

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NUMBER 0039 OF 2013

HON. GERALD KAFUREEKA KARUHANGA:.....: PETITIONER

VS.

ATTORNEY GENERAL:.....: RESPONDENT

CORAM:

HON. MR. JUSTICE REMMY KASULE, JA/JCC

HON. MR. JUSTICE ELDAD MWANGUSYA, JA/JCC

HON. MR. JUSTICE RUBBY AWERI OPIO, JA/JCC

HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA/JCC

**HON. JUSTICE PROFESSOR L.EKIRIKUBINZA TIBATEMWA,
JA/JCC**

**JUDGEMENT OF HON. JUSTICE PROFESSOR L.EKIRIKUBINZA
TIBATEMWA, JCC**

Introduction.

This Constitutional Petition was brought under **Article 137** of the Constitution of Uganda. The petition challenged the appointment of

Justice Benjamin Odoki for a term of 2 years as Chief Justice of the Republic of Uganda, after vacation of office on the attainment of the mandatory age of retirement.

The petition was first called for hearing on 9th January 2014. The Coram of the Court included Hon. Mr. Justice S. B. K. Kavuma, JA, Hon. Mr. Justice Augustine Nshimye, JA, Hon. Mr. Justice Eldad Mwangusya, JA, Hon Mr. Justice Geoffrey Kiryabwire, JA, and Lady Justice Professor Lillian Ekirikubinza Tibatemwa, JA.

The Petitioner was represented by Professor George Kanyeihamba assisted by Mr. Nicholas Opio, Mr. Jude Mbabali and Mr. Orono Emmanuel. The Learned Attorney General was represented by Mr. Wanyama Kadoli Principal State Attorney, assisted by Ms. Charity Nabasa, State Attorney.

Before the hearing could start, Counsel for the Petitioner requested to address Court in Chambers where an objection to the composition of the panel was raised. The first ground concerned both Justice Kavuma and Justice Nshimye while the second ground concerned only Justice Kavuma.

In brief, the first objection was that during the hearing of *Constitutional Petitions 16 of 2013 and 21 of 2013* in which Justices S. B. K. Kavuma and Augustine Nshimyewere part of the Coram, a question of bias against the two justices was raised but it remained unresolved because their decision to decline to disqualify themselves was appealed against in the Supreme Court and the Supreme Court was yet to determine the said appeal. Counsel did not make any

attempt to illustrate how the existence of an appeal in a matter unrelated to the present petition would make it irregular for the two justices to participate in the matter at hand.

The second objection was that the appointment of Hon. Steven Kavuma as Ag. Chief Justice of the Republic of Uganda had been irregularly done. Counsel argued that the irregularity was rooted in the fact that the appointment of Justice Kavuma was by Hon. Justice Odoki in a letter dated 24.06.2013 when as a matter of fact, Justice Odoki had vacated office on 23. 06. 2013. The said appointment had thus been by a private citizen. After deliberation on the two objections, both Justices Kavuma and Nshimye declined to disqualify themselves from hearing the petition.

When Court convened in the open Court, Counsel requested that the proceedings in chambers be replicated. Given the importance attached to the matters raised, Counsel's request was granted by the Court. A ruling in which the objection of Counsel for the Petitioner was overruled was delivered in open Court. Upon delivery of the ruling, Counsel for the Petitioner requested for an adjournment to enable him consult his client. The request was granted. When Court reconvened, Counsel informed Court that his client was adamant that unless the two justices stood down he was not to proceed with the petition but to appeal against the Court's ruling in the Supreme Court.

Counsel for the Respondent indicated readiness to proceed with the petition but Court allowed Counsel for the Petitioner time to obtain a

copy of the proceedings to enable him file an appeal in the Supreme Court. The following is the order which was given by the Court:

“In view of what transpired in Court after standing over the hearing of this petition granted by the Court, this Court adjourns the hearing of the petition to enable the petitioner obtain a copy of the proceedings of the Court of this morning to enable the petitioner to appeal to the Supreme Court...”

The above Order is quoted verbatim because it has a bearing on what transpired on 16th June 2014 when the petition was called for hearing.

16th June 2014

When the petition was called for hearing on 16.06.2014 the Coram had changed. Both Justices Kavuma and Nshimye were no longer on the Coram which now consisted of Hon. Justices Remmy Kasule, Eldad Mwangusya, Aweri Opio, Solomy Balungi Bossa, and Justice Professor Lillian Ekirikubinza Tibatemwa.

The Petitioner who was present in Court was represented by Prof George Wilson Kanyeihamba and Mr. Orono Emmanuel from G.W Kanyeihamba Co. Advocates as well as Mr. Nicholas Opio of M/S Onyango & Co. Advocates. The respondent was represented by Mr. Wanyama Kodoli, Principal State Attorney; Ms. Charity Nabasa State

Attorney and Ms. Jane Francis Nanvuma, State Attorney, all from the Attorney General's Chambers.

Before the hearing could proceed Counsel for the Petitioner raised an objection to proceeding with the matter on the ground that since the Petitioner had lodged an Appeal in the Supreme Court regarding the earlier Ruling of the Court delivered on 9th January 2014, the Petition should be stayed until the disposal of the Appeal by the Supreme Court. The Petitioner's Counsel also complained that although he had applied for the 9th January 2014 record of Court Proceedings, the Registrar of this Court had only availed hand written notes prepared by two of the Justices; Hon. Steven Kavuma and Hon. Augustine Nshimye JA. Counsel argued that what should have been availed to him was a full record signed by all the Justices who had constituted the Coram.

In brief reply Mr. Wanyama Kodoli opposed the prayer to stay the proceedings given that this is a Constitutional matter which this Court is obliged to handle expeditiously. The Respondent's Counsel also pointed out that Court had not made any Order for Staying of the Proceedings pending disposal of the appeal at the Supreme Court and thus there was no reason for declining to hear the Petition.

In its brief ruling court ordered that since none of the parties was objecting to the Coram of the Court as newly constituted, and there was no order to stay the proceedings of this Court pending disposal of the appeal at the Supreme Court, the hearing of the petition would

continue and a comprehensive treatment of the reasons would be given in the full judgment in the petition.

Upon delivery of the above ruling Counsel for the Petitioner requested Court to allow him to consult his client which Court agreed. On consultation with the Petitioner the said Counsel submitted that the Petitioner intended to appeal against the ruling of the Court made on 16.06.2014 and that pending the appeal to the Supreme Court the proceedings in this Court should be stayed. Counsel for the Respondent opposed the prayer to stay the proceedings and in agreement with him, Court on the consideration that this is a constitutional matter which must be disposed of expeditiously, ordered the hearing to proceed. Upon this order being delivered, both the Petitioner and his Counsel walked out of Court.

I now give the reasons why Court decided to proceed as promised in the ruling.

The first consideration which must be emphasised is that under **Article 137 (7)** of the Constitution, Court is enjoined thus:

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

Rule 10 of the Constitutional Court (Petitions and References) Rules, 2005 also lays emphasis on the need for expeditious hearing of petitions.

The instant petition was filed on 26th July, 2013. The answer to the petition was filed on 2nd August 2013. A joint Scheduling Memorandum in which the issues for determination were framed was filed on 13.11. 2013 and the petition set for hearing on 9th January 2014. During the hearing of the petition Counsel for the petitioner has submitted and rightly so that this matter is of great Constitutional importance because it touches on the appointment of the head of one of the three organs of government namely the judiciary. Given its importance this Court felt that its hearing could not be delayed any longer.

The second consideration was that when the petition was adjourned to enable the Petitioner file his appeal, no order of stay of proceedings was sought and none was given. A Notice of Appeal does not act as an automatic stay of proceedings. In any event, one would have expected that between 9th January 2014 when the petition was adjourned and 16th June 2014 when it was convened for hearing, some steps would have been taken by the Petitioner, towards prosecution of the appeal. Counsel for the Petitioner complained that he had not received the full Court record of proceedings insisting that all the Justices who sat in the hearing of the petition on 9th January 2014 should have signed the proceedings. Court noted that we know of no legal requirement or practice that all the Justices in the hearing of the case must sign the

proceedings. A copy of the record of proceedings certified by the Registrar of the Court is an authentic record of the Court and even without the signatures of the Justices it is the basic document one requires to file an appeal.

The third consideration was that the Coram to which the petitioner had originally objected had changed. Counsel for the Petitioner emphatically submitted that he had no objection to the present composition of the Coram. So even if the appeal to the Supreme Court was to proceed, its outcome would have no bearing on the petition because the persons who declined to disqualify themselves would not be part of the hearing and therefore not part of the decision that would be made.

The departure of the Petitioner and his counsel left the petition without anybody to present it. Court had the option to dismiss it. On record however was the petition and supporting affidavit evidence - two affidavits deponed by the Petitioner, Hon Gerald Kafureeka Karuhanga, filed on 26th July 2013 and on 13th November 2013 respectively. A Joint Scheduling Memorandum containing arguments on behalf of the Petitioner was also already on record. The Respondent's answer to the petition was supported by two affidavits, one deponed by Hon. Peter Nyombi, in his capacity as Attorney General and Chief Legal Advisor of Government and another by Mr. Kagole E. Kivumbi, Secretary to the Judicial Service Commission (JSC). Of further significance was that the Respondent's Counsel did not ask

Court to dismiss the Petition but rather submitted that he was ready to proceed and did proceed to present the case for the Respondent.

Based on the documents on record and the oral submissions of Counsel for the Respondent, this Court was adequately equipped to resolve the issues raised in order to determine the Constitutionality of the re-appointment of His Lordship Benjamin Odoki as Chief Justice of this Country after he had vacated office as Chief Justice on attaining the retirement age of 70 years, which we proceeded to do.

Background to the Petition.

The background to the Petition is as follows:

1. On 18th June 2013, the Judicial Service Commission wrote to the President and proposed that Justice Bart Katureebe be appointed Chief Justice of the Republic of Uganda.
2. On 21st June 2013, the Attorney General wrote to the President and informed him that Justice Benjamin Odoki would be retiring as Chief Justice on 23rd June 2013. The Attorney General advised the President that two options were available, either to appoint another substantive Chief Justice or to appoint retired Chief Justice Odoki as Chief Justice under **Articles 142 (1) and 253 (1)** of the Constitution.

