THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO.16 OF 2013

HON. LT (RTD) SALEH M.W. KAMBA
MS AGASHA MARYM :::::::::::::::::::::::PETITIONERS

VERSUS

THE ATTORNEY GENERAL OF UGANDA
HON. THEODORE SSEKIKUBO
HON. WILFRED NIWAGABA :::::::::::::::RESPONDENTS
HON. MOHAMMED NSEREKO
HON. BARNABAS TINKASIMIRE

CONSTITUTIONAL PETITION NO.19 OF 2013

JOSEPH KWESIGA ::PETITIONER

VERSUS

THE ATTORNEY GENERAL OF UGANDA::::::::::::::RESPONDENT

CONSTITUTIONAL PETITION NO.21 OF 2013

NATIONAL RESISTANCE MOVEMENT ::::::::::::::::::PETITIONER

VERSUS

THE ATTORNEY GENERAL OF UGANDA
HON. THEODORE SSEKIKUBO

HON. WILFRED NIWAGABA
HON. MOHAMMED NSEREKO
HON. BARNABAS TINKASIMIRE } ::::::::::::::::::::RESPONDENTS

CONSTITUTIONAL PETITION NO.25 OF 2013

HON. ABDU KATUNTU :::::::::::::::::::::::::::::::::::::: PETITIONER

VERSUS

THE ATTORNEY GENERAL OF UGANDA ::::::::::::::::::RESPONDENT

CORAM: HON. MR. JUSTICE S.B.K. KAVUMA, AG.DCJ.

HON. MR. JUSTICE A.S. NSHIMYE, JA/CC

HON. MR. JUSTICE REMMY KASULE, JA/CC

HON. LADY JUSTICE FAITH MWONDHA, JA/CC

HON. MR. JUSTICE R. BUTEERA, JA/CC

DISSENTING JUDGEMENT OF HONOURABLE JUSTICE REMMY KASULE, JUSTICE OF THE CONSTITUTIONAL COURT

I am grateful and in agreement with their Lordships of the majority judgement as to the facts constituting the background to the consolidated **Constitutional Petitions numbers 16, 19, 21 and 25 of 2013,** as well as the principles of constitutional interpretation set out in the said judgement.

However, with the greatest respect to their Lordships of the majority judgement, I beg to differ from some of the conclusions they have reached on some of the framed issues.

I will, as much as possible deal with the issues following the order they were submitted upon by respective counsel, even though this pattern may be departed from now and then, where the inter-relationship of the issues so demand.

Issue 1, 4, 5 and 6:

The overriding question for resolution through these four issues is whether or not under the 1995 Constitution an expulsion of a Member of Parliament by a political party from membership of that political party upon whose ticket the said member was elected to Parliament, automatically leads to that Member of Parliament to lose his/her seat in Parliament under **Article 83 (1) (g) and (h) of the Constitution.** The Article provides:

"83. Tenure of office of Members of Parliament.

(1) A member of Parliament shall vacate his or her seat in Parliament –

(a) ……

(b) ……

(c) ……

(d) ……

(e) ……

(f)……

(g) If that person leaves the political party for which he or she stood as a candidate for election to Parliament to join another party or to remain in Parliament as an independent member;

(h) If, having been elected to Parliament as an independent candidate, that person joins a political party;"

(i) ……

Historical Perspective:

The history, particularly the legislative history of a country is a relevant and useful guide in constitutional interpretation:

See: **Okello Okello John Livingstone & Six Others Vs The Attorney General and Another: Constitutional Court Constitutional Petition No.4 of 2005.**

The 1995 Constitution, as is reflected in its preamble, Ugandans through a Constituent Assembly, adopted, enacted and gave to themselves and to their posterity a constitution on the basis:

"Recalling our history which has been characterized by political and constitutional instability,

RECOGNISING our struggles against the forces of tyranny, oppression and exploitation;

COMMITTED to building a better future by establishing a socio economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress; ……..”

Hence the 1995 Constitution is a result of the struggles of Ugandans against political and constitutional instability brought about by the forces of tyranny, oppression and exploitation. It is therefore through proper application and compliance with the 1995 Constitution that a society of Ugandans based on the principles of unity, peace, equality, democracy, freedom, social justice and progress has to be created.

The suppression of fundamental human rights and freedoms of conscience, expression, movement, assembly and association, particularly through a dictatorship of the political party that managed to keep itself in political power at the suffocation of other political groups and other organs of the state had to be done away with. Hence the enactment of **Article 75 of the Constitution,** that Parliament shall have no power to enact a law establishing a one-party state.

In 2005, Ugandans, through a Referendum, freely chose to govern themselves under a multi-party democracy dispensation with political parties presenting candidates for Presidential, Parliamentary and Local Government elections with the winning candidate in Presidential elections becoming President of the country and the winning party in Parliamentary

elections controlling Parliament through its majority of Members in Parliament. The political party (parties) with minority seats form the opposition in Parliament. But all Members of Parliament representing constituencies as well as those representing special groups constitute the Parliament of Uganda whose constitutional mandate is to make laws to promote unity, peace, equality, democracy, freedom, social justice and progress. The same also happens, as much as possible, in respect of local governments.

Therefore from the historical perspective, the Constitution is to be interpreted in such a way that promotes the growth of democratic values and practices, while at the same time doing away or restricting those aspects of governance that are likely to return Uganda to a one party state and/or make in-roads in the enjoyment of the basic human rights and freedoms of conscience, expression, assembly and association.

The reason for the inclusion of **Article 83 (1) (g) and (h) in the Constitution** is thus, in my humble view, to address some of the wrongs identified in Uganda's history of political and constitutional instability. The Uganda Constitutional Commission headed by His Lordship Justice Odoki, JSC, as he then was, gathered views from Ugandans as to how they wanted to be governed and made a report that was debated by the Constituent Assembly and provided the basis for the 1995 Constitution.

The Commission found that since the attainment of independence, it had become a practice by Members of the political parties in opposition

crossing the floor in Parliament and joining the party in Government, thus contributing to the creation of a one party state and rendering the working of multi-party democracy impossible. The Odoki Commission thus proposed as a remedy that in the case of a multi-party Parliament a member wishing to cross the floor must first resign his or her seat and seek fresh mandate from the constituency that had elected him/her to represent the people of that constituency in Parliament. Likewise, one elected as an Independent, should also seek fresh mandate on joining a political party.

It is of some significance, in my observation, that the recommendation of the Odoki Commission is restricted to a Member of Parliament belonging to a political party or who was elected as an independent crossing the floor in Parliament to join another party or leaving the party to become an Independent in Parliament. The recommendation does not cover a situation of that Member of Parliament being in dispute with his or her political party outside Parliament on matters having nothing to do with that member's duties and responsibilities in Parliament, that for one reason or another, may lead to the expulsion of that Member from the party. This omission, in my considered view, must also be acknowledged as missing from **Article 83 (1) (h) and (g).**

Principles of Constitutional Interpretation.

