 (1981) (Quoting Harvard Law School, Occasional Pamphlet No. 9, at \$20\$ \$22-23(1967)\$.

The Judicature (Small Claims Procedure) Rules came into place following the exercise of power granted to the Rules Committee under the Judicature Act.

As stated in **Agarwal Ayengar & Co. v. State (supra)**, the delegate ought to \$25\$ do that which is not only expressly authorized but also that which is reasonably incidental to or consequential upon that which is in terms

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$\$S$

$\$S$ authorized. The passing of the Rules is authorized and reasonably incidental to the authorized terms since the said committee can pass rules regulating the practice and procedure in the Magistrates Court.

What needs to be ascertained is whether the failure to provide for the right to appeal in the rules render the rules unconstitutional even when the

\$10\$ Constitution, Judicature Act and the Magistrates Courts` Act expressly provide for the right of Appeal from decisions of Magistrates Courts generally.

In Raila Odinga & 6 Others v. Nairobi City Council Nairobi HCCC No. 899 of 1993; [1990-1994] EA 482, which was referred to us by the Petitioner it was held:

"... Order 53 contains the procedural rules made in pursuance of s. 9(1) of the Law Reform Act. S. 9(2) of that Act states that the rules made under subsection \$(1)\$ may prescribe that an application for mandamus, prohibition and certiorari shall be made within six months or such

shorter period as may be prescribed. Thus it will be seen that on one hand s. 9(2) of the Act enjoins that the court may make rules prescribing that application for mandamus prohibition and certiorari shall be made within six months or such shorter period as may be prescribed by the rules. On the other hand O. 53 rule 2(1) which is a procedural rule made under that very section says that the court may for good reason extend the period of six months. The rules of court made under the Act cannot defeat or override the clear

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- provisions of s. 9(2) of the Act. An Act of Parliament cannot be amended by subsidiary legislation. The parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it. The Court's duty is to give effect to the law as it exists. (Emphasis, ours.)*
- The constitution, the Judicature Act and the Magistrates Courts Act as stated above provide for the right of appeal from decisions made by Magistrates. This right is not limited; it extends to all decisions of magistrates courts whether made under the Judicature small claims procedure or its ordinary procedure in other claims or matters.

The silence of the Judicature (Small Claims Procedure) rules on the right of appeal cannot be interpreted as overriding the clear and express statutory provisions of Article 139 (1) of the Constitution, section 16 of the Judicature Act, sections 220 (1) and 229 of the

Magistrates Courts Act.

The duty of court in interpreting legislation is to give effect to the law as it exists so far as the language permits. Appeals are a creature of statute and in the instant case, there are existing provisions in the Constitution and statutes providing for the right of appeal from decisions of Magistrates Courts and thereunder. Judgments arising out of the Judicature (Small Claims Procedure) Rules can be subjected to appeal under those

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- provisions which take precedence over the Judicature (Small Claims Procedure) Rules. The mere silence or failure to expressly provide for the right of appeal in the rules neither extinguishes the right of appeal provided in the Constitution, the Judicature Act and the Magistrates Courts Act to which the rules are subordinate. The silence on the right of

- \$10\$ appeal in the said rules does not render the Rules unconstitutional. Dissatisfied parties under the Judicature Small Claims Procedure who seek to appeal still have their right guaranteed and have recourse to the aforementioned statutory provisions to ensure that ends of justice are met.

In light of the above, I find that the failure of the Judicature (Small Claims

Procedure) Rules to expressly provide for the right of appeal thereunder 15 does not contravene article 139(2) of the Constitution.

This issue is answered in the negative.

Issue 3: Whether the provisions of the Judicature (Small Claims Procedure) Rules, 2011 contravene the right to fair hearing guaranteed under Article \$20\$ \$28\$ of the Constitution by failing to provide for legal representation by an aggrieved person during hearing;

The gist of the appellant's contention under the third issue was that the provisions of the Judicature (Small Claims Procedure) Rules, contravene the right to a fair hearing guaranteed under Article 28 of the Constitution

by failing to provide for legal representation for an aggrieved person during \$25\$ hearing. That this failure also violates Article 40 of the Constitution and

section 11(3) of the Advocates Act. Counsel submitted that it is only a law \$\overline{5}\$ amending the Advocates Act which can bar advocates from appearing before Courts of Judicature.