The Attorney General advised the President that “since an appointment under **Article 142 (2)** is not affected by the retirement age, Justice Odoki could be appointed thereunder as

Acting Supreme Court Justice and then appointed as Chief Justice under **Article 253** of the Constitution.”

3. On 26th June 2013, the Judicial Service Commission wrote to the President and proposed that four Justices of the Supreme Court, among them Benjamin Odoki, be requested on their vacation of office as a result of attaining the age of 70, to act as Justices of the Supreme Court for two years.
4. On 9th July 2013, the President wrote to the Chairperson of the Judicial Service Commission, communicating his acceptance that Justice Benjamin Odoki and the 3 other retiring Supreme Court Justices be requested to stay on as Acting Justices of the Supreme Court for 2 years.

In the same letter, the President communicated his “*decision*” that for 2 years, Benjamin Odoki should continue to be the Chief Justice so that the country would optimize the utilization of her scarce resources.

5. On 16th July 2013, the Chairperson of the Judicial Service Commission wrote to the President acknowledging receipt of the President’s letter of 9th July. The Chairperson informed the President that the Commission had prepared the instruments of appointment regarding the temporary appointments of the 4 Justices of the Supreme Court as Acting Justices, among them, Benjamin Odoki. He further communicated that although the Commission had noted the decision of His Excellency to appoint Acting Justice Odoki of the Supreme Court as Chief Justice of

Uganda, the Commission had reservations about the appointment due to the fact that the appointment of a Chief Justice was a substantive appointment.

The Chairperson stated that the Commission's reservations had been expressed in, among others, the Commission's letters to the President dated 20th November 2012 and 21st March 2013.

In the same letter dated 16th July 2013 the Chair ended thus: "I trust the Hon. Attorney General will guide you further on this."

6. In a letter dated 30th July 2013, the Attorney General wrote to the President pointing out that he (Attorney General) had noted that although the President had in his letter dated 9th July 2013, informed the Chairperson of the Judicial Service Commission that he (the President) had decided that Benjamin Odoki continues to be Chief Justice for 2 years, the Chair of the Commission had in a letter dated 16th July 2013 pointed out the reservations of the Commission (reservations expressed in earlier letters dated 20th November 2012 and 21st March 2013) about the said appointment. The Attorney General stated that he had had opportunity of studying the two earlier letters and in his (Attorney General's) letter dated 23rd July 2013, pointed out that the two letters did not spell out the reservations of the Commission. The Attorney General further informed the President that in his (the Attorney General's) view, the Commission whose meetings he attended, had no substantial reason that would make it impossible for it to advise

the President to appoint Justice Benjamin Odoki Chief Justice, as is required by **Clause (1) of Article 142** of the Constitution.

The Attorney General went further to state that:

“Clause (1) of Article 142 of the Constitution provides that the Chief Justice shall be appointed by the President **‘acting on the advice of the Judicial Service Commission and with the approval of Parliament.’** Thus the appointment is by the President. The Commission advises the President on the appointment. Although it is clear from the above-mentioned provisions of Clause (1) of Article 142 that the appointment of the Chief Justice is the preserve of H.E The President, it is not clear to me that HE the President can only act on the advice of the Judicial Service Commission. So yesterday I tried to persuade the Commission to give such advice. However, the Commission which had earlier on agreed and advised on the appointment of JUSTICE BENJAMIN ODOKI as a Justice of the Supreme Court under Clause (2) of Article 142 of the Constitution, one of the qualifications for the appointment of one as a Chief Justice, was unwilling to give such advice.

The Commission insisted on having reservations, which reservations have never been, clearly spelled out. So although the Solicitor General has prepared the Instrument (of appointment in respect of the appointment of Justice Benjamin Odoki as Chief Justice), I thought I should bring the position of the Commission to your attention.”

7. On 1st August 2013, the Chairperson of the Judicial Service Commission wrote to the President and referred to the letters of the Attorney General dated 23rd and 30th July 2013 concerning the appointment of the Chief Justice. The Chairperson of the Commission explained that the Commission's "reservations" to the appointment of Benjamin Odoki as Chief Justice were rooted in the "absence of Constitutional authority to re-appoint, let alone appoint, a Chief Justice who has attained the age of 70 years". The Chair explained further in detail thus:

"The Constitution is clear. At that age, a sitting Chief Justice "shall" (i.e. must) vacate office. The effect of vacation is to cease to be qualified for that office. Temporary vacancies in the office of the Chief Justice are automatically filled by the Deputy Chief Justice. A permanent vacancy in that office is filled by a substantive appointment whose tripartite formula comprises (i) advice by the JSC; (ii) Appointment by the President; and (iii) Approval by Parliament. Any other appointment (e.g. under Article 253) must be:

- of a person "qualified" to be appointed;
- done in accordance with the provisions of the Constitution.

The matter of Article 142(2) concerning the appointment of Acting Justices/Judges is totally

separate from and outside the ambit of the appointment of a Chief Justice, Deputy Chief Justice or Principal Judge. That Article deals exclusively with filling vacancies concerning **Judges** of the three Courts of Judicature (High Court, Court of Appeal and Supreme Court). But even here, the overriding principle of age is quite evident- a judge who attains the retirement age must vacate office. However, such a judge may exceptionally and subject to the terms and conditions stipulated in the Article, be recalled on temporary duty as an **Acting Judge**, “notwithstanding” the age factor. Nowhere in that Article is the question of recalling a retired CJ or DCJ or PJ raised. That is because temporary absence of the CJ, DCJ and PJ are addressed elsewhere in the Constitution, in provisions that are specific (i.e. “tailor made”) to those three offices [see Articles 133(2), 136 (2) and 141) (2)].

Excellency, as is readily evident, from the above summary of the law, the Commission’s reservations are grounded in the letter and spirit of the fundamental provisions of the Constitution. For the Commission to advise otherwise would be to advise an illegality and to transgress the solemn oath which the

Commissioners took to ‘uphold, protect and defend the Constitution’.

It has come to the Commission’s attention that this matter has now been filed as a Constitutional petition (No. 39 of 2013) in the Constitutional Court of this land. We will await the authoritative interpretation of that Court to put finality to this issue of judicial appointments.

We agree with the Attorney General’s opinion that appointment of now Ag. Justice Odoki as Chief Justice would be a substantive appointment; which would require Parliamentary approval. In view of that, the Instrumental of Appointment would become necessary only after Parliament completes its approval.”

8. In a letter dated 9th August 2013, the President wrote to the Speaker of Parliament and communicated to the said office that in exercise of powers vested in the President by Articles 142 (1), 143 and 253 of the Constitution, he had appointed Justice Benjamin Odoki as Chief Justice on a two (2) year contract. The name was thus being forwarded to the Speaker for Parliamentary Approval.

Issues

According to the Joint Scheduling Memorandum, the issues identified for determination by the Court were:

1. Whether or not the decision of the President in reappointing retired Chief Justice Benjamin Odoki as Chief Justice of Uganda is inconsistent with and/or in contravention of **Articles 130, 133, 142 (1), 142 (2), 142 (3), 143 (1), 144 (1) (a), 147 (1) (a) 147 (2) of the Constitution of Uganda.**
2. What remedies are available to the Petitioner?

For ease of reference I have reproduced the above mentioned Articles below:

130. Supreme Court of Uganda

The Supreme Court shall consist of-

- (a) *the Chief Justice; and*
- (b) *such number of justices of the Supreme Court not being less than six, as Parliament may by law prescribe.*

133. Administrative functions of the Chief Justice

- (1) *The Chief Justice-*
 - (a) *shall be the head of the judiciary and shall be responsible for the administration and supervision of all courts in Uganda; and*
 - (b) *may issue orders and directions to the courts necessary for the proper and efficient administration of justice.*

(2) *Where the office of the Chief Justice is vacant or where the Chief Justice is for any reason unable to perform the functions of his or her office, then until a person has been appointed to and has assumed the functions of that office or until the Chief Justice has resumed the performance of those functions, those functions shall be performed by the Deputy Chief Justice.*

142. Appointment of judicial officers

(1) *The Chief Justice, the Deputy Chief Justice, the Principal Judge, a justice of the Supreme Court, a justice of Appeal and a judge of the High Court shall be appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament.*

(2) *Where-*

- (a) *the office of a justice of the Supreme Court or a justice of Appeal or a judge of the High Court is vacant;*
- (b) *a justice of the Supreme Court or a justice of Appeal or a judge of the High Court is for any reason unable to perform the functions of his or her office; or*
- (c) *the Chief Justice advises the Judicial Service Commission that the state of business in the Supreme Court, Court of Appeal or the High Court so requires,*

the President may, acting on the advice of the Judicial Service Commission, appoint a person qualified for appointment as a justice of the Supreme Court or a justice of Appeal or a judge of the High Court to act as such a justice or judge even though that person has attained the age prescribed for retirement in respect of that office.

(3) A person appointed under clause (2) of this article to act as a justice of the Supreme Court, a justice of Appeal or a judge of the High Court shall continue to act for the period of the appointment or, if no period is specified, until the appointment is revoked by the President acting on the advice of the Judicial Service Commission, whichever is the earlier.

144. Tenure of office of judicial officers

- (1) A judicial officer may retire at any time after attaining the age of sixty years, and shall vacate his or her office-*
- (a) In the case of the Chief Justice, the Deputy Chief Justice, a justice of the Supreme Court and a justice of Appeal, on attaining the age of seventy years;*

146. The Judicial Service Commission

- (1) There shall be a Judicial Service Commission*
- (3) The Attorney General shall be an ex official member of the commission.*

147. Functions of the Judicial Service Commission

- (1) The functions of the Judicial Service Commission are-*

(a) to advise the President in the exercise of the President's power to appoint persons to hold or act in any office specified in clause (3) of this article, which includes power to confirm appointments, to exercise disciplinary control over such persons and to remove them from office;

(2) In the performance of its functions, the Judicial Service Commission shall be independent and shall not be subject to the direction or control of any person or authority.

(3) The offices referred to in clause (1)(a) of this article are

(a) the office of the Chief Justice, the Deputy Chief Justice, the Principal judge, a justice of the Supreme Court, a justice of Appeal and a judge of the High Court;

Submissions by the Petitioner

The Petitioner's submissions as contained in the Petition, affidavits in support of the Petition and in the Joint Scheduling Memorandum which was filed in Court on 13th November 2013 were as follows:

1. That following his retirement in June, 2013 retired Chief Justice Benjamin Odoki was no longer eligible and qualified to be reappointed as Chief Justice of the Republic of Uganda under the 1995 Constitution.
2. That the Constitution does not provide for/contemplate reappointment of a retired Chief Justice.