The overriding principle is that in any question relating to the interpretation or application of any provision of the Constitution, the primary aids to the interpretation must be found in the Constitution itself:

See: **Supreme Court of Malawi Court Reference by the Western Highlands provincial Executive [1995] PG SC 6; SC 486 (20th September, 1995).**

It is a principle of constitutional interpretation that where words or phrases of the Constitution are clear and unambiguous, they are to be given their primary, plain, ordinary and natural meaning. The language must be construed in its natural and ordinary sense. Should the language of the Constitution be imprecise or ambiguous, then a liberal, generous and/or purposive interpretation should be given to it: See: **Attorney General Vs Major General David Tinyefunza: Constitutional Appeal No.1 of 1997 (SC).**

The language of the Constitution may be broad and in general terms laying down broad principles. This calls for a generous interpretation avoiding strict, legalistic and pedantic interpretation, but rather broadly and purposively; aiming at fulfilling the intention of the framers of the Constitution. One provision of the Constitution ought not be isolated from all the others. The Constitutional provisions bearing upon a particular subject should be looked at and be so interpreted as to effectuate the great purpose of the constitution: See: **Supreme Court of Uganda Constitutional Appeal No.1 of 1998: Attorney General Vs Salvatori Abuki.**

The Constitutional (Amendment) No.3 Bill, 2005:

The debates of Members of Parliament of this Bill have some significance in resolving the framed issues under consideration because the Bill constituted a proposed amendment by Parliament of **Article 83 (1) (g) in 2005.** The proposed amendment was:-

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

Members of Parliament from all the groups represented in Parliament extensively contributed giving various reasons either supporting or not supporting the amendment. Hon. Wandera, MP, reasoned that an MP who supports a position in the national interest, but contrary to the position of his/her party, ought not be a victim of the provision. To him issues of internal discipline in the political parties ought not be introduced in the Constitution. He reasoned that Members of Parliament were elected by the populace in the constituency including those who do not belong to the party of the MP. These should not be deprived of their MP because of that MP being expelled by his/her party. Hon. Amama Mbabazi's stand was that in a multi-party system, once the party expels one, then such a one has no basis to speak in Parliament. Hon. Ben Wacha saw the amendment as

redundant. He read it as already contained in **Article 83 (1) (g).** Hon. Dr. Okulo pointed out that political parties can be very arbitrary in their decisions and an MP should not lose his/her seat for standing against such decisions. **Hon. Ruhindi:** Proposed that the circumstances under which an MP is to be expelled be clearly set out in the provision so that there is protection to MPs and that way the functioning of systems and institutions be strengthened.

Parliament then resolved on 07.07.05 to stand over the amendment and consult further. On 08.08.05 when Parliament re-assembled, Hon. Dr. Makubuya, the then Attorney General, proposed to delete the amendment **"in the interest of peace"** because Members had expressed serious concern over what it meant. The House unanimously approved the deleting: See: **The Hansard: 5th session: 1st meeting: 07.07.05 pp 14745 – 15066.**

From the above account as to what transpired in Parliament, I am unable to conclude that **Article 83 (1) (g) and (h)** of the Constitution was retained as it was on the understanding that it was not necessary to amend it. Its effect was already catered for. The view I take is that Parliament on considering all the reasons put forward by the Honourable Members rejected the proposed amendment by having the same deleted. I am enforced to reach this view by the words of the then Attorney General Dr. Makubuya that he proposed to delete the amendment **"in the interest of peace"** because members had expressed serious concern as to what the amendment meant.

Position in Other jurisdictions:

There are other jurisdictions to look at having constitutional provisions on the lines of **Article 83 (1) (g) and (h).**

Zambia:

Article 71 (2) (c) of the Constitution of Zambia provides that a Member of the National Assembly shall vacate his/her seat:

> **"(C) in the case of an elected member, if he becomes a member of a political party other than the party of which he was an authorised candidate when he was elected to the National Assembly or, if having been an independent candidate, he joins a political party, or having been a member of a political party, he becomes an independent;"**

Malawi:

Section 65 (1) of the Malawi Constitution provides that:

"**The Speaker shall declare vacant the seat of any Member of the National Assembly who was, at the time of his or her election, a Member of one political party represented in the National Assembly, other than by that member alone but who has voluntarily ceased to be a member of that party or has joined another political party represented in the National Assembly, or has joined any other political party or association or organization whose objectives or activities are political in nature.**

(2) Notwithstanding subsection (1), all members of all parties shall have the absolute right to exercise a free vote in any and all proceedings of the National Assembly, and a Member shall not have his or her seat declared vacant solely on account of his or her voting in contradiction to the recommendations of a political party, represented in the National Assembly, of which he or she is a member."

India:

The Tenth schedule to the Constitution of India, under its **Article 102 (2) and 191 (2)** provides:

"2. Disqualification on ground of defection:-

(1) Subject to the provisions of [paragraph 4 and 5] a member of a House belonging to any political party shall be disqualified for being a member of the House…….

(a) If he has voluntarily given up his membership of such a political party or

(b) If he or she votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs……..without obtaining ……the prior permission of such a political party."

New Zealand:

New Zealand, a commonwealth country, has a proportional representation system in Parliament. The proportion of the popular vote received by political parties determines representation in Parliament according to the Electoral Act. The proportionality of party representation is also reflected in the distribution of seats on select committees, allocation of question time and the order of call in the House.

Under **Section 55A of Electoral Act of new Zealand** a seat of a Member of Parliament becomes vacant if that member ceases to be a Parliamentary Member of the political party for which that member was elected if that member notifies in writing that he/she has resigned from the Parliamentary Membership of the political party for which the member was elected, or if the member wishes to be recognized for Parliamentary purposes as either an independent Member of Parliament or a member of another political party.

The political party also may through its Parliamentary leader in a written statement signed by the said leader stating that the Parliamentary leader reasonably believes that a Member of Parliament concerned has acted in a way that has distorted, or is likely to continue distorting the proportionality of political party representation in Parliament as determined at the last general election, after notifying and requiring the member concerned to respond, and after obtaining support of at least two thirds of the Party Parliamentary Members, notify the Speaker of the House to declare the seat of that Member vacant.

Interpretation of Article 83 (1) (g) and (h):

Having considered the historical perspective, the appropriate principles of interpretation of the Constitution, the relevant Uganda Parliamentary debates on the very proposed amendment when it was tabled before Uganda Parliament in 2005 as well as the situations in some other jurisdictions other than Uganda, I now proceed to interpret **Article 83 (1) (g) and (h)**.

The Article has already been considered by this court in **Constitutional Petition No.038 of 2010: George Owor Vs Attorney General and Another** when the court held that its language was very simple and clear. It was not ambiguous and should be construed basing on the natural meaning of the English words. To the court, the provision meant that:-

" (i) A Member of Parliament must vacate his/her seat if he/she was elected on a political party/organization ticket and then before the end of that Parliament the member joins another party.

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

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

(iii) Common sense dictates that if one was elected to Parliament on a political party ticket and joins another party, he/she

cannot be validly nominated for election on the ticket of that latter party unless he/she at the time of nomination resigned or vacated the seat in Parliament.

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

The court gave as the rationale for its decision, as being that one cannot, in a multiparty political system, continue to represent the electorate on a party basis in Parliament while at the same time offering oneself for election for the next Parliament on the ticket of a different political party or as an independent. It would be a betrayal of the people who elected such a one and an exhibition of the highest form of political hypocrisy and opportunism which the Article was designed to prevent. It would also be an exhibition of political indiscipline and an abuse of people's sovereignty which is so strongly enshrined in the Constitution.

The court, in similar terms and on the same grounds as above, interpreted **Article 83 (1) (h)** as meaning that an Independent Member of Parliament who joins a political party before the end of the Parliamentary term he/she was elected to, must also resign the seat of Parliament otherwise he/she cannot be validly nominated on a political party ticket for election to the next Parliament.

However, the decision of the **George Owor case (supra)** is not, in my view, a basis for the proposition of the petitioners in **Constitutional Petitions numbers 16, 19 and 21 of 2013** that once a Member of Parliament elected to Parliament on a ticket of a political party is expelled from membership of that party by the party itself, then such a member must also automatically vacate his/her seat in Parliament.

My appreciation of the meaning of the language of **Article 83 (1) (g) and (h)** is that the Member of Parliament concerned must himself/herself, out of his/her own volition take the decision to leave and abandon the political party for which he or she stood as a candidate for election to Parliament and the same member must also, again out of his/her own volition decide to join another party or to become an Independent. Once such a member takes that decision, then, such a member's seat in Parliament becomes vacant and a bye-election has to be held.

While the member of Parliament concerned may take such a decision directly and openly by announcing in writing, or otherwise, of leaving the political party on which he/she was elected to Parliament and joining another political party or becoming an Independent or vice versa, it is also possible that such a decision can be inferred from the conduct of the concerned Member of Parliament.