Counsel for the Respondent disagreed and argued that the principle of fair hearing is not premised on legal representation but rather on impartiality and fairness of the court in permitting the parties before it to adduce \$10\$ evidence and present their case unhindered by technicalities. Counsel referred court to Rule 25 of the Small Claims Procedure Rules and submitted that the said rule provides for an impartial and fair hearing where each party is given an opportunity to be heard expeditiously and without undue regard to technical rules of evidence and procedure and \$15\$

According to Counsel, the right to a fair hearing is different from a right to legal representation. Fair hearing can be attained without legal representation of the parties. That Article 28 of the Constitution only mandates a right to legal representation under clause 3(d) and (e) where a 20 person is charged with a criminal offence.

that the Petitioner in this case had an opportunity to be heard.

Generally, the right to a fair hearing is a norm of international human designed to protect individuals from the unlawful and law rights arbitrary curtailment or deprivation of basic rights and freedoms. According to the European Court of Human Rights in **Bönisch v Austria**,

\$25\$ 1991) 13 E. H. R. R. 409 [1986] E. C. H. R. 8658/79, the right to a fair hearing

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is a basic principle of the rule of law in a democratic society which aims to S secure the right to a proper administration of justice.

Principle number 2 of the Principles and guidelines on the right to a fair trial and legal assistance issued by the African Commission on Human and Peoples Rights, lists essential elements of a fair hearing to include

- equality of arms between the parties to a proceeding whether they be \$10\$ administrative, civil, criminal or military; adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence; and an entitlement to consult and be represented by a legal representative or other qualified persons chosen by
- \$15\$ the party at all stages of the proceedings.

The right to a fair hearing is also based on Article 14 of the International Covenant on Civil and Political Rights which was ratified by Uganda on \$22nd\$ July 1985. The article provides that;

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and \$20\$ obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a

\$25\$ democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in

- special circumstances where publicity would prejudice the interests of $\overline{5}$ justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the *guardianship of children.*
 - 2. Everyone charged with a criminal offence shall have the right to be \$10\$ presumed innocent until proved guilty according to law.
 - 3. In the determination of any criminal charge against him, everyone shall *be entitled to the following minimum guarantees, in full equality:*
- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; \$15\$
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have \$20\$ legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him and to obtain $\overline{5}$ the attendance and examination of witnesses on his behalf under the same *conditions as witnesses against him;*

\$(f)\$ To have the free assistance of an interpreter if he cannot understand or *speak the language used in court;*

(g) Not to be compelled to testify against himself or to confess guilt. \$10\$

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence \$15\$ and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of 20 the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

\$25\$

The fairness of a trial requires that the accused/defendant is given a fair chance of dealing with the allegations against him or the Applicant has had a chance to present his or her case.

Rule 8 of the Judicature (Small Claims Procedure) Rules prohibits legal representation in small claims. It states: - \$10\$

8. Parties who may appear in Court

- (1) Only a natural person may institute an action in court, but a body corporate may become a party to an action in a court as a defendant.

(2) A party to an action shall appear in person before a \$15\$ court and shall not be represented by an advocate during the proceedings.

> (3) In case of a body corporate, it may appear before court by a representative not being an advocate.

\$20\$

Counsel for the Petitioner argued that the denial of legal representation and cross-examination greatly compromised the right to a fair hearing. Rule 24 of the Judicature (Small Claims Procedure) Rules states thus:

24. Cross-examination

Cross-examination between the parties or of any witness is not permitted, but the judicial officer may inquire into any aspect of the evidence that has been adduced in Court.