3. That the Judicial Service Commission had duly performed its function of advising the President by forwarding to him names of candidates deemed fit and competent for the office of Chief Justice but the President ignored their advice.
4. That the act of the President disregarding the advice of the Judicial Service Commission is in contravention of and/or is inconsistent with **Article 147 (1)** (a) of the Constitution.
5. That to appoint a Chief Justice, the President had to act on the advice of the Judicial Service Commission
6. That it is against the spirit of the Constitution for the President to be the one to recommend to the Judicial Service Commission the name(s) of persons to be appointed judicial officers.
7. That if the decision of his Excellency the President is effected by the Judicial Service Commission it would not augur well for the Independence of the Judiciary, fostering Democratic Governance, Rule of Law and the general principles of Separation of Powers.
8. That if the decision of the President were left to stand, the Judicial Service Commission would be abdicating its functions and responsibilities as envisaged under **Article 147** of the Constitution of the Republic of Uganda.
9. That if the reappointment of the retired Chief Justice as head of the Judiciary were to be confirmed, it would prejudice the people of Uganda considering that Judicial Power is derived from the People.

10. That it is in the interest of justice that the retired Chief Justice declines to take up such reappointment to save the breach of the Constitution.
11. That the retired Chief Justice is not eligible for reappointment as Chief Justice in accordance with the laws of Uganda.
12. That the decision of the President to recommend reappointment of retired Chief Justice as Chief Justice is an affront on the Independence of the Judiciary and the effective performance and function of the Judicial Service Commission.
13. That the decision of the President to reappoint the retired Chief Justice as Chief Justice is a betrayal of the mandate of the people under **Article 128** of the Constitution of Uganda and an abuse of the Constitution.
14. That it is in the interest of justice that this Honourable Court declares that the above acts of His Excellence the President of the Republic of Uganda were in contravention of and/ or inconsistent with **Articles 130, 133, 142 (1) (2) (3), 143 (1), 144 (1)(a), 147 (1) (a) and (2)** of the Constitution of the Republic of Uganda 1995.
15. That the decision of the President to reappoint a retired Chief Justice as Chief Justice of Uganda is illegal, null and void as it is in contravention of the provisions of the Constitution of Uganda 1995.
16. That a retired Chief is not eligible for reappointment as Chief Justice and is not a justice of the Supreme Court.

17. That the concept of reappointment of a retired Chief Justice as Chief Justice is strange in our Constitution and unheard of.

Declarations and Orders

The Petitioner prayed that based on the above submissions, this Court be pleased to grant the following Declarations and Orders:

- (i) That the decision of the President to reappoint a retired Chief Justice as Chief Justice is inconsistent with and or is in contravention of **Articles 130, 133, 142 (1) (2) (3), 143 (1), 144 (1)(a), 147 (1) (a) (2)** of the Constitution of the Republic of Uganda 1995 and therefore null and void.
- (ii) That the President does not have the legal mandate letter on power to advise the Judicial Service Commission on who should be appointed Chief Justice.
- (iii) That the decision of the Judicial Service Commission to advise the President to request Chief Justice Benjamin Odoki is illegal.
- (iv) That when a Chief Justice retires he/she does not qualify for reappointment under the Constitution.
- (v) That a Permanent injunction doth issue restraining the respondent or his and other agencies or bodies of Government from implementing or continuing to do unconstitutional acts in perpetuation of the President's unlawful decision.
- (vi) That a permanent injunction doth issue against the respondent, the Judicial Service Commission and any other agencies of Government from purporting to amend the Constitution through unlawful means in the guise of reappointing a retired Chief Justice as Chief Justice.
- (vii) That the said reappointment of a retired Chief Justice is unknown and /or strange to the law.

(viii) Costs of this Petition be borne by the respondent and a certificate for two Counsel be issued in that regard.

(ix) Any other further declarations as Court may be pleased to grant.

Submissions by the respondent

The Respondent opposed the petition and the orders sought therein.

At the hearing of the petition, Lead Counsel for the Respondent submitted that he would adopt the legal arguments of the Respondent as contained in the Joint Scheduling Memorandum. Counsel however also made oral submissions aimed at shedding more light on the written submissions.

It was submitted that the petition was misconceived and an abuse of Court Process and that in re-appointing Justice Benjamin Odoki as Chief Justice, the President had not contravened **Articles 130, 133, 142 (1), 142 (2), 142 (3), 143 (1), 144 (1) (a), 147 (1) (a) 147 (2))** of the Constitution as alleged by the Petitioner. The respondent argued that the retired Chief Justice Benjamin Odoki was constitutionally eligible to be re-appointed as Chief Justice after vacating office upon attaining the age of 70 years and that such appointment was catered for under **Article 253(1)** of the Constitution which provides:

Article 253. Reappointments and concurrent appointments

(1) Where any person has vacated an office established by this Constitution, that person may, if qualified, again be appointed or elected to hold that office in accordance with the provision of this Constitution.

Counsel argued that it was in line with **Article 253 of the Constitution**, that the President used his powers to recommend the re-appointment of the retired Chief Justice Odoki and that the said act was not illegal.

That as evidenced in the President's opinion expressed in his letter to the Chairperson of the Judicial Service Commission dated 9th July 2013 the appointment had been executed in line with **Articles 142, 143 and 253** of the Constitution. That there is no provision prohibiting the re-appointment of a Chief Justice even though he/she has attained the retirement age spelt out by the Constitution.

It was contended further that the President had not ignored the advice of the Judicial Service Commission but had considered it and then given reasons for recommending retired Chief Justice Odoki for the post of Chief Justice. It was also averred that there was no Constitutional provision which bars the President from recommending names of persons to be appointed judicial officers.

It was further submitted that the appointment of the retired Chief Justice did not constitute gross abuse of the rule of law, good governance and constitutionalism and would not undermine the Independence of the Judiciary.

Respondent's Counsel referred Court to **Article 144 (1) (a)** which provides that a Chief Justice vacates office at the age of 70 years and submitted that whereas Chief Justice Benjamin Odoki vacated the office of Chief Justice on attaining 70 years of age, his re-appointment was pursuant to **Article 253** since the office of the Chief Justice is an

office established by the Constitution. He argued further that retired Chief Justice Benjamin Odoki is qualified to be re-appointed because he possesses the qualifications which are stipulated under **Article 143(1) (a)** as necessary for taking up the office of Chief Justice thus:

Article 143. Qualifications for appointment of judicial officers

(1) *A person shall be qualified for appointment as-*

- (a) *Chief Justice, if he or she has served as a justice of the Supreme Court of Uganda or of a court having similar jurisdiction or has practiced as an advocate for a period not less than twenty years before a court having unlimited jurisdiction in civil and criminal matters;*

In essence, the argument of Counsel for the Respondent was that all that is required for **Article 253** was that the individual must have vacated office and that he “qualifies” for the particular office.

Counsel argued that indeed vacation of office is mandatory at the attainment of 70 years of age but the question is whether on vacation of office, a Chief Justice is eligible to be re-appointed as is any other Civil Servant and that the question must be answered in the affirmative.

Counsel further argued that although there was no specific Article in the Constitution addressing re-appointment of a retired Chief Justice, **Article 253** was applicable. He contended that one becomes eligible for re-appointment only after vacation of office. He maintained that “clearly” the appointment was in accordance with **Article 142**, under

which the mandate of appointment of a Chief Justice is the preserve of only one authority - the President.

In addition Counsel submitted that the appointment was also in accordance with **Article 147(1) (a)** under which the Judicial Service Commission's role is to advise the President in exercising the power to appoint judicial officers. To support his argument, Counsel purported to distinguish between the legal effect of the President's letter to the Chairperson of the Judicial Service Commission dated 09th July 2013 and his letter to the Speaker of Parliament dated 9th August 2013.

It was the argument of the Respondent's Counsel that the President's 9th July 2013 letter to the Chairperson of the Judicial Service Commission merely expressed the President's view that Justice Benjamin Odoki should continue to be the Chief Justice and was not an appointment. Counsel emphasized that the document was merely a recommendation to the Commission and the President did not thereby appoint a Chief Justice. Counsel contended that in the said letter, the President expressed his opinion as a citizen but made no appointment. According to the argument of Counsel the appointment was done vide the letter dated 9th August 2013 addressed to the Speaker of Parliament. Counsel argued that the President's opinion was in accordance with the advice of the Attorney General, the Principal Legal Advisor to Government, contained in the letter dated 21 June 2013. As evidence Counsel referred Court to the letter of advice annexed to the Affidavit of Hon. Nyombi, (Annexure A) in support of the Respondent's Answer to the Petition.

Counsel emphasized the need to distinguish between the two documents. He argued that since the appointment of the Chief Justice was done vide the letter dated 9th August 2013 and not through the 9th July letter, that appointment was in accordance with **Article 142(1) of the Constitution** which specifically provides that the Chief Justice shall be appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament.

Counsel also referred Court to the Affidavit in reply to the Petition, deponed by the Secretary to JSC, Mr. Kagole Kivumbi, dated and filed in this court on 18th November 2013 which was to the effect that:

1. There was no minute of the Judicial Service Commission advising the President NOT to reappoint the retired Chief Justice Benjamin Odoki as Chief Justice of Uganda.
2. In its meeting of 29th July 2013 the Commission had sat and discussed the subject of the appointment of the Chief Justice, as indicated in Annexure A to the Affidavit.
3. Under Min 214/2013 (of the 29th July 2013 meeting) the Judicial Service Commission resolved that the Appointing Authority be informed of the Commission's reservations to the appointment. (The minute was attached as Annexure B to the Affidavit)
4. That the Commission's reservations were communicated to the Appointing Authority on 16th July and 1st August 2013 (as indicated in Annexures C and D to the Affidavit).