In the **Supreme Court of New Zealand case of Richard William Prebble and Three others Vs Donna Awatare Huata, SC C IV 9/2004,** such a conduct was inferred from the fact, amongst others, that the

concerned Member of Parliament willingly stopped paying subscription for her membership to her political party upon which she had been elected to Parliament so that her membership to that party lapsed. Since New Zealand has a proportional representation system of electing Members of Parliament whereby a political party is allotted Members of Parliament according to the number of votes a party has got at a general election, the lapse in membership willingly caused by this Member to her political party let that party to lose its strength under the proportional representation arrangement system. Thus the political party took the procedural steps provided for in the **Electoral Act of New Zealand** to have the Speaker declare the seat of this member vacant and the same was done.

All this was done on the basis that it was this Member of Parliament who voluntarily took the step to cease Membership of her party by withholding payment of her membership subscription to the same. The Supreme Court of New Zealand thus held that the political party was justified to take the steps it took, as allowed by the law, to have this member vacate her seat in Parliament.

The facts of this case are therefore very different from the facts of the consolidated **Constitutional Petitions 16, 19, 21 and 25 of 2013** where expulsion of the Members of Parliament is already done by the political party and the Speaker of Parliament is presented with a demand by the expelling political party to declare the seats of the concerned Members of Parliament to be vacant.

Also the Malawi Supreme Court of Appeal **In the matter of the question of the crossing the Floor by Members of the National Assembly: Presidential Reference Appeal No.44 of 2006 [2007] MWSC1** interpreted **section 65 (1) of the Constitution of Malawi** and held that the section did not violate the fundamental and other human rights and freedoms of conscience, expression, assembly and association as are enshrined in the Constitution of Malawi. It is of significance that the said section 65 (1) specifically provides that the Member of Parliament concerned must have **"voluntarily ceased to be a Member of that party and has joined another political party represented in the National Assembly……."**. Further, **Section 65 (2)** removes any restrictions upon a Member of Parliament in that he/she retains an absolute right to freely vote in the National Assembly, even contrary to the recommendations of his/her political party upon which he/she was elected to Parliament.

The Malawi legislation therefore, while ensuring that political parties exercise discipline upon their Members of Parliament by preventing defections, Members of the Parliament of Malawi are allowed to vote freely in Parliament even against positions taken by their respective political parties on specific issues. Further still, in the case of Malawi the decision by a Member of Parliament to leave the party to join another or to become an independent must be a voluntary one.

The Supreme Court of Zambia has also had occasion to consider the meaning of **Article 71 (2) (c) of the Zambian Constitution.** This is in the case of **The Attorney General, The Movement for Multiparty Democracy (MMD) V Akashambatwa Mbikusita Lewanika Fabian and 4 Others: [1994] S.J. (S.C.).** The issue for resolution by that Court was whether the Article as worded made a Member of Parliament elected on a ticket of the MMD political party to vacate his/her seat on that member's announcing that he/she had left the MDD party but without stating whether he/she had joined any other political party.

The Zambian Supreme Court, in resolving the issue, adopted the **"purposive approach"** other than the rule of literal interpretation of the Constitution, so as to promote the general legislative purpose underlying the provision. The court stated:-

> **"……..whether the strict interpretation of a statute gives rise to unreasonable and unjust situation, it is our view that judges can and should use their good common sense to remedy it – that is by reading words in if necessary – so as to do what Parliament would have done had they had the situation in mind."**

The court then proceeded to remedy the situation in the case by reading the necessary words so as to make the constitutional provision, which the court had found to be discriminatory, so as to make it to be fair and undiscriminatory. Consequently the court read the words **"vice versa"** in **Article 71 (2) (c)** so that the same read:

"71 (2) A member of the National Assembly shall vacate his seat in the Assembly:

(c) In the case of an elected member, if he/she becomes a member of a political party other than the party, of which he/she was an authorized candidate when he/she was elected to the National Assembly or, if having been an independent candidate, he/she joins a political party or vice versa."

The Zambian Article 71 (2) (c) is in many respects similar to Uganda's **Article 83 (1) (g) and (h).** No Constitutional Court in Zambia has, as of now, interpreted the article to mean that a Member of Parliament automatically loses his/her seat in Parliament on being expelled from membership of that party for whatever cause, if that party is the one on whose ticket the concerned Member was elected to Parliament.

In India, where a Member of Parliament, can even lose his/her seat by reason of voting in Parliament on an issue contrary to a stand taken by his/her political party on that issue, the law specifically provides that the Member concerned shall **voluntarily** take the decision and the Constitution restricts itself to the conduct of a Member of Parliament within the House where crossing the floor primarily applies.

Having considered the history of Uganda's political development, including its legislative history giving rise to the 1995 Constitution, and later on in 2005, the rejection by Uganda Parliament of the Constitutional (Amendment) Bill No.3 of 2005 on the very point, and the decisions of

courts of different jurisdictions, with constitutional provisions having a bearing on **Article 83 (1) (g) and (h),** and some of whom too, like Zambia and Malawi, have had some aspects of history similar to that of Uganda, like the lack of democratic governance and the one party state, it is necessary to adopt the purposive approach in analyzing the meaning of **Article 83 (1) (g) and (h).** This approach was also, in some ways, adopted by this court in the **George Owor case (supra).**

It is necessary to address the question as to what is the mischief that the Article is there to cure.

In my considered view while the Article is there to prevent crossing on the floor of Parliament by Members who enter Parliament, and fail to stick and to pursue the policies of the party upon whose ticket the said members were elected into Parliament on the one hand, it must also be appreciated on the other hand, that a Member of Parliament represents everyone in the Constituency that elected him/her into Parliament, regardless of party affiliation on the part of the voters in that constituency and as such the Member of Parliament must be let to carry out his/her primary function as a constitutive part of Parliament under **Article 79 (1) of the Constitution:**

"79. Functions of Parliament.

(1) Subject to the provisions of this Constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda.

(2) Except as provided in this Constitution, no person or body other than Parliament shall have power to make provisions having the force of law in Uganda except under authority conferred by an Act of Parliament.

(3) Parliament shall protect this Constitution and promote the democratic governance of Uganda."

It follows therefore that where, according to the judgement of the Member of Parliament, in situations where the position of a political party of a Member of Parliament is at variance with fulfillment of any of the constitutional functions stated above, a Member of Parliament, has by the command of the Constitution, to be let to take a stand in Parliament even if that stand is contrary to the position of his/her political party.

The political party concerned ought not, under the pretext of **Article 83 (1) (g) and (h)** claim to have powers to expel such a member from the party and by reason of the expulsion, to have that Member automatically vacate his/her seat in Parliament. Were that to be the case, then the mischief of elements of a one party state type of governance of suppressing basic freedoms of a Member of Parliament and over dominating organs of state, such as Parliament, that are supposed to operate independently, subject to the constitutional checks and balances, would re-surface again. This indeed would be the more reason if **Article 83 (1) (g) and (h)** is given the interpretation that would allow political parties to expel Members of Parliament from their membership to that party on grounds that do not

have even any bearing on the role, duties and responsibilities of a Member of Parliament as a representative of his/her constituency in Parliament.

The composition of Parliament, notwithstanding its constitutional mandate of five years, would be entirely left to be changed from time to time by the political parties depending on how many members the parties expel from membership during that period of five (5) years. This would greatly weaken Parliament and subject the country to have by-elections whenever a political party expels a Member of Parliament.

There is also a likelihood that free debate in Parliament would be negatively affected as Members, under the threat of expulsion, would restrain themselves from playing their role as representatives of all the people in the respective constituencies by merely supporting what their political parties dictate to them. A Member of Parliament would be rendered to be a mere mouth piece of the party he/she represents in Parliament.

I am thus unable to infer that the framers of the 1995 Constitution intended in framing the Article in question that a Member of Parliament elected in Parliament on a party ticket of a particular party should vacate his/her seat in Parliament because that member has been expelled by his/her party for some reasons between that member and the party, but which reasons are totally outside the roles, duties and responsibilities of that member as a legislator in Parliament.