Articles 28 of the Constitution provides for the right to a fair hearing. The right is constitutionally guaranteed as non-derogable under Article 44 of \$10\$ the constitution. Article 28 states:

- 1) "In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.
- \$2) \ldots\$
- 3) (d) The right to be permitted to appear before the court in person or at that person's expense, by a lawyer of his or her choice;
- (e) in the case of any offence which carries a sentence of 20 death or imprisonment for life, be entitled to legal representation at the expense of the State.

In *Charles Twagira v Uganda Supreme Court Criminal Appeal No. 27 of 2003*, Court stated:

"... A fair trial, or a fair hearing under Article 28 means that a 25 party should be afforded an opportunity to, inter alia, hear the witnesses of the other side testify openly; that he should, if he
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chooses, challenge those witnesses by way of cross*examination; that he should be given an opportunity to give his* own evidence, in his defence, that he should if he so wishes, call witnesses to support his case..."

In order to determine the constitutionality of a section of a Statute or Act of Parliament, court has to consider the purpose and effect of the \$10\$ impugned statute or section. If its purpose does not infringe a right guaranteed by the constitution, the court may then go further and examine the effect of its implementation and if the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute shall be declared unconstitutional. See; *Queen v Big M*.

Drugmart Ltd 15 (others intervening) [1986] LRC (Const) 332 and the American case of MCG Owan v Matyland 366 US 420 6LED 393 [1961].

The purpose of the Judicature (Small Claims Procedure) Rules was to ensure that Justice should not be a rich man's luxury. Sometimes there

- have been delays and expenses incidental to litigation which have \$20\$ discouraged poor litigants to secure redress for meritorious claims but small in amount which have been fettered by the expense of employing an attorney and paying court costs. It was for these reasons that the Rules were passed. Small Claim Courts are courts of equity which are not bound by the letter of the law of evidential rules of practice and they are intended \$25\$
- to provide holistic approaches of problem solving and dispute resolution.

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- In Prudential Ins. Co. v Small Claims Court 76 Cal. App. 2d 379, where \$\overline{5}\$ court was considering section 117 (g) of the Code of Civil Procedure of San Francisco which provided that, no attorney at law or other person than the plaintiff and defendant shall take any part in the filing or prosecution or defense of such litigation in the small claims court, it found that depriving
- a litigant of the right to counsel in both civil and criminal matters is a 10 violation of due process. In that case the court went further and stated that:

"... But that does not mean that the Legislature cannot create a small claims court where informal hearings may be held without the assistance of counsel, as long as the right to appear 15 by counsel is guaranteed in a real sense somewhere in the proceeding. If the Applicant desires an attorney, he can sue, even on these small claims in the justices or municipal courts. Moreover, the defendant has no legal cause for complaint because if he is dissatisfied with the judgment of the small 20 courts he has a right of appeal to the superior court where he is entitled to a trial de novo and this satisfies the due process requirement."

The Justices in **Prudential Ins. Co. v Small Claims Court** (supra) also referred to the decision of the Supreme Court of **Minnesota in Flour City \$25\$ Fuel Transfer Co. v Young** 150, Minn 452 [185 N. W 934] where in

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upholding the constitutionality of the Statute of that state creating the $\mathbb{S}$ conciliation and small debtor's court, in which juries were barred. It was held that the constitutional guarantee is satisfied if a party is afforded a jury trial on appeal though not in the tribunal of primary jurisdiction.

The above authorities are distinguishable from the facts of the Petition before us. Whereas Rules 8 and 24 prohibit legal representation and cross-examination respectively in the small claims court, the said Rules are silent on the right of appeal.

Article 28 of the Constitution provides for the right to fair hearing in both civil and criminal cases and this right includes the right to legal representation. The components of the mandatory right to legal representation arise in criminal cases as stipulated under Clause 3 (d) and (e) therein and in civil cases. I agree with the Respondent that in certain cases, there can be a fair hearing without legal representation where a party decides to represent him/herself in as long as he/she is afforded an opportunity to, inter alia, hear the witnesses of the other side testify openly; challenge those witnesses by way of cross-examination if he or she chooses; be given an opportunity to give his own evidence, in his defence, that he should if he so wishes, call witnesses to support his case. However, where a defendant in a civil matter is desirous and willing to pay for legal

representation in such small claims and his or her right to do so is taken away,

this would amount to a fetter of his or her constitutional right to a fair hearing.