It was the argument of the Respondent's Counsel that the evidence that the JSC advised the President was contained in the above

mentioned affidavit and annexures attached to the Affidavit. *Annexure A* to the said affidavit were minutes of an Extra Ordinary Meeting of the JSC held on 29th July 2013, attended by among others, the Attorney General. It was recorded in the attached minutes that having noted the contents of the letter of the Attorney General dated 23rd July 2013 to the Appointing Authority, the Commission agreed that:

- (i) Its reservations, on the substantive appointment of Justice Benjamin Odoki, as Chief Justice of Uganda for two years, were, and still remain, as expressed in the letter dated 16th July 2013 to the Appointing Authority;
- (ii) The appointment being substantive would require approval of Parliament consistent with Article 142 of the Constitution;
- (iii) The question of Instruments of Appointment would arise after (ii) above;
- (iv) Given the Constitutional constraints faced by the Commission, and for purposes of consistency with Article 147 of the Constitution, the Attorney General pursues his guidance to the Appointing Authority, taking into account all the above.

Annexure B was Minute 214/2013 extracted from an Extra Ordinary Meeting of the Commission held on 15th July 2013 wherein it was agreed *inter alia* that:

- (ii) the decision, by the Appointing Authority, for Justice Benjamin Odoki to continue as Chief Justice be noted; and the

Appointing Authority, be informed of the Commission's reservations.

- (iv) Chairperson, JSC, takes the appropriate action(s) on all the above decisions; and reports back at the next meeting.

Counsel submitted that the affidavit clearly demonstrated the evidence of the Judicial Service Commission minute, which was filed as Annexure A to the said Affidavit and the resolution of JSC on the subject which is annexure B.

Counsel noted that the meeting of 29th July 2013 took place after the President had expressed his view but before he made the appointment.

The essence of the argument of Counsel was that although the Commission had reservations, it had been agreed that the reservations be solved by none other than the Attorney General meeting with HE The President. Consequently, the subsequent advice of the Attorney General to the President - advice to the effect that the retired Chief Justice can be re-appointed – fulfilled the Constitutional requirement that the President acts on the advice of the JSC. It is on the basis of the AG's advice that the President went ahead to make the appointment. Counsel emphasized that the Commission did not reject the proposed appointment but rather had reservations, reservations which the Commission empowered the Attorney General to handle through advising the appointing authority.

The Respondent's Counsel emphasized that the point of reservations by the Commission was based on the Commission's opinion that there

was absence of constitutional authority to re-appoint a person as Chief Justice when the individual had attained the age of 70 years. Counsel reiterated that in the opinion of the Respondent, that point of reservation is misconceived because there is an Article in the Constitution that allows re- appointment of a person who has vacated office – **Article 253**.

Counsel further submitted that although the chairperson of the JSC wrote a letter to the appointing authority communicating the Commission’s opinion that appointing retired Justice Odoki as a Chief Justice would be unconstitutional, the minutes of the meeting merely stated that the commission had reservations and did not refer to the appointment as an illegality. He argued that in the circumstances, the minutes are more binding than the letter although the reasons for reservation are the same. The essence of Counsel’s argument was that since the minutes quoted above are more binding than the letter, the Attorney General could not be faulted for advising the President that he could go ahead and appoint retired Justice Benjamin Odoki as Chief Justice. What the Commission penned down as a minute was that the Attorney General would resolve the issue and so the Attorney General later on advised the President that retired Chief Justice Benjamin Odoki could be re-appointed Chief Justice under **Article 253(1)**. That in any event, as evidenced by the Affidavit of the Secretary to the Judicial Service Commission, there was no JSC minute advising the President NOT to reappoint the retired Chief Justice Benjamin Odoki as the Chief Justice of Uganda.

Resolution of the issues by Court.

I have carefully analysed all the pleadings, written submissions and legal authorities and documents filed in Court by the Petitioner. I have also carefully considered all the pleadings, legal authorities and documents filed by the Respondent and the oral arguments by Counsel for the Respondent, submitted in support of the Respondent's case.

In coming to my decision (s), I have been guided by the profound realization that the constitutional provisions at the core of this petition must be interpreted within the context of the Constitution and its values as a whole. I am also keenly aware that one of the fundamental values of our Constitution is the separation of powers. Consequently, a vital consideration in deciding this petition must be the Constitutional imperative of judicial independence.

I also subscribe to the philosophy that a transparent and accountable appointment process of judicial officers is a necessary attribute for an independent judiciary.

The main issue in this Petition has been, whether or not the decision of the President in reappointing retired Chief Justice Benjamin Odoki as Chief Justice of Uganda is inconsistent with and/or in contravention of **Articles 130, 133, 142 (1), 142 (2), 142 (3), 143 (1), 144 (1) (a), 147 (1) (a) 147 (2)** of the Constitution of Uganda

In determining this issue I answered three related questions:

- a) whether the provisions of the Constitution support the re-appointment of a Chief Justice who has vacated office as a consequence of attaining the mandatory age of retirement?
- b) whether the President can initiate the process of appointing a Judicial Officer?
- c) whether the Judicial Service Commission can delegate its advisory role to the Executive Arm of Government?

In answering question (a) above, I considered the meaning and intent of **Article 142** which deals with appointment of judicial officers; **Article 143** which deals with qualifications for appointment of judicial officers, **Article 144** on the tenure of office of judicial officers and **Article 253** which provides for the reappointment of persons who have vacated offices established by the constitution.

Article 142 (1) provides inter alia that the Chief Justice shall be appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament. Clause (2) (a) specifically deals with vacancies in the offices of a justice of the Supreme Court or a justice of Appeal or a judge of the High Court and empowers the President, acting on the advice of the Judicial Service Commission, *to appoint a person qualified for appointment as a justice of the Supreme Court or a justice of Appeal or a judge of the High Court to act as such a justice or judge even though that person has attained the age prescribed for retirement in respect of that office. (Emphasis of Court)*

Article 143 (1) (a) provides that:

(1) A person shall be qualified for appointment as-

- (a) Chief Justice, if he or she has served as a justice of the Supreme Court of Uganda or of a court having similar jurisdiction or has practiced as an advocate for a period not less than twenty years before a court having unlimited jurisdiction in civil and criminal matters;*

Article 144 provides that a judicial officer may retire at any time after attaining the age of sixty years, and shall vacate his or her office, in the case of the Chief Justice, the Deputy Chief Justice, a justice of the Supreme Court and a justice of Appeal, on attaining the age of seventy years.

It was not contested that on 23rd June 2013, Justice Benjamin Odoki attained the age of 70 years and vacated the office of Chief Justice as mandatorily required by **Article 144** of the Constitution. However, the Petitioner argued that following his retirement in June 2013, retired Chief Justice Benjamin Odoki was no longer eligible and qualified to be reappointed as Chief Justice of the Republic of Uganda under the 1995 Constitution.

The essence of the Petitioner's submission was that since **Article 142** only mentioned Justices of the Supreme Court, Court of Appeal and High Court as judicial officers whose tenure could be extended after attainment of the mandatory age of retirement/vacation of office, and no mention was made of the office of the Chief Justice, the

Constitution does not provide for/contemplate reappointment of a retired Chief Justice to that same office.

On the other hand, Counsel for the Respondent counteracted this argument by submitting that **Article 253** dealt with the lack of mention of the Chief Justice in **Article 142** and that under **Article 253**, a Chief Justice could be re-appointed to the same office. He argued that retired Chief Justice Odoki could be appointed because he satisfied the parameters set out under the Article - he had vacated the office of Chief Justice; the said office was established by the Constitution and under Article **143 (1)(a)** which sets out the qualification of appointment into the office, Justice Odoki qualified for the office. Contrary to the argument of the Petitioners that a person aged 70 and above did not qualify to be Chief Justice, the Respondent argued that age was not a parameter for qualification since the Article which set out the qualifications was silent on age.

I am inclined to accept the arguments of the Petitioner. **Article 142** explicitly refers to posts of Justices of the Supreme Court, the Court of Appeal and Judges of the High Court as posts which can be held in an Acting Capacity after an individual has vacated office as a result of the mandatory age limit. The provision is silent on the office of the Chief Justice and this, I believe, is a strong message that the office of Chief Justice is not one which can be held by an individual who has vacated office as a result of the mandatory age limit. Had the framers of the Constitution contemplated that a retired Chief Justice could be re-

appointed in an acting capacity, the provision would have, as it did with the other posts, explicitly said so. Since it is **Article 142** which deals with appointment of judicial officers, it is unlikely that the framers of the Constitution would find it useful to make specific mention of the possibility of extending the tenure of other judicial officers on the one hand, and on the other, relegate the office of the Head of the Judiciary to a general provision. My interpretation is strengthened by the existence of **Article 133 (4)** which provides thus:

Where the office of the Chief Justice is vacant or where the Chief Justice is for any reason unable to perform the functions of his or her office, then until a person has been appointed to and has assumed the functions of that office or until the Chief Justice has resumed the performance of those functions, those functions shall be performed by the Deputy Chief Justice.

In regard to a vacancy in the office of the Chief Justice, the enactors of the Constitution specifically provided that the Deputy Chief Justice would take up the mantle until a person has been appointed to and has assumed the functions of that office. There is thus no need to resort to a general provision. The omission of the office of the Chief Justice in **Article 142** and the existence of **Article 133 (4)** is clear evidence that the enactors of the Constitution addressed their minds to vacancies in Judicial Offices and restricted the possibility of extension of tenure to judicial functions but not to administrative functions. The two provisions read together culminate into a strong

message that the office of the Chief Justice is not one which was to be held by an individual who has vacated office as a result of the mandatory age limit. It is also clear that the office of the Chief Justice can only be filled with a substantive appointment and not in acting capacity— a possibility available only to the other judicial offices. The Deputy Chief Justice can only temporarily fill the vacancy, and this is by virtue of her/his substantive appointment as Deputy Chief Justice.

I also note that in creating a provision for Judicial officers to be appointed in acting capacity, **(Article 142 (2) (a))** all posts with administrative functions were left out— the office of the Chief Justice, the office of the Deputy Chief Justice and the office of the Principal Judge. The three offices have something in common - the Constitution itself creates these offices and singles them out from other members of the Higher Bench. In addition to their judicial functions they perform administrative duties. Their duties may require them to represent the judiciary and to act on its behalf in dealings with the other arms of government. I am convinced that the Legislature's omission of offices with administrative role from eligibility to be appointed in acting capacity after vacation of office was deliberate.

It is clear that where the constitution seeks to single out the Chief Justice it does so deliberately and plainly. Consequently, the power to extend the tenure of a judicial officer must, where granted to the appointing authority, be circumscribed carefully to the express terms of the constitutional authorization and not through general provisions such as **Article 253**.

I am strengthened in my opinion by history. I note that under the **1962 Constitution, Article 91 (4)** provided that where the office of the Chief Justice was vacant, those functions would be performed by such one of the *puisne* judges as would be designated in that behalf by the President, acting in accordance with the advice of the Prime Minister.

Under **the 1967 Constitution**, vacancy in the office of the Chief Justice would be filled by a *puisne* judge designated by the President (**Article 84 (5)**). Neither the 1962, nor the 1967 Constitution provided for the extension of the tenure for the Chief Justice.

The 1995 Constitution also envisages situations where the office of the Chief Justice is vacant and provides in **Article 133 (2)** that in those circumstances, those functions shall be performed by the Deputy Chief Justice.

The enactors of Uganda's constitutions have been consistent in **not** providing for the extension of the tenure for the Chief Justice.

Had the enactors of the current Constitution seen it fit to depart from earlier constitutions and to provide that a retired Chief Justice could be appointed to act as Chief Justice after vacation of office, they would have specifically provided for it either in **Article 142** in which the issue of extension of tenure for judicial officers of the Higher Bench is dealt with or under **Article 133**, which empowers the Chief Justice with administrative functions of the judiciary. Instead **Article 133 (2)** provides that vacancy in the office of the Chief Justice is to be filled by

the *Deputy Chief Justice* until a person has been appointed to fill the vacancy.

Counsel for the Respondent also made submissions on the issue of qualifications for the office of the Chief Justice. He argued that because **Article 143** which is entitled “**Qualifications for appointment of judicial officers**” and sets out the qualifications for the office of Chief Justice in Clause (1) (a) makes no mention of age, age is not a parameter to be considered in determining whether an individual is eligible/qualifies for appointment into the said office. It was the argument of Counsel that the retirement/vacation age was just a term of service for judicial officers. He thus concluded that attainment of 70 years of age does not culminate into disqualification for appointment as Chief Justice.

I disagree with the reasoning of Counsel. One cannot read **Article 143** independent of **Article 144 (2)** which sets out the tenure of office of judicial officers and specifically obliges a Chief Justice to vacate office at 70 years of age. The effect of vacation of office on attaining the age of 70 years is that an individual ceases to be qualified for that office. A judicial officer who has attained the age of 70 can only continue in office under the provisions specifically set out in **Article 142** – an Article I have already stated does not cover a Chief Justice. Reading **Article 143** in isolation of **Article 144 (2)** would go against a cardinal rule of constitutional interpretation that the constitution must be looked at as a whole, the entire constitution must be read as an integral whole and no one particular provision should destroy the

other but each should sustain the other. This is the rule of harmony, of completeness and exhaustiveness. (See e.g. **Foundation for Human Rights Initiative versus The Attorney General, Constitutional Petition No. 20 of 2006, CC; Paul Ssemogerere and Ors v Attorney General, Constitutional Appeal No.1 of 2012, SC; Attorney General vs Susan Kigula and Others, Constitutional Appeal No. 03 of 2006, SC**). I also find profound guidance in the pronouncements of this Court in **Twinobusingye Severino v Attorney General, Constitutional Petition No. 47 of 2011**, in which Court stated that where several provisions of the Constitution have a bearing on the same subject, they should be read and considered together so as to bring out the full meaning and effect of their intent.

I must also note the fact that **Article 253** which Counsel for the Respondent has relied on does not limit the conditions for its application to vacation of office and qualification for the office as the only prerequisites for its application. It also requires that an appointment there under be made *“in accordance with the provisions of this Constitution.”* In regard to the office of the Chief Justice, the relevant constitutional provisions, which must be read and applied together would be **Articles 142, 143 and 144** and as I have already resolved **Article 142(2)** leaves out the said office. Consequently, one of the parameters which must be fulfilled for **Article 253** to come into play is lacking.

The second and third questions which are critical to resolving issue 1 rotate around the role of the Judicial Service Commission on the one hand and that of the President on the other, in the process of the appointment of a Chief Justice and indeed appointment of judicial officers who serve on the Higher Bench. What is the nature of the role of the Commission; can the Commission delegate its advisory role? I have been specifically guided by **Articles 142, 146 and 147** of the Constitution. These Articles must be interpreted purposively in the light of the language used, the constitutional and historical context of the provisions and the imperative of judicial independence.

Article 142 which deals with the appointment of judicial officers provides inter alia in its **Clause (1)** that the Chief Justice shall be appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament.

Article 146 (1) provides that there shall be a Judicial Service Commission and in **Clause (3)** it is provided that the Attorney General shall be an ex officio member of the commission.

And according to **Article 147:**

(1) The functions of the Judicial Service Commission are (a) to advise the President in the exercise of the President's power to appoint persons to hold or act in any office specified in clause (3) of this article.

(2) In the performance of its functions, the Judicial Service Commission shall be independent and shall not be subject to the direction or control of any person or authority.

(3)The offices referred to in clause (1) (a) of this article are (a) the office of the Chief Justice

It was the submission of the Petitioner that it is against the spirit of the Constitution for the President to be the one to recommend to the Judicial Service Commission the name(s) of persons to be appointed judicial officers. The Petitioner further argued that the Judicial Service Commission had duly performed its function of advising the President by forwarding to him names of candidates deemed fit and competent for the office of Chief Justice but the President ignored their advice. In the opinion of the Petitioner, the act of the President disregarding the advice of the Judicial Service Commission is in contravention of and/or is inconsistent with **Article 147 (1) (a)** of the Constitution. Further still the Petitioner contended that to appoint a Chief Justice, the President had to act on the advice of the Judicial Service Commission. And that if the decision of the President to appoint Justice Odoki as Chief Justice, contrary to the advice of the Commission were left to stand, the Judicial Service Commission would be abdicating its functions and responsibilities as envisaged under **Article 147** of the Constitution of the Republic of Uganda.

On the other hand, it was averred by the Respondent's Counsel that there was no constitutional provision which bars the President from recommending names of persons to be appointed judicial officers. It was the argument of Counsel that the President's 9th July 2013 letter to the Chairman of the Judicial Service Commission merely expressed

the President's view that Justice Benjamin Odoki should continue to be the Chief Justice and was not an appointment. Counsel further argued that in the said letter, the President expressed his opinion as a citizen, but he made no appointment, it was merely a recommendation to the Commission and the President did not thereby appoint a Chief Justice. It was also the submission of Counsel that that the President did not ignore the advice of the Judicial Service Commission but considered the advice and gave reasons for recommending retired Chief Justice Odoki for the post of Chief Justice. In essence, Counsel's argument was that the President is not bound by the advice of the commission and that appointment of a Chief Justice is a preserve of the President. Counsel argued that it is within the discretion of the President to receive the advice and consider whether to accept it or not since advice does not constitute a directive or an order.

According to the argument of Counsel for the Respondent, the appointment was done vide the letter dated 9th August 2013 addressed to the Speaker of Parliament. Counsel argued that the President's appointment was in accordance with the advice of the Attorney General, the Principal Legal Advisor to Government, contained in the letter dated 21 June 2013 and annexed to the Attorney General's Affidavit in support of the Respondent's Answer to the Petition.

Counsel emphasized the need to distinguish between the 9th July 2013 letter and the 9th August 2013 letter. He argued that since the appointment of the Chief Justice was done vide the letter dated 9th August 2013 and not through the 9th July letter, that appointment

was in accordance with **Article 142(1)** of the Constitution which specifically provides that the Chief Justice shall be appointed by the President acting on advice of the Judicial Service Commission and with approval of Parliament.

Counsel submitted that as evidenced by the affidavit of the Secretary to the JSC, there was no minute of the Commission advising the President against the re-appointment of the retired Chief Justice as Chief Justice.

The essence of the argument of Counsel was that although the Commission had reservations, it had been agreed that the reservations be solved by none other than the AG. Consequently, the subsequent advice of the AG to the President - advice to the effect the retired Chief Justice can be re-appointed – fulfilled the Constitutional requirement that the President acts on the advice of the JSC. It is on the basis of the AG's advice that the President went ahead to make the appointment. Counsel emphasized that the Commission did not reject the proposed appointment but rather had reservations, reservations which the Commission empowered the AG to handle through advising the appointing authority.

Counsel further submitted that although the chairperson of the Judicial Service Commission wrote a letter to the appointing authority communicating the Commission's opinion that appointing retired Justice Odoki as a Chief Justice would be unconstitutional, the minutes of the meeting merely stated that the commission had reservations and did not refer to the appointment as an illegality. He

argued that in the circumstances, the minutes are more binding than the letter although the reasons for reservation are the same. The essence of Counsel's argument was that since the minutes quoted above are more binding than the letter, the Attorney General could not be faulted for advising the President that he could go ahead and appoint retired Justice Benjamin Odoki as Chief Justice. What the Commission pinned down as a minute was that the Attorney General would resolve the issue and so AG later on advised the President that this person can be re appointed under **Article 253(1)**. That in any event, as evidenced by the Affidavit of the Secretary to the Judicial Service Commission, there was no JSC minute advising the President NOT to reappoint the retired Chief Justice Benjamin Odoki as the Chief Justice of Uganda.

The Respondent's Counsel emphasized that the point of reservations by the Commission was based on the Commission's opinion that there was absence of constitutional authority to re-appoint a person as CJ when the individual had attained the age of 70 years. Counsel reiterated that in the opinion of the Respondent, that point of reservation is misconceived because on the one hand, there is no constitutional provision prohibiting the re-appointment of a Chief Justice who has vacated office and on the other hand, there is an Article in the Constitution that allows re-appointment of a person who has vacated office – **Article 253**. Counsel argued vehemently that

silence about the office of Chief Justice in Article 142 is not prohibition of appointment.

On these points, as was with the first point, I am inclined to disagree with the arguments of the Respondent Attorney General. Under **Article 142**, the Constitution provides for a tripartite procedure in which the Judicial Service Commission is required to compose a list of nominees and submit the list to the President. The President then makes appointments from this list and sends the names to Parliament for approval. The President *can only* appoint a Judicial Officer from a list the Judicial Service Commission provides. It is therefore my considered opinion the President cannot initiate the process of appointing any particular individual to judicial office. To allow such a process would be to undermine the independence of the Commission and in a way subject it to the direction or control of the Executive Arm of Government, contrary to **Article 147 (2)** of the Constitution.

It was the argument of Counsel for the Respondent that no constitutional provision bars the President from recommending names to the Judicial Service Commission. He further argues that the President's 9th July 2013 letter to the Chairman of the Judicial Service Commission merely expressed the President's view that Justice Benjamin Odoki should continue to be the Chief Justice and was not an appointment of a Chief Justice. Counsel emphasized that the document was simply a recommendation to the Commission and

that the President therein expressed his opinion as a citizen, but made no appointment.

Having looked at the wording of the letter in question, I reject Counsel's interpretation of the said letter as a mere opinion, an opinion which the Commission could have treated as they would the view of an ordinary citizen. The President's communication clearly stated thus: "It is *my decision* that for those two years, His Lordship Justice Odoki should continue to be the Chief Justice".(Emphasis of Court)

Counsel also argued that as evidenced by the Affidavit of the Secretary to the Judicial Service Commission, there was no JSC minute advising the President NOT to reappoint the retired Chief Justice Benjamin Odoki as the Chief Justice of Uganda. In light of the wording of the 1st August letter of the Chairperson of the Commission to the President, I disagree with this line of argument. The Chair of the Commission clearly stated in the said letter that "*the effect of vacation (as a result of attaining 70 years of age) is to cease to be qualified for that office.*" The Chair's letter also stated that *the Commission's reservations are grounded in the letter and spirit of the fundamental provisions of the Constitution ... For the Commission to advise otherwise would be to advise an illegality ...*" It is thus not logical to argue that the Commission did not advise against the appointment of a retired Chief Justice.

It was also the submission of Counsel that that the President did not ignore the advice of the Judicial Service Commission but considered the advice and gave reasons for recommending retired Chief Justice Odoki for the post of Chief Justice. In essence, Counsel's argument was that the President is not bound by the advice of the commission and that appointment of a Chief Justice is a preserve of the President. Counsel argued that it is within the discretion of the President to receive the advice and consider whether to accept it or not since advice does not constitute a directive or an order.

I strongly believe that the advice of the Judicial Service Commission is a *sine Qua non* (a pre-requisite) for the appointment of a Judicial Officer and this includes the appointment of a Chief Justice.

I must also emphasize that although I agree with the respondent that it is the President who makes the appointment, I am also convinced that the President's Executive Discretion is not unfettered; it must be rooted in the advice of the Judicial Service Commission. I also hasten to add that where the advice of the Commission is in regard to issues of legality/illegality and matters of constitutional imperatives, the President is not at liberty to disregard such advice.

In construing the cited Articles I do more than merely, parse the words. In giving meaning to the words therein, I approach them against the background of the structure of the Constitution as a whole, and the setting of **Articles 146 and 147**, which establish the Judicial Service Commission and set out its role- within Chapter 8 - the Chapter which regulates courts and the administration of justice.

So approached, the supremacy of the Constitution and the rule of law, the separation of powers between the Executive and Judiciary, and the independence of the judiciary provide the setting in which the meaning of the provision must be determined.

The power to extend the term of a Chief Justice goes to the Core of the tenure of office and thus judicial independence and the separation of powers. The term of the office of the highest judicial officer is a matter of great importance in any Constitutional Democracy.

The independence of judges is given vigorous protection by means of detailed and specific provisions regulating their appointment. The Chief Justice is at the pinnacle of the judiciary and thus the protection of his or her independence is critical.

The Article establishing the Judicial Service Commission spells out its significant role in the separation of powers and protection of judicial independence. The nature of this role cannot be down played just because the “phrase” advice is found in the Articles spelling out the tripartite process.

The argument of the Respondent fails to interpret the relevant provisions against the background of the constitutional values that are essential to the independence of the judiciary.

It was also the argument of Counsel that although the Judicial Service Commission had had reservations about the re-appointment of Justice Odoki as Chief Justice, the Commission had in its 29th July 2013 meeting authorized the Attorney General to pursue the issue with the

President. Consequent to this, the Attorney General advised the President that Justice Odoki could be re-appointed under **Article 253**. It was after the Attorney General had resolved the issue with the President that the President made the appointment, vide the 9th August 2013 letter to the Speaker of Parliament. In essence Counsel for the Respondent argued that indeed the President consulted the Commission, albeit through the Attorney General and thus complied with the constitutionally established tripartite process.

I disagree with the Respondent's submission that advice from the Attorney General, and moreover advice which was contrary to the considered view and stand of the Commission as a body, is fulfillment of the constitutional imperative that the President appoints a Chief Justice on the advice of the Judicial Service Commission. First, the Attorney General is a member of the Judicial Service Commission and as a matter of fact, he attended the 29th July meeting in which the Commission expressed reservations about the re-appointment of the retired Chief Justice. Secondly, although as Counsel argues, the Commission agreed that the Attorney General pursues the issue with the appointing authority, the mandate given to the Attorney General was clearly restricted - it was expected that the Attorney General guides the President as to the constitutional imperatives which were making it illegitimate to re-appoint Justice Odoki as Chief Justice. The Attorney General was expected to take the position of the Commission and explain it to the appointing authority. This is evident in the minute of the relevant meeting annexed to the Affidavit in Reply to the Petition deponed by the Secretary to the Judicial Service Commission.

The minute stated that: “*Given the Constitutional constraints faced by the Commission, and for purposes of consistency with **Article 147** of the Constitution, the Attorney General pursues his guidance to the Appointing authority, **taking into account all the above.***” (Emphasis of Court). Contrary to this expectation, the Attorney General in his letter to the President dated 30th July 2013, a day after the meeting of the Commission, literally disassociated himself from the position of the Commission and advised the President that under **Article 142 (1)** retired Justice Odoki could be re-appointed as Chief Justice.

It is not logical to conclude that whereas the Attorney General was present in the meeting which discussed the reservations - and it is not recorded that he had a different opinion- the mandate given to him included the liberty to advise the President to act contrary to the position of the Commission in the matter.

But even more important, is my considered opinion that the Judicial Service Commission cannot delegate/cannot legally surrender to the Attorney General - *a member of the Executive* - its power to advise the President. Such would be tantamount to abdication of the Commission’s Constitutional duty.

My view is also informed by history. The 1962 Constitution of Uganda exclusively placed the power to appoint the Chief Justice in the hands of the Executive. **Article 91 (1) of the 1962 Constitution** provided thus:

“The Chief Justice shall be appointed by the President, acting in accordance *with the advice of the Prime Minister.*” (Our emphasis)

Article 84 (1) of the 1967 Constitution provided that: “The Chief Justice shall be appointed by the President.” This time, power was exclusively in the hands of one individual - the President.

Article 142 of the 1995 Constitution introduced the Judicial Service Commission into the matrix – the departure from both the 1962 and 1967 Constitutions must have been calculated, deliberate. As a result, the role of the Judicial Service commission cannot be taken lightly.

To argue, as did counsel for the Attorney General, that the Judicial Service Commission delegated its power to advise the President to a member of the Executive, is to take us to the Pre-1995 Constitution position where the appointment of the Chief Justice was exclusively in the hands of the Executive, since the Attorney General is part of the executive arm of the State.

The enactors of the 1962 Constitution introduced a Judicial Service Commission and the 1967 Constitution maintained its presence. But in both Constitutions, the role of the Commission was limited to engagement in the appointment of judges other than the head of the judiciary. The enactors of the 1995 Constitution **elevated** the role of the Commission and made it part of the process of appointing the Head of the Judiciary. That the 1995 Constitution did not only maintain but exalted the role of the Commission is evidence that

involvement of the Commission in judicial appointments has, over the decades, proved invaluable.

I must reiterate my conviction that the constitutional provisions at the core of this petition must be interpreted within the context of the Constitution and its values as a whole and one of the fundamental values is the separation of powers and another is judicial independence.

A democratic Society calls for a strong and independent judiciary. More importantly still, it has to be underpinned by a commitment by the State to the rule of Law.

Lord Bingham in his book *The Rule of Law*(2011) offers a working definition of “The Rule of Law” thus:

The Core of the principle is that all persons and authorities within the state should be bound by laws publicly made... (Page 8)

Parliament is responsible for publicly enacting law. It is only through acting within the law provided by Parliament that the executive can ensure that the rule of law is maintained. (See Lord Justice Grossin his article, “*The Judiciary: The Third Branch of the State*” (April 2014); at judiciary.gov.uk. Accessed in July 2014)

The Constitution established the Judicial Service Commission and demarcated specific roles to it. All branches of the State must respect the Constitutional imperatives.

Within the working definition of the concept of “Rule of Law” given by Lord Bingham (supra), we see what is meant by separation of powers. Within that definition, the three separate branches of the State are delineated.

The fact that the Judicial Service Commission is placed within **Chapter 8 of the Constitution**— a chapter which deals with the Judiciary - is not a mere coincidence. As a body created for purposes of supporting the Judiciary, the Judicial Service Commission must, like it is with the Judiciary, be supported by all institutions/branches of the state, to independently carry out its mandate without interference. The duty/authority to **initiate** the appointment of a Judicial Officer lies exclusively with the Commission and should not be interfered with by either the Executive or the Legislature.

By providing for a tripartite process in the appointing of the Chief Justice and indeed other Judicial officers on the Higher Bench, there is a Constitutional distinction between the roles of the Judicial Service Commission, the Executive and the Legislature.

The Judicial Service Commission initiates the process, the President (Executive) appoints, **on the advice of the Judicial Service Commission** and the Legislature approves the appointment.

The Principle of Separation of Powers ensures that the different “powers” are given different roles. It is through separation of powers that society holds State institutions accountable.

In reference to the separation of powers between the Legislature, the Executive and the Judiciary, *Lord Justice Gross*(supra) observed thus:

“One crucial consequence of the structural separation of powers is that the branches can come into conflict with each other.

This is, of course, a possibility that cannot exist where power is concentrated in a single set of hands. (Yes the branches can come into conflict with each other). But that is the price we pay for our commitment to the rule of law.(My emphasis)

In jurisdictions such as England, judicial independence is safeguarded in a number of ways - first, there is **an independent** Judicial Appointments Commission. In Uganda, although other branches of the State are involved, the tripartite process is meant to safeguard the independence of the Judiciary.

The role of the Judicial Service Commission is critical and must be protected. Short of this, we open the body to the danger of “incremental encroachments”. It is for this reason that **Article 147 (2)** provides that:

In the performance of its functions, the Judicial Service Commission shall be independent and shall not be subject to the direction or control of any person or authority.

The relationship between the Judicial Service Commission and the President within the context of the appointment of judicial officers is an aspect of the relationship between the Judiciary and the Executive branches of the State.

I adopt the words of *Lord Justice Gross (supra)* wherein he states thus:

“The proper and effective functioning of any State committed to the rule of law depends on its branches understanding and being respectful of each other’s respective roles and functions. Understanding is the basis from which the branches can work together within a framework of separation of powers to maintain.....the rule of law”

Resulting from the above discussions, the Petition succeeds.

Declarations and Orders

In my considered view, there is no need to address each and every relief sought by the Petitioner. This is because some reliefs are irrelevant and/or in effect, repetitive. I also find it **not** necessary to issue orders of prohibition or to issue injunctions as prayed for in the Petition.

It is my considered judgment that responses to the two issues below will answer all the other prayers sought by the Petitioner:

1. Whether a Chief Justice who has vacated office by reason of attaining the mandatory age of retirement is eligible for re-appointment as Chief Justice of the Republic of Uganda under the 1995 Constitution.
2. Whether the appointment of a Chief Justice without advice from the Judicial Service Commission is inconsistent with **Articles 142 (1); 144 (1) (a); 147 and 253** of the Constitution of the Republic of Uganda.

Arising from above,I find that the Petitioner is entitled to the following Declarations:

1. That under the 1995 Constitution, a Chief Justice who has vacated office by reason of having attained the mandatory age of retirement is not eligible for re-appointment as Chief Justice of the Republic of Uganda.
2. That the re-appointment of Hon. Justice Benjamin Odoki as Chief Justice of Uganda after vacation of office by virtue of having attained the mandatory age of retirement is inconsistent with and/or in contravention of **Articles 133 (2); 142 (1); 144 (1) (a);147 (1) (a), 147 (2); 147 (3) and 253** of the Constitution of the Republic of Uganda.
3. That the advice of the Judicial Service Commission is a pre-requisite for the appointment of a Chief Justice and an appointment done without advice from the Judicial Service

Commission is inconsistent with and in contravention of **Articles 142 (1); 147 (1) (a), 147 (2); 147 (3)(a) and 253** of the Constitution of the Republic of Uganda.

4. With regard to Costs, I find that this being a matter of public interest, it is prudent not to award any costs, bearing in mind the all-important duty of court not to stifle the spirit of Constitutionalism with costs that may be deemed prohibitive to would be litigants.

Dated at Kampala, this 04 Day of August 2014.

.....

PROFESSOR L.EKIRIKUBINZA TIBATEMWA

JUSTICE OF THE COURT OF APPEAL/CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

CONSTITUTIONAL PETITION NO. 0039 OF 2013

Hon. Gerald Kafureeka Karuhanga:: Petitioner

VERSUS

The Attorney General of Uganda:: Respondent

Coram: Hon. Mr. Justice Remmy Kasule, JA/CC
Hon. Mr. Justice Eldad Mwangusya, JA/CC
Hon. Mr. Justice Rubby Aweri Opiyo, JA/CC
Hon. Lady Justice Solomy Balungi Bossa, JA/CC
Hon. Justice Prof. L. Ekirikubinza Tibatemwa, JA/CC

JUDGMENT OF HON. MR. JUSTICE REMMY KASULE, JA/CC

I have had the benefit of reading in draft the Judgment of Hon. Justice Professor Lilian Ekirikubinza Tibatemwa, Justice of Appeal/Constitutional Court. I agree with the reasoning and the conclusions she has reached.

I only wish to express myself on a few matters as relate to this constitutional petition.

First, the conduct of the petitioner and his lawyers in the course of the trial of this petition. The petitioner who is himself a lawyer by training and an Honourable Member of Parliament, as well as the team of Counsel representing him comprising of Professor, retired

Justice of the Supreme Court, George Wilson Kanyeihamba (SC), Mr. Orono Emmanuel and Mr. Nicholas Opio, walked out of Court on 16.06.2014 when Court refused to grant their prayer that the hearing of the petition be stayed pending their pursuance of a stated appeal relating to the petition by the petitioner in the Supreme Court.

My appreciation of what happened is that the petitioner and his lawyers did what they did because they did not agree with the Court order that the hearing of the petition had to proceed.

This Court, and any other Court of law, takes exception to the conduct of a party and the lawyers representing that party to walk out of Court just because the party and his/her lawyers do not agree with the order made by that Court in the course of a trial of a cause. A Court of law has inherent powers to conduct a trial of a cause in the best manner that will ensure, in the Judgment of that Court guided by the basic principles of presiding over a trial, that justice is done in the cause that is before it. The Court must not conduct its business of adjudicating a cause by making orders that only please and are acceptable to the parties and their lawyers that are before it. Were that to be the case, then Courts of law would cease to be temples of justice rendering justice to all manner of people without fear or favour, affection or ill will as the Judicial Oath that every judicial officer subscribes to under **Article 149** of the Constitution mandates.

Needless to remind ourselves, we members of the legal profession, in our respective callings, particularly those of us in legal practice, that **Section 16 of the Advocates Act, Cap. 267** imposes a responsibility upon every advocate to be an officer of Court and subject to the Court's jurisdiction.

Being an officer of Court imposes obligations on an advocate who appears before a Court of law. One of these obligations is that a lawyer representing a client, must exhibit all due courtesy and

respect to the Court before which such a lawyer is appearing. Such a lawyer is in a way a minister of justice whose role is to assist the Court in arriving at the truth in the matter that is the subject of adjudication. It is thus the duty of a lawyer to be present throughout the hearing of a cause in which such lawyer is instructed so that the Court, with the assistance of that lawyer, can arrive at a just resolution of the cause before it.

Therefore, with the greatest respect to the petitioner and, his lawyers, the act of walking away from Court, because of disagreeing with the decision judiciously made by the Court, was, in my view, an act that was most disrespectful of this Court, which Court is vested with the heavy responsibility of interpreting the Constitution. It is an act that negates the commitment of Ugandans expressed in the preamble to the constitution to building a better future with the Rule of Law as its foundation. It is hoped that the same will not be repeated again, before this Court, or indeed in any other Court of law. Should this warning not be heeded by practising Counsel, then Courts are called upon to severely deal with such offending advocates pursuant to **Section 17 of the Advocates Act** which provides:

“17. Saving of disciplinary powers of Courts.

Nothing in this Act shall supersede, lessen or interfere with the jurisdiction of any Court, inherent or otherwise, to deal with misconduct or offences by an advocate, or any person entitled to act as such, committed during, or in the course of, or relating to, proceedings before the Court”.

Second, I feel constrained to say something, if only for more emphasis, about the constitutional role of the Judicial Service Commission to advise His Excellence the President in the exercise of the President’s power to appoint persons to hold or act in any office specified in **Clause 3 of Article 147** of the Constitution. These are: The offices of Chief Justice, Deputy Chief Justice, the

Principal Judge, a Justice of the Supreme Court, a Justice of Appeal, a Judge of the High Court and the office of the Chief Registrar and a Registrar.

In my humble view, the import of **Article 142 (1)** of the Constitution is that it makes it a constitutional prerequisite that before anyone can be appointed by H.E. the President to any of the judicial offices stated in the **Clause 3 Article 147**, the Judicial Service Commission must first have rendered advice to H.E. the President that such a person be appointed to such a particular Judicial Office. No appointment can be made by H.E. the President or approval carried out by Parliament in the absence of such advice from the Judicial Service Commission.

It follows therefore that where the Judicial Service Commission advises that such a person be **NOT** appointed to a particular Judicial Office, then no such appointment can be made of such a person to such Judicial Office by H.E. the President. Parliament cannot also consider approval of such appointment. This must be so because there is no requisite constitutional advice of the Judicial Service Commission upon which H.E. the President has to act to effect such an appointment. It follows therefore that an advice by the Judicial Service Commission to H.E. the President **NOT** to appoint a particular person to any one of the Judicial offices specified in **Clause 3 Article 147** cannot, whatever the circumstances, be transformed by any other authority, into an advice to appoint such a person to such a Judicial Office.

In the case before us, the facts are such that the Judicial Service Commission rendered advice to H.E. the President that the Honourable Retired Chief Justice Benjamin Odoki, having attained the retirement age of seventy years was no longer eligible for appointment as Chief Justice. The Judicial Service Commission never rendered any other different advice to H.E. the President on this issue. Therefore that being the case, there was no requisite

constitutional advice from the Judicial Service Commission upon which H.E. the President could proceed to appoint Hon. Ag. Justice Benjamin Odoki, to be Chief Justice of Uganda. The advice of the Hon. Attorney General to H.E. the President, which advice was contrary to the stand and advice of the Judicial Service Commission to His Excellence the President, could not therefore be the basis for the appointment of Hon. Ag. Justice Benjamin Odoki, Ag JSC, to be Chief Justice of Uganda after vacating that office on attaining the mandatory retirement age.

It is also necessary to determine whether an acting Justice of the Supreme Court (or Court of Appeal) who has been appointed in an acting capacity after vacating office on the attainment of the mandatory retirement age of seventy years is eligible to be appointed as a substantive Chief Justice of Uganda.

I have found no specific article in the Constitution addressing this issue. **Article 142 (1)** provides that the Chief Justice shall be appointed by H.E. the President acting on the advice of the Judicial Service Commission. **Article 143 (1) (a)** requires that one qualifies to be appointed a Chief Justice of Uganda if he/she has served as a Justice of the Supreme Court of Uganda or of a Court having similar Jurisdiction or has practised as an advocate for not less than twenty years before a Court having unlimited jurisdiction in civil and criminal matters. A Chief Justice, once appointed, serves in office, but must mandatorily vacate that office on attaining the age of seventy years. Before attaining that age, he or she may, choose to retire on attaining the age of sixty years: **Article 144 (1) (a)**.

It appears to me, that unlike in the case of a retired Justice of the Supreme Court, Court of Appeal or Judge of the High Court who can be appointed in an acting capacity after attaining the mandatory retirement age under **Article 142 (2)(a) (b) and (c)**, there is no similar provision in the Constitution in respect of the

office of the Chief Justice, Deputy Chief Justice and Principal Judge.

The framers of the constitution, in my Judgment, deliberately avoided creating a situation where a Justice who has retired on attaining the mandatory retirement age of seventy years, would be appointed a substantive Chief Justice of Uganda. They did so by providing in **Article 133 (2)** that wherever the office of the Chief Justice is vacant, or where the Chief Justice is for any reason unable to perform the functions of his or her office, then the Deputy Chief Justice mandatorily performs the functions of the office of Chief Justice until such a time as a substantive Chief Justice is appointed or until the Chief Justice has resumed the performance of those functions.

Therefore in a situation where both the offices of the Chief Justice and Deputy Chief Justice may be vacant at the same time, the Constitution imposes a constitutional obligation upon the Judicial Service Commission to render the requisite advice to H.E. the President as the Appointing Authority and for the President to appoint and submit to Parliament for approval and for Parliament to approve a substantive holder of the office of Chief Justice or Deputy Chief Justice as the case may be. If H.E. the President does not approve of the person proposed to be appointed Chief Justice or Deputy Chief Justice, then the matter reverts back to the Judicial Service Commission and the process of appointment starts again.

It appears to me that the 1995 Constitution does not make room for any other person, other than the Deputy Chief Justice, to perform duties of a Chief Justice on an acting basis, if the office of the Chief Justice is vacant or the Chief Justice is for any reason unable to perform the functions of the office.

A Chief Justice who has vacated office by reason of having attained the retirement age of seventy years cannot be re-appointed to the office of Chief Justice under **Article 253** of the Constitution. This

is because under **Article 253** a person can only be re-appointed if that person qualifies to be so appointed. A person who attains seventy years is mandatorily commanded by the Constitution to vacate the office of Chief Justice under **Article 144 (1) (a)**. So such a person does not qualify to be re-appointed under **Article 253**. Further, any appointment under **Article 253** must be in accordance with the provisions of the Constitution. An appointment of a person above seventy years to be Chief Justice would be in violation of **Article 144 (1) (a)** and as such that appointment would not be in accordance with the provisions of the Constitution.

The above being my appreciation of the Constitutional provisions I have stated, it is my conclusion that no person can be appointed Chief Justice (and to any other Judicial offices specified in clause 3, Article 147) unless and until the Judicial Service Commission has first rendered advice to H.E. the President that such a person be so appointed. Further, I also conclude that under the Constitution, one appointed as an acting Justice to continue to act as a Justice of the Supreme Court/Court of Appeal, after such a one has attained the mandatory retirement age of seventy years, cannot be appointed under the Constitution to the office of a substantive Chief Justice (or Deputy Chief Justice) of Uganda.

Lastly, on the issue of costs, I have already expressed my disapproval of the conduct of the Petitioner and the team of his lawyers who walked away from Court, just because they did not agree with the decision of the Court to proceed with the hearing of the petition. I, by reason thereof, refuse to award any costs to the Petitioner and his team of lawyers.

In conclusion by a majority of 4 to 1, this petition is allowed. The petitioner is awarded the declarations and orders as are set out in the Judgment of Hon. Justice Professor Lilian Ekirikubinza Tibatemwa, JA/CC.

As to costs, on the basis of the reasons respectively given by each of their Lordships, it is ordered that no order be made as to costs.

Dated this ...**04th** day of **August, 2014**.

Remmy Kasule, JA/CC.

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 0039 OF 2013

HON. GERALD KARUHANGAPETITIONER

VERSUS

THE ATTORNEY GENERAL OF UGANDA RESPONDENT

Coram:

Hon. Mr. Justice Remmy Kasule, JA/ CC

Hon. Mr. Justice Eldad Mwangusya, JA / CC

Hon. Mr. Justice Rubby Aweri Opiro, JA/CC

Hon. Lady Justice Solomy Balungi Bossa, JA/CC

Hon. Justice Prof L. Tibatemwa Ekirikubinza, JA/CC

JUDGMENT OF HON. MR. JUSTICE ELDAD MWANGUSYA, JA/CC

I have had the benefit of reading the draft Judgment prepared by the Honourable Justice Professor Lillian Tibatemwa Ekirikubinza and agree with the conclusions reached in the Judgment and it is only for emphasis that I comment on two issues which to me constitute the most crucial considerations for resolutions of this petition.

The first issue which is well articulated in the Judgment of Hon. Justice Tibatemwa Ekirikubinza is the application of Article 253 of the Constitution of the Republic of Uganda and its implication on the appointment of a retired

Chief Justice who has attained the mandatory retirement age of 70 years. The relevant sub-article of Article 253 is set down hereunder:-

“253 reappointments and concurrent appointment

(1)Where any person has vacated an office established by this Constitution, that person may, if qualified, again be appointed or elected to hold that office in accordance with the provisions of this constitution

(2)

(3)” Underlining for emphasis

My first observation is that this is an article of general application and it clearly provides that any appointment under it must be in accordance with the constitution. The specific provision for appointment of Judicial Officers is Article 142 which I also reproduce here under.

“142 Appointment of Judicial officers

(1) The Chief Justice, the Deputy Chief Justice, The Principal Judge, a justice of Supreme Court, a Justice of Court of Appeal and a Judge of the High Court shall be appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament.

(2) Where –

(a) The office of a Justice of a Supreme Court or a Justice of Appeal or a Judge of the High Court is vacant;

(b) A Justice of the Supreme Court or a Justice of Appeal or a Judge of the High Court is for any reason unable to perform the functions of his or her office;

(c) The Chief Justice advises the Judicial Service Commission that the state business in the Supreme Court, Court of Appeal or the High Court so requires,

the president may, acting on the advice of the Judicial Service Commission appoint a person qualified for appointment as a Justice of the Supreme Court or a Justice of Appeal or a Judge of the High Court to act as such Justice or Judge even though that person has attained the age prescribed for retirement in respect of that office.

(3) A person appointed under clause (2) of this article to act as a Justice of the Supreme Court, a Justice of Appeal or a Judge of the High Court shall continue to act for the period of the appointment or, if no period is specified, until the appointment is revoked by the President acting on the advice of the Judicial Service Commission, whichever is earlier.”

One of the principles that govern interpretation of a Constitution is that the Constitution must be looked as a whole and no one provision of the Constitution should be segregated from the others and considered alone.

Article 253 stipulates that the appointments under it are subject to the Constitution. The Article of the Constitution to which it must be subject is Article 142 which is specific on appointments of all categories of Judicial Officers.

The appointments under Article 142 can be classified in two broad categories. The first category is substantive appointments under sub article I and the

second category are Temporary Appointments under Sub-Article 2. The appointments under Sub-Article 2(b) for example are made when there is no vacancy but the occupant of the position is unable to perform the functions of his or her office while the appointments under Sub-Article 2(c) are dictated by the State of business in the Courts which makes it imperative to make acting appointments and it is only under the second category that a retired Judicial Officer can be appointed and a Chief Justice does not fall under this category.

Hon Justice Tibatemwa explains that the framers of the Constitution deliberately excluded appointment of a retired or retiring Chief Justice, Deputy Chief Justice and Principal Judge under Article 142 and provided for appointment of Ag. Justices of the Supreme Court, Court of Appeal and Judges of the High Court.

It is also my view that the framers of the Constitution cannot have intended that all the appointments of Judicial Officers including the Ag. Appointments would be made under Article 142 of the Constitution and that of the Chief Justice would be made outside this provision. To me this would mean that if no provision was made under Article 142 for appointment of a retired or retiring Chief Justice it was deliberate and it would not be open to anybody to resort to Article 253 which is applicable to appointments other than Judicial appointments. My conclusion would be that a retired Chief Justice is not eligible for reappointment under Article 253.

The other issue which arises from the above finding is that even if a retired Chief Justice was eligible for appointment, his appointment like all other appointments under article 142 of the constitution would be subject to advice of the Judicial Service Commission. It should be observed that in both categories of appointments discussed above the advice of the Judicial Service Commission is a prerequisite. Approval of a Parliament is only required when substantive appointments are made under Article 142 (1). There is no doubt

that the final authority in the appointment of Chief Justice is the President. The President and even Parliament may not be bound by the advice of the Judicial Service Commission on the suitability of a particular candidate but where, like in this case, the Judicial Service Commission advised against the appointment of a particular candidate on account of the fact that it was in breach of the Constitution the advice should have been heeded.

On costs, I would on the consideration that the Petitioner and his Counsel did not attend the hearing of the petition and that this is a matter of great Constitutional importance not make any order for costs.

Date this day of 2014

Eldad Mwangusya, JA/CC

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 0039 OF 2003
HON. GERALD KAFUREEKA KARUHANGA.....PETITIONER
5 **VERSUS**
ATTORNEY GENERAL.....RESPONDENT

CORAM:

HON. MR. JUSTICE REMMY KASULE JA/JCC

10 **HON. MR. JUSTICE ELDAD MWANGUSYA, JA/JCC**

HON. MR. JUSTICE RUBBY AWERI OPIO JA/JCC

HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA/JCC

HON. JUSTICE PROFESSOR L. EKIRIKUBINZA TIBATEMWA JA/JCC

15 **JUDGMENT OF THE HONOURABLE LADY JUSTICE SOLOMY
BALUNGI BOSSA JCC**

I have had the benefit of reading the draft judgment prepared by my
sister, the Honourable Justice Professor Lillian Ekirikubinza Tibatemwa . I
generally agree with her reasoning and the conclusions made on all the
20 issues. I would only emphasize that apart from the fact that the re-
appointment must be made ***"in accordance with the provisions of this
Constitution"*** under ***Article 253***, that article also stipulates that the
person sought to be re-appointed must qualify. That article provides as
follows;

25 ***Article 253. Reappointments and concurrent appointments.***

(1) *Where any person has vacated an office established by this Constitution, that person may, if qualified, again be appointed or elected to hold that office in accordance with the provision of this Constitution.(emphasis mine)*

5 The term “qualify”, in my view, is in the context of **Article 253** used in a broader context than paper qualifications or experience envisaged under **Article 143**. The qualifications for appointment and tenure regarding the office of the Chief Justice are to be found in **Articles 143 and 144 of the Constitution**. They provide;

10 **Article 143. Qualifications for the appointment of judicial