Indeed, as legislators, a number of Members of Parliament are vested with certain responsibilities and roles that may require them to take or not to take stands on issues in respect of which the political parties upon which they were elected to Parliament may be taking different stands. The case of the Speaker and Deputy Speaker of Parliament is a case in point. **Article 82 of the Constitution** provides that the Speaker and deputy Speaker of Parliament are to be elected by Members of Parliament from among their members. Under **Article 82 (7) (d)** a Speaker/Deputy Speaker vacates office on ceasing to be a Member of Parliament. No business of Parliament shall be transacted in Parliament, other than the election of the Speaker, if the office of the Speaker is vacant. The Speaker and Deputy Speaker may, as indeed they are now, belong to a political party.

The responsibilities of the office of Speaker of Parliament dictate that the Speaker be as neutral as possible while managing the affairs of the House. This of necessity may result in the Speaker not always taking the same stand as his/her political party on whose ticket he/she is elected to Parliament. It is inconceivable to assert that the framers of the Constitution intended that the Speaker of Parliament would vacate her seat in Parliament if, for some reasons, the party to which she happens to belong were to expel her from membership of the party, asserting as it is being asserted now by the petitioners in **Constitutional Petitions 16, 19 and 21 of 2013,** that under **Article 83 (1) (g)** any Member of Parliament expelled by his/her political party has to automatically vacate Parliament.

What is stated in respect of the Speaker of Parliament is also true of the Deputy Speaker or some other Members of Parliament like Commissioners of the Parliamentary Commission under the **Parliamentary Commission Act** created under **Article 87A of the Constitution** and others serving as chairpersons and members of the various committees and organs of Parliament where, because of the special nature of the responsibilities of their respective offices, it may not be possible for them to always follow or vote or manage the affairs of Parliament in accordance with the dictates of the political parties upon whose tickets they were elected into Parliament, even when under strict instructions by those parties to do so.

Thus to interpret **Article 83 (1) (g) and (h)** as giving powers to political parties to cause Members of Parliament to automatically vacate their seats in Parliament through the avenue of expelling them from party membership would be to stifle the workings of Parliament as an independent arm of Government and thus undermine democratic governance under a multi-party political system. Where, the Constitution of Membership of Parliament, is such that there is a dominant party forming Government, the force of the threat of being expelled from Parliament, may easily bring about a near one party state type of governance that the Constitution bars under its **Article 75.** That surely cannot be said to have been the intention of the framers of the 1995 Constitution.

I appreciate that there is certainly need for legislators elected on the platform of a particular political party to advance the cause of that party, where circumstances do not dictate otherwise, in Parliament and also to the electorate. There is also need to maintain discipline in political parties if they are to be effective organs promoting democracy. Democracy also demands that a Member of Parliament on changing from one political party to another, or to become an independent, the electorate in the constituency should give approval or disapproval to such a change by the Member involved vacating his/her seat in Parliament and subjecting him/herself to the approval of the electorate through a by- election. But this must be through a voluntary act of the Member of Parliament involved and must be in respect of matters to do with the Member's duties and role in Parliament and not matters that have nothing to do with that role. Discipline in the whole process of representation of the people, political parties inclusive, is maintainable by applying the legal process that the Constitution and other laws have put in place.

Where a Member of Parliament who through his/her voluntary conduct leaves his/her party on whose ticket the said member was elected to Parliament and joins another party or remains independent, but refuses to do so or to state publicly and openly that this is what he or she has done, then in such a case, the remedy available to the political party demanding that this Member vacates his/her seat in Parliament is in **Article 86 (1) (a) of the Constitution.** That remedy is for the political party to petition the

High Court to declare the seat of the concerned member vacant. The Article provides:

"86. Determination of question of Membership.

(1) The High Court shall have jurisdiction to hear and determine any question whether –

(a) A person has been validly elected a Member of Parliament or the seat of a Member of Parliament has become vacant;

(2) ……

(3) Parliament shall by law make provision with respect to-

(a) the persons eligible to apply to the High Court for determination of any question under this article; and

(b) the circumstances and manner in which and the conditions upon which any such application may be made."

My appreciation of the law is that the act of vacating a seat in Parliament to which a Member of Parliament was elected through a valid Parliamentary election is by its own nature an election matter. Such an act is therefore appropriately a matter that may be addressed by the **Parliamentary Elections Act [17 of 2005],** which is an Act enacted by Parliament pursuant to **Article 76** whereby Parliament enacts laws on elections.

I come to this conclusion because there is no provision both in Article 76 of the constitution and section 86 of the Parliamentary Elections Act [17 of 2005] restricting the application of the said Article and section to a special category of members of Parliament, say, the disabled, the workers, the youth and army representatives. The Article and the section seem to me to be of general application to a situation of a member of Parliament in respect of whom the issue of determination of a question of his/her membership to parliament arises.

Section 86 of the Parliamentary Elections Act is a repeat, word for word, of **Article 86 (1) (a) (b) and (2) of the Constitution. Section 86 (3) (4) (5) (6) and (7)** sets out a procedure as to how the High Court is to be accessed so as for that court to determine the question referred to in **Article 86 of the Constitution** and **Section 86** of the very Act. **Under Section 86 (5) of the same Act,** given **Article 86 (2) of the Constitution,** a person aggrieved by the decision of the High Court may appeal to the Court of Appeal.

The procedure under the section requires that the one or group or entity raising the issue that a particular Member of Parliament has to vacate the seat in Parliament forwards an application in writing to the Attorney General signed by not less than fifty registered voters stating that a question referred to in **Article 86 (1) of the Constitution and Section 86 (1) of the Act** has arisen stating the ground for

coming to that conclusion. The Attorney General has to petition the High Court within thirty days after receipt of the application, and if he fails to do so, then those who submitted the application to the Attorney General may directly petition the High Court for determination of the question.

In my considered view the above procedure set out in **Section 86 (3) and (4) of the Parliamentary Elections Act** caters very well for a political party seeking to have a seat in Parliament vacated because the Member of Parliament holding that seat and who was elected on the ticket of that political party has by his/her voluntary conduct, in carrying out his/her role as Member of Parliament, without publicly stating so, left that party upon which he/she was elected to Parliament and has joined another party or has become an Independent in Parliament.

The political party concerned should be able to secure the requisite number of at least fifty registered voters signing the application may be from the electoral constituency of the Member of Parliament whose seat is being sought to be vacated in Parliament. The procedure gives an opportunity to the Attorney General to study and express himself/herself on the merits of the demand of the political party requiring that its member vacates his/her seat in Parliament and as such the political party is so advised by the Hon. Attorney General about the merits of the demand. The procedure also brings

in the participation of the ordinary voters, possibly from the constituency of the Member of Parliament whose Parliamentary seat is sought to be vacated, whose signatures are necessary to support the demand.

The above notwithstanding, should the procedure to access the High Court set out in **Section 86 (3) and (4)** be not the applicable one in the case of a political party as petitioner, the absence of such a procedure, cannot in any way affect, erode or diminish the jurisdiction vested in the High Court to hear and determine any question whether **"the seat of a Member of Parliament has become vacant"** by **Article 86 (1) of the Constitution.** If the law to provide for the proper procedure is not there, then Parliament should enact that law, but in the meantime, the High Court has to exercise the jurisdiction vested in it by the Constitution and access to the High Court has to be done through some appropriate procedure available to access the High Court. In my considered opinion, the procedure set out in **Section 86 (3) and (4) of the Parliamentary Elections Act** is appropriate.

By having the High Court decide whether the seat of the Member of Parliament alleged to have **"crossed the floor"** has become vacant puts a burden upon the political party seeking to have the seat declared vacant to prove its case for asserting so, while at the same time the Member of Parliament concerned is heard in defence as to why his/her seat in

Parliament should not be declared vacant. The court then proceeds to resolve the matter judiciously by taking into consideration all the relevant factors necessary to reach a just decision, with a right of appeal to the Court of Appeal by whoever is dissatisfied with the decision. Such a court process of determination by the High Court of whether or not a vacancy of a Member of Parliament has become vacant would result in creating discipline between the Members of Parliament and their political parties upon whose tickets they are elected to Parliament.

It has been submitted for the petitioners in **Constitutional Petitions 16, 19 and 21 of 2013** that given that the ordinary meaning of the word to **"leave"** is **"to go away from", "cease to live at a place or house", cease to belong to a group", to go away", "to stop living in" "to stop working for", "to stop belonging to"**, therefore when used in **Article 83 (1) (g) and (h)** the word **"leave"** is neutral, and as such there is no difference between a Member of Parliament who voluntarily decides to leave his/her political party upon which he/she was elected to join another political party or to remain an Independent in Parliament, and the one who is forced to leave by being expelled from his/her political party.

With the greatest respect I do not agree with that interpretation. The word **to expel** is **to be sent away by force or to force someone to leave or to dismiss officially from an institution, school, club or body**: See: **Longman Dictionary of Contemporary English: New Edition, 1987 page 354.**

There is surely a difference between someone who voluntarily and through personal choice takes a decision to go away from or to cease to live at a place or to belong to a group and the one who by force is made to go away or to cease to live at a place or to belong to a group. There is no free will on the part of the doer in the case of the latter, while it is there in the case of the former.

It follows therefore that in terms of **Article 83 (1) (g) and (h)** the Member of Parliament to fall under the ambit of that article has to, by exercise of his/her free will, to decide to leave the political party for which he or she stood as a candidate for election to Parliament, the same Member of Parliament has also, by exercise of his/her free will, decide to join another party or, remain as an independent member, or if elected as an Independent, to join a political party. Once these choices are made by the Member of Parliament concerned, by the exercise of his or her free will, and the member so communicates to the Speaker of Parliament and whoever else is concerned, then the seat of this Member of Parliament becomes vacant.

On the other hand, in my considered view, if the political party upon whose ticket the Member of Parliament concerned was elected to Parliament, comes to the conclusion, on the basis of the evidence the party has, that this Member of Parliament through the exercise of his/her free will has left the said political party and has joined another one or has decided to remain in Parliament as an Independent, and therefore by

reason thereof, the seat of this Member of Parliament should be declared vacant, then the political party under **Article 86 (1) and Section 86 (1), (3) and (4) of the Parliamentary Elections Act** takes steps to have the High Court declare the seat of the concerned Member of Parliament vacant.

In conclusion, in disagreement with my Lords of the majority judgement, I answer issues 1, 4, 5 and 6 as hereunder:

Issue 1:

My answer is that expulsion of a Member of Parliament by and from the political party upon whose ticket the said Member of Parliament was elected to Parliament is not an automatic ground for a Member of Parliament to lose his/her seat in Parliament under **Article 83** of the 1995 Constitution of Uganda.

Expulsion of a Member of Parliament by his/her political party upon whose ticket a Member was elected into Parliament may however be part of the evidence of the grounds of the political party, where circumstances demand that the political party petitions the High Court to have a seat of that Member of Parliament be declared vacant under **Article 86 (1) of the Constitution** and **Section 86 (1) (3) and (4) of the Parliamentary Elections Act.**

Issue 4:

The answer to this issue is that the 2nd, 3rd, 4th and 5th respondents to **Constitutional Petitions 16,19 and 21 of 2013** having not declared that they

left the party upon which they were elected to Parliament so as to join another political party or to remain as Independents in Parliament, as concerns their roles and duties as Members of Parliament, and the political party to which they still claim they belong to having not moved the High Court for a declaration that the seats in Parliament of these members be declared and the High Court has not declared the said seats vacant, I find that the continued stay in Parliament of the 2nd, 3rd, 4th and 5th respondents, after their expulsion from the NRM party on whose ticket they were elected in Parliament is not contrary to and/or inconsistent with **Articles (1) (1) (2) (4), 21 (1) (2), 29 (1) (e), 38 (1) 43 (1), 45, 69 (1) 71, 72 (1) 72 (2), 72 (4), 78 (1) 79 (1) (3) and 255 (3) of the Constitution.**

Issues 5 and 6:

The answer is that the expelled MPs who left and/or ceased being members of the National Resistance Movement political party, the petitioner in **Constitutional Petition No.21 of 2013,** but who still claim that they are members did not vacate their respective seats in Parliament and they are still Members of Parliament in accordance with the Constitution.

Consideration of issues 9, 10, 11, 12 and 13.

These issues arise from and concern in the main **Constitutional Petition No.25 of 2013: Hon. Abdu Katuntu (Shadow Attorney General) Vs The Attorney General.** The issues revolve upon the question whether the Honourable Attorney General acted contrary to the Constitution in his advice dated 08.05.2013 to the Rt. Hon. Speaker of Parliament relating to

the request by the Secretary General of the National Resistance Movement (NRM) political party that the Rt. Hon. Speaker declares the Parliamentary seats of the 2nd, 3rd, 4th and 5th respondents to **Constitutional Petitions 16, 19 and 21 of 2013** to be vacant by reason of the said respondents having been expelled from the NRM political party. The Rt. Hon. Speaker had in a statement to Parliament on 02.05.2013 stated that because of the absence of a **"clear unambiguous and unequivocal provisions of the law"** to empower her to make such a declaration she had restrained herself from acceding to the request of the Secretary General of the NRM Party.

The Honourable Attorney General after considering the decision taken by the Rt. Hon. Speaker of Parliament and pointing out the relevant laws that, according to him, applied to the situation, came to the conclusion that the 2nd, 3rd, 4th and 5th respondents, having been expelled from the NRM political party, cannot legally hold their seats and were now **"Aliens"** in the 9th Parliament, their continued stay in Parliament being illegal and an abuse of the law. The Hon. Attorney General then advised, in his capacity as the Principal Legal Adviser of the Government, the Rt. Hon. Speaker to reverse her decision of not declaring vacant the seats of the 2nd, 3rd, 4th and 5th respondents because it was unconstitutional.

Constitutional Petition No.25 of 2013 faults the Attorney General that his advice contravenes the Constitution in that it wrongly advises that only members of political parties and representatives of the army are the only ones who sit in Parliament, that the 2nd, 3rd, 4th and 5th respondents are no

longer Members of Parliament by reason of their expulsion from NRM party and therefore their seats are vacant, that the Attorney General cannot advise the Speaker to reverse her ruling. The petition seeks declarations that the said acts are unconstitutional.

The Attorney General as respondent maintained he acted in accordance with the Constitution.

No evidence was adduced to this court as to what action, if any, had been taken by the Rt. Hon. Speaker or Parliament on the advice the Hon. Attorney General had rendered to the Rt. Hon. Speaker. The advice thus remains not acted upon.

Under **Article 119 (3)** The Attorney General is the principal legal adviser of the Government, and carries out under **Article 119 (4)** the functions of giving legal advice and legal services to the Government on any subject, draws and peruses agreements, contracts, treaties, conventions and other documents to which the Government is a party or in which the Government has an interest, represents the Government in courts of law and in other proceedings to which the Government is a party and performs other functions assigned to him/her by the President or by law. Every agreement, contract, treaty, convention or any document relating to a transaction in which the Government has an interest must be concluded with legal advice having been obtained from the Attorney General, unless Parliament by law directs otherwise.

Courts in Uganda have pronounced themselves as to the effect and import of the legal advice that the Attorney General renders to Government its institutions and agencies.

While the Attorney General has a dual role as the Government principal legal adviser on both political and legal issues, as adviser on legal matters the Attorney General is a law officer and as such his/her advice on legal matters must be geared towards advancing the ends of justice. It is thus the duty of the Attorney General in discharging such responsibilities, to consult and access relevant information and advice from legitimate sources, including appropriate relevant advisers, so that the Attorney General informs himself/herself of all circumstances relevant to the advice and decision he/she is to render: See: **The attorney General, Politics and the Public interest, 1984, by John L.J. Edwards,** referred to in the judgement of G.W. Kanyeihamba, JSC, as he then was, in **Bank of Uganda V Banco Arabe Espanol: Civil Appeal No.1 of 2001 (SC).**

The opinion of the Attorney General authenticated by his/her own hand and signature about the laws of Uganda and their effect, binding nature of any agreement, contract or other legal transaction in as much as the same concern the Government, ought to be accorded the highest respect by government, public institutions and their agents and unless there are other agreed conditions, third parties are entitled to believe and act on that opinion without further enquiries or verification.

Where the Government, any other public Institution or body in which the Government has an interest treats and deals with the advice of the Attorney General in such a way that on the basis of the said advice the rights and interests of third parties are affected, then the Government or public institution or body in which the Government has interest is estopped, as against those third parties, from questioning the correctness or validity of that Attorney General's legal opinion: See: **Bank of Uganda V Banco Arab Espanal (supra).**

Where, as one representing the Government in a court of law or Tribunal, the Attorney General decides to take a certain action or not to take action, in the case before the court or Tribunal such a decision of the Attorney General cannot be challenged by another Government department, public Institution or body in which government has an interest: See: **Gordon Sentiba And 2 Others V Inspectorate of Government: Civil Appeal No.6 of 2008 (SC).**

Public institutions created under the 1995 Constitution such as the Electoral Commission, Judicial Service Commission and others that are mandated under the Constitution to carry out their work independently without being subjected to the control of any one, can be advised by the Attorney General, and while they must respect and take such advice as very persuasive, they are not bound to follow the advice of the Attorney General if to do so would compromise their constitutional role to act independently and without being subjected to the control or direction of

any one authority. In this regard courts of law as the third arm of the state are not bound by the advice of the Attorney General: See: **Constitutional Court Constitutional Petition No.1 of 2006: Kabagambe Asol And 2 Others Vs The Electoral Commission And Dr. Kizza Besigye.**

From the ordinary natural meaning of the English words: **"advise, advice and advisor"** an advice is never binding on the entity being advised. Therefore although the Attorney General is principal advisor of Government, the Constitution does not provide anywhere that such advice amounts to a directive that must be obeyed. Such advice while persuasive is subject to the Executive or Cabinet decision. See: **Kabagambe Asol case (supra)**

From the above analysis of the law as to the import and effect of the legal advice from the Attorney General, it is to be appreciated that Parliament, as the second Arm of Government, is part of Government and therefore has the Attorney General as principal legal adviser under **Article 119 (3) of the Constitution.**

I therefore, in agreement with their Lordships of the majority judgement, hold that the Honourable Attorney General acted within his constitutional powers to offer legal advice dated 08.05.2013 to the Rt. Hon. Speaker of Parliament.

The Speaker is the head of Parliament which is the second arm of Government, the first being the Executive and the third the Judiciary. Parliament is created by **Article 77 of the Constitution** and consists of

Members directly elected representing constituencies, one woman representative from each district, representatives of the army, the youth, workers and persons with disabilities, as well as the Vice President and Ministers.

The main function of Parliament is that it is vested by the constitution with power to make laws on any matter for the peace, order, development and good governance of Uganda: See: **Article 77.** In exercising that power, Parliament is only subject to the Constitution. It follows therefore that Parliament acts independent of any other authority or body, except the Constitution. It is therefore only in instances where the constitution provides that the exercise of power of Parliament be subjected to some other authority that that other authority may interfere with the work of Parliament. For example under **Article 137 of the Constitution,** the constitutional court may determine whether or not an Act of Parliament was enacted by Parliament in accordance with the constitution.

Therefore Parliament, while it must give all the respect to, cannot be bound by the advice of the Attorney General because no provision of the Constitution provides so. It follows therefore that as head of Parliament, the Rt. Hon. Speaker of Parliament, while bound to give the highest respect to the advice of the Hon. Attorney General, was not bound to follow the Hon. Attorney General's advice that she reverses her decision of retaining in Parliament the 2nd, 3rd, 4th and 5th respondents to **Constitutional Petitions numbers 16 and 21 of 2013** after they had been expelled from

membership of the NRM party upon whose ticket they had been elected to Parliament.

Specifically in answer to issue number 9, I too, like the majority judgement, find that the Honourable Attorney, through possibly a slip of the pen, mistakenly stated in his advice on page 6 thereof that the only members provided for to constitute Parliament are Members of political parties and representatives of the army; and then later on the same page at the bottom, he mentioned the categories as being only Members of Parliament representing political parties, representative of the army and Independents. The Honourable Attorney General went on to explain on page 7 of his advice why the 2nd, 3rd, 4th and 5th respondents had become **"Aliens"** in the Parliament of Uganda after they had been expelled from the NRM political party.

The Honourable Attorney General properly referred to **Article 78 of the Constitution** which clearly sets out the categories of those who constitute parliament. He would not have referred to the Article if his intention was to distort, contrary to the Constitution, the categories of members that constitute the composition of Parliament. I am satisfied that it was a mere mistake on the part of the Honourable Attorney General not to set out in his advice all categories that constitute Parliament as **Article 78** provides. I therefore hold that issue Number 9 does not raise a question for constitutional interpretation. It was framed basing on an obvious mistake by the Honourable Attorney General in failing to set out in his advice all

the categories of members that constitute Parliament as set out in **Article 78 of the Constitution.**

As to issues 10, 11, 12, my resolution of issues 1, 4, 5 and 6 has a bearing on these issues. This resolution, which is contrary to the resolution of the majority judgement, is that the expulsion of a Member of Parliament by the political party upon whose ticket that member was elected to Parliament does not automatically result in that member vacating his/her seat in Parliament. The seat of a Member of Parliament may be vacated under **Article 83 (1) (g) and (h)** only under circumstances I have already set out while dealing with issues 1, 4, 5 and 6 earlier on in this judgement.

Further, as already held above, the advice of the Honourable Attorney General, though deserving all the highest respect possible is not binding upon the Rt. Hon. Speaker of Parliament, since Parliament of which the Rt. Hon. Speaker is head, carries out its functions as the second arm of Government only subject to the Constitution. The Constitution does not provide that the advice of the Attorney General shall be binding upon Parliament. To the extent therefore that issues 10, 11 and 12 arise from the advice of the Hon. Attorney General to the Rt. Hon. Speaker of Parliament, which advice has no binding effect upon the Rt. Hon. Speaker of Parliament, and which advice was never acted upon the said issues do not deserve any further consideration by way of interpreting the Constitution.

Issue number 13 questions whether the Honourable Attorney General's advice to the Honourable Speaker to reverse her decision retaining in

Parliament the four expelled Members of Parliament, was not inconsistent and/or contrary to **Article 137 of the Constitution** given the fact that the Honourable Attorney General rendered the said advice on 08.05.2013 after **Constitutional Petition No.16 of 2013** to which the Attorney General was the first respondent, had already been lodged in this court.

I find that **Article 119 of the Constitution** does not prescribe as to when or under what circumstances the Attorney General is supposed to give legal advice and legal services to the Government or an arm of Government like Parliament on any subject. The Constitution makes this to be a preserve of the Attorney General.

Constitutional Petition Number 16 of 2013 was lodged in the Constitutional Court on 06.05.2013 and the advice of the Attorney General to the Speaker was rendered on 08.05.2013. The petitioner in **Constitutional Petition No.25 of 2013** did not adduce evidence to this court to show whether by the 08.05.2013 the Honourable Attorney General had already been served with **Constitutional Petition No.16 of 2013.** What is obvious is that the said petition was merely pending in the Constitutional Court by the time the Attorney General rendered his advice to the Speaker and as such there was no inconsistency with or contravention of **Article 137 of the Constitution** by the Honourable Attorney General in rendering the said advice. I so resolve.

Constitutional Petition No.25 of 2013 has issues arising out of the Hon. Attorney General's advice dated 08.05.1013. As I have already resolved,

the said advice is not binding upon the Rt. Hon. Speaker of Parliament or Parliament itself. Further the **Constitutional Petition No.25 of 2013** does not assert that any action has been taken by anyone with regard to that advice. In my considered view, no cause of action arises out of such advice to give the petitioner locus to petition the Constitutional Court for declarations relating to contents of such advice.

Issues 2, 3 and 8: I will consider these issues together as they are interrelated. Issue number 2 is whether the act of the Speaker in ruling on 02.05.2013 that the four Members of Parliament expelled from the NRM political party for which they stood as candidates for election to Parliament, are to retain their respective seats in Parliament is inconsistent with or in contravention of the Constitution. Issue number 3 is whether by ruling as she did the Right Honourable Speaker created a category of Members of Parliament, peculiar to and thus inconsistent with and/or contrary to the constitution. Issue 8 is whether the Right Honourable Speaker of Parliament had jurisdiction to act as she did.

Specifically in respect of issue number 3, I have already resolved, while dealing with issues 1, 4, 5 and 6 that, under **Article 83 (1) (g) and (h) of the Constitution,** expulsion of a Member of Parliament from membership of and by the political party on whose ticket the said member was elected to Parliament does not, per se, automatically result in that Member of Parliament vacating his/her seat in Parliament. The Right Honourable

Speaker, therefore, in my considered view arrived at the correct decision consistent and not in contravention of the Constitution.

As to whether the Right Honourable Speaker was seized of jurisdiction under the Constitution to act as she did (issue No.8), **Article 82 of the Constitution** provides that:

"82. Speaker and Deputy Speaker of Parliament.

(1) ……..

(2) …….

(3) ……

(4) Subject to article 81 (4) of this Constitution, no business shall be transacted in Parliament other than an election to the office of Speaker at anytime that office is vacant."

Article 81 (4) requires every Member of Parliament to take and subscribe to the oath of allegiance and that of a Member of Parliament.

Article 79 provides for the business that Parliament transacts and only when the office of Speaker is not vacant, namely: to make laws on any matter for the peace, order, development and governance of Uganda. Parliament also protects the Constitution and promotes democratic governance of Uganda.

The Rt. Hon. Speaker therefore is vested with jurisdiction under the Constitution to handle, deal with and give directions on any matters that

relate to the business of Parliament as is vested in Parliament by **Article 79**. In exercising those powers the Rt. Hon. Speaker is subject to the Constitution, the laws that Parliament may enact under the Constitution and to the **Rules of Procedure of Parliament of Uganda.**

Under **Rule 7 of the Rules of Procedure of Parliament,** the Speaker presides at any sitting of the House, preserves order and decorum in the House. In case of any doubt for any question of procedure not provided for in the Rules, the Speaker decides on that issue, having regard to the practices of the House, the Constitutional provisions and practices of other Commonwealth Parliaments in so far as they may be applicable to Uganda's Parliament.

It is a fact that on 16.04.2013 the Secretary General of the NRM political party, Hon. Amama Mbabazi, requested in writing the Rt. Hon. Speaker to declare the seats of the four expelled MPs vacant because the NRM political party upon whose ticket each of the said MPs had been elected to Parliament, had expelled each of the four MPs from membership of the party.

The request in my considered view, is a matter that constituted business of Parliament in terms of **Articles 79 and 82 of the Constitution** and also falls under the ambit of the **Rules of Procedure of the Parliament of Uganda.**

The Rt. Hon. Speaker had to deal with the request made to her office by the Hon. Secretary General of the NRM party. The way the Rt. Hon. Speaker chose to handle the request is as per her statement to Parliament on 02.05.2013. Parliament received the statement of the Rt. Hon. Speaker and no further action was taken upon it by Parliament there and then or thereafter. The issue then came to the Constitutional Court through the consolidated Constitutional Petitions, the subject of this judgement.

It is my finding, given the state of the law as applied to the facts before this court, that the Rt. Hon. Speaker had the jurisdiction to act as she did and as such her act was not inconsistent or in contravention of the Constitution.

Whether by ruling that the four expelled MPs remain in Parliament, the Rt. Hon. Speaker of Parliament created a peculiar category of MPs in Parliament unknown to and being inconsistent with and/or in contravention of the Constitution, I note that **Article 78 of the Constitution** sets out those who constitute Parliament. These are: Members directly elected to represent constituencies, one woman representative for every district, representatives of the army, youth, workers and persons with disabilities, the Vice President and Ministers, who if not already elected Members of Parliament, are ex officio Members of Parliament with no right to vote on an issue requiring a vote in Parliament.

While **Rule 9 of the Rules of Procedure of Parliament** provides that in the House, the seats to the right hand side of the Speaker are for Members

of the political party in power and those on the left are for the members of parties in opposition, the said Rule must be applied and interpreted subject to the Constitution. **Article 78** mandates the Rt. Hon. Speaker to seat in the House any member directly elected to represent a constituency in the House. Indeed **Rule 9 (1) of the Rules of Procedure of Parliament** provides that:

"9. Sitting arrangement in the House.

(1) Every Member shall, as far as possible, have a seat reserved for him or her by the Speaker."

The Rt. Hon. Speaker, after having considered the request of the Secretary General of the NRM party to declare the seats of the four Members of Parliament expelled by the party vacant, arrived at the conclusion that the law did not give her powers to do so. The Rt. Hon. Speaker then ruled that the four MPs remain in Parliament and found places for them where to sit and transact business of Parliament as elected Members of Parliament representing constituencies on the basis that, according to the Rt. Hon. Speaker, (and now as I have held in this Judgement), the expulsion of the said Members of Parliament from membership of the political party upon which the said member were elected to Parliament did not automatically result in having their seats declared vacant.

I therefore hold that the Rt. Hon. Speaker of Parliament acted within and not in contravention of the Constitution when she ruled that the 2nd, 3rd, 4th and 5th respondents remain in Parliament as members directly

elected to represent constituencies. It is up to those members to transact their Parliamentary business in compliance with the dictates of the party they claim they still belong to, upon which they were elected to Parliament, or on the other hand, it is up to the said political party to petition the High Court under **Article 86 (1)** to have the seats of the said Members of Parliament declared vacant on the basis that the party upon which they were elected in Parliament has expelled them. It is not the Rt. Hon. Speaker to resolve that dispute between the said four MPs and the political party upon which they were elected to Parliament. The responsibility of the Rt. Hon. Speaker under **Rule 9 of the Rules of Procedure of Parliament** is to **"have a seat reserved"** for the said four Members of Parliament.

Issue No.7

This is whether the court should grant a temporary injunction stopping the 2nd, 3rd, 4th and 5th respondents to **Constitutional Petitions numbers 16, 19 and 21 of 2013** from sitting in Parliament pending determination of the consolidated petitions or as a permanent injunction.

On 06.09.2013 in a dissenting ruling, I declined to entertain the issue of granting or not granting a temporary injunction at that stage of the court proceedings when only what remained was delivery of the final judgement in the consolidated petitions. Their Lordships of this Court in a majority decision issued the prayed for temporary injunction.

I now deal with the issue whether or not a temporary injunction ought to have been granted to the petitioners in **Constitutional Petitions 16 and 21 of 2013** stopping the 2nd, 3rd, 4th and 5th respondents as members expelled by the political party upon which they were elected to Parliament from sitting in Parliament pending determination of the consolidated constitutional petitions.

The petitioners in **Constitutional Petitions 16 and 21 of 2013** through **Constitutional Applications numbers 14 and 23 of 2013** applied for the above stated injunction first as against the Attorney General only, but later on application of the 2nd, 3rd, 4th and 5th respondents, they too were added on the applications as respondents. For reasons already given in my ruling of 06.09.2013 the Constitutional Court ordered that the two **Constitutional Applications 14 and 23 of 2013** be heard and disposed of together with the consolidated petitions.

A court injunction is an order which either prohibits (a prohibitory injunction) or requires one to do (a mandatory injunction) a particular act or thing. A breach of a court injunction is punishable as contempt of court and may, in some circumstances, lead to imprisonment.

The grant of an injunction by court is within the discretionary powers of the court. The test for consideration by court whether or not to grant an injunction is whether the applicant has made out a case as to whether there is a fair and bonafide question to be tried, whether damages would be an adequate remedy and, in case of doubt as to these two, whether the balance

of convenience favours the grant of an injunction. See: **Giella V Cassman Brown and Company [1973] EA 358** and also **: Noormohamed Jan-Mohamed Vs Kassamali Virjl Madhani [1963] 1 EACA 8.**

In practice, however, an applicant for a mandatory injunction has a higher burden to establish his/her case to be granted such an injunction than the one seeking a prohibitory one. This is because a mandatory injunction, if granted, imposes an additional degree of hardship or expense on the victim of the injunction. Therefore the jurisdiction as to a mandatory injunction is such that:-

"It is a jurisdiction to be exercised sparingly and with caution but, in the proper case, unhesitatingly." See: **Redland Bricks Ltd V Morris [1970] AC 652.**

The injunction sought in **Constitutional Applications 14 and 23 of 2013** was mandatory in nature in that it required, if granted by Court, the Rt. Hon. Speaker of Parliament not to implement her ruling of 02.05.2013 whereby she retained in Parliament the four MPs expelled by their NRM political party, by restraining those same MPs from entering; sitting in Parliament or participating in any parliamentary proceedings or accessing premises, precincts of Parliament until the disposal of the consolidated constitutional petitions or until further orders of the court.

The application for the mandatory injunction was based, according to the applicants, on the fact that the 2nd, 3rd, 4th and 5th respondents, having been expelled by the NRM political party from membership of that party,

each one of them had ceased to be a Member of Parliament and by reason thereof their respective seats in Parliament had been vacated and so each one ought not to be in Parliament.

Obviously therefore the application for the temporary injunction, mandatory in nature, was based upon the very issues to be resolved by the Constitutional Court in the consolidated **Constitutional Petitions numbers 16, 19, 21 and 25 of 2013.**

In my humble view, given the fact that the issues to be resolved in the consolidated **Constitutional Petitions, particularly numbers 16 and 21 of 2013,** were not straight forward and clear cut but were complicated issues involving interpretation of the Constitution and being determined, on their special facts, for the first time by the Constitutional Court, the applicants for the injunction never made out a case, that this was the nature of the case where an application for a mandatory injunction should have been made.

Further, the overriding consideration for an injunction is to preserve the status quo, but not to create a new one. The status quo in this case was that the 2nd, 3rd, 4th and 5th respondents to **Constitutional Petitions 16 and 21 of 2013** were and are sitting Members of Parliament representing their respective constituencies having been validly elected as such on the NRM political party ticket. The petitioners in the **consolidated Constitutional Petitions numbers 16, 19 and 21 of 2013** assert that this status of the 2nd, 3rd, 4th and 5th respondents should now change to a new status whereby the

said respondents, not being Members of Parliament because of their having been expelled by and from the political party upon whose ticket they were elected to Parliament, have to vacate Parliament and their seats declared vacant so that fresh elections are held in their respective constituencies. It is in effect because there is a dispute as to whether or not the alleged new status is valid or not under the Constitution that this Constitutional Court is being called upon, to resolve the dispute through the said consolidated constitutional petitions. It was therefore not proper, in my view, for the petitioners in **Constitutional Petitions numbers 16 and 21 of 2013,** to seek to obtain a mandatory injunction purporting to preserve a status whose constitutional legitimacy was the very issue the very petitioners were calling upon the Constitutional Court to pronounce upon through **Constitutional petitions 16 and 21 of 2013.**

For the above reasons I would not have granted a temporary injunction prayed for in **Constitutional Applications 14 and 23 of 2013.**

Now in this judgement, by reason of the findings and holdings I have made in respect of the framed issues, particularly my holding that the expulsion of a Member of Parliament by his/her political party, on whose ticket he/she was elected to Parliament does not automatically result in the Parliamentary seat of that member becoming vacant, I refuse to grant the prayed for injunction.

In conclusion by way of remedies I hold that:

1. The expulsion from a political party is not an automatic ground for a Member of Parliament to lose his or her seat in Parliament under **Article 83 of the 1995 Constitution** but

   (i) Where a Member of Parliament elected to Parliament on the ticket of a political party voluntarily leaves that party to join another political party or to remain an Independent in Parliament or having been an Independent in Parliament joins a political party, then that member vacates Parliament under **Article 83 (1) (g) and (h).**

   (ii) In any other cases, where the political party upon whose ticket a Member of Parliament was elected to Parliament, asserts that the said Member of Parliament through his/her voluntary conduct, has left that party and joined another one or has remained an Independent in Parliament, or having been elected as an Independent he/she has joined a political party, but that the said member has refused to declare to that effect, the issue whether the seat of that Member of Parliament has become vacant must be resolved upon by the High Court under **Article 86 (1) of the Constitution.** The political party concerned may use the evidence of the expulsion of such a member as part of the evidence in establishing a case against the Member of Parliament in a question as to why his/her seat should not be declared vacant by the High Court.

2. The Ruling of the Right Honourable Speaker of Parliament dated 02.05.2013 that the 2nd, 3rd, 4th and 5th respondents to **Constitutional Petitions numbers 16, 19 and 21 of 2013,** remain in Parliament did not contravene any provision of the Constitution.

3. The Rt. Hon. Speaker of Parliament did not create a peculiar category of MPs, unknown and contrary to the Constitution by ruling as she did in (2) above.

4. The continued stay of the 2nd, 3rd, 4th and 5th respondents after their expulsion from the NRM political party on whose ticket they were elected to parliament is not contrary to or inconsistent with the Constitution.

5. The said 2nd, 3rd, 4th and 5th respondents did not vacate their seats in Parliament. They are still Members of Parliament under the Constitution.

6. No temporary injunction or any injunction at all stopping the 2nd, 3rd, 4th and 5th respondents from sitting in Parliament should be granted.

7. The Rt. Hon. Speaker of Parliament had the jurisdiction to make the orders she made and she acted within and in compliance with the Constitution.

8. The Act of the Hon. Attorney General of advising the Speaker and Parliament is not inconsistent or contrary to the Constitution, but the said advice, while deserving all the respect from the Rt. Hon. Speaker

is not binding upon the Speaker, let alone Parliament, as the second arm of Government. To this extent, it is unnecessary in this case for court to determine the constitutionality or unconstitutionality of the nature of advice the Hon. Attorney General gave the Rt. Hon. Speaker, except in as far as that advice was part and parcel of the independent issues arising from **Constitutional Petitions numbers 16, 19 and 21 of 2013** which have been resolved upon separately in this judgement.

Having resolved the issues as above I decline to grant the declarations prayed for in **Constitutional Petitions numbers 16, 19 and 21 of 2013, Constitutional Applications numbers 14 and 23 of 2013** as well as the first respondent's (Attorney General) cross petition to **Constitutional Petition No.21 of 2013.** The said Constitutional Petitions, cross-petition and applications stand dismissed.

As to **Constitutional petition No.25 of 2013,** to the extent that the advice of the Attorney General is not binding upon the Rt. Hon. Speaker and Parliament as the second arm of Government, I find that on the mere basis of securing a copy of the said advice, which advice has not been acted upon, does not vest in the petitioner to that petition a cause of action to petition the Constitutional Court for the declarations he prays for which are all about the contents of such

advice. Accordingly **Constitutional Petition No. 25 of 2013** is also dismissed by reason thereof.

As to costs, the consolidated petitions raised issues of great public importance as regards the constitutional inter-relationship of political parties and Parliament, the office of Attorney General and that of the Speaker of Parliament and the functioning of the three arms of Government: The Executive, the Legislature and the Judiciary. It is therefore only fair and fitting that no particular party to the consolidated petitions and applications be punished by way of costs. I accordingly order that each party bears its own costs of all the proceedings in the consolidated constitutional petitions, cross petition and the applications.

Lastly I wish to thank counsel of all parties for the detailed research, exposition and clarity of submissions. This court was very much assisted by such. Thank you so much.

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

Remmy Kasule
JUSTICE OF CONSTITUTIONAL COURT