Rule 24 provides no justification for the bar on cross examination of parties and witnesses. In a trial without cross examination, the guilt or innocence and the rights of a party might be decided on a perjured, biased,

or erroneous testimony. Cross examination helps to bring these ills to light.

In *Marko Matovu & 2 Others v Sseviri & Another*, Civil Appeal No.7, of 1978, two rules or principles of natural justice to wit, *nemo iudex in causa sua* (no person shall be a judge in his or her own case) and the *audi*

alteram partem (hear the other party) must be observed by both judicial and administrative bodies. They must be observed by all bodies and public officers who have a duty to act judiciously or quasi-judiciously. **See also** *Abbot v Sullivan* [1952] 1 ALL. E. R. 226.

Therefore, the right to legal representation and cross examination are at the core of the right to a fair trial or hearing under Article 28 of the constitution which is a non derogable right under Article 44 of the Constitution and the Judicature (Small Claims Procedure) Rules cannot diminish or extinguish it.

For the above reasons, I find that Rules 8 and 24 of the Judicature (Small Claims Procedure) Rules which prohibit the right to legal representation and cross examination of witnesses respectively are unconstitutional.

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Issues 2 and 3 are answered in the affirmative.

Having found that the Petition succeeds on issues 2 and 3, I am inclined to allow the Petition and make the following declarations:

- $\frac{1}{\sqrt{2}}$ day of $\frac{1}{\sqrt{2}}$ \$2021\$ Dated at Kampala this

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

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 $\backslash \$ Ssejemba Israel =====$

\$=====\$ Respondent Attorney General

JUDGMENT OF FREDRICK EGONDA-NTENDE, JCC

- I have had the opportunity to read in draft the judgment of my brother, Barishaki [1] Cheborion, JCC. I agree with it and have nothing useful to add.
- As Musoke, Mutangula Kibeedi and Mulyagonja, JJCC, agree this petition is allowed with the declarations and orders proposed by Barishaki Cheborion, JCC.

Dated, signed and delivered at Kampala this $\frac{1}{2}$ day of $\frac{1}{2}$ manning.

edrick Egonda-Ntende **Justice of Appeal**

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA CONSTITUTIONAL PETITION NO. 0037 OF 2014

SSEJEMBA ISRAEL:.....

VERSUS

ATTORNEY GENERAL:..... #####

HON. MR. JUSTICE FREDRICK EGONDA-NTENDE, JCC CORAM: 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 benefit of reading in draft the Judgment of my learned brother Cheborion, JCC. I agree. For the reasons that he gives, I would allow the Petition in part and make the orders that he has proposed.

Dated at Kampala this..... $\mathbb{Z}$ day of

Elizabeth Musoke Justice of the Constitutional Court

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**CONSTITUTIONAL PETITION NO. 037 OF 2014**

SSEJEMBA ISRAEL:..... **PETITIONERS**

VFRSUS

ATTORNEY GENERAL:.....

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

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JCC.

I have had the benefit of reading, in draft, the judgment of my brother Cheborion, JCC, and I fully concur with the judgment and the orders he has

proposed therein.

Dated at Kampala, this day of $\sqrt{10}$ $\cdot$ 2021

> MUZAMIRU MUTANGULA KIBEEDI JUSTICE OF THE CONSTITUTIONAL COURT

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

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

CONSTITUTIONAL PETITION NO.037 OF 2014

SSEJEMBA ISRAEL.....

VERSUS

ATTORNEY GENERAL.....

JUDGMENT OF IRENE MULYAGONJA, JCC

I have had the benefit of reading in draft the judgment of my brother Cheborion Barishaki, JCC.

I agree that the petition should succeed in part and with the orders he has proposed.

Dated at Kampala this $\frac{1}{2021}$

Konningering

Irene Mulyagonja JUSTICE OF APPEAL/CONSTITUTIONAL COURT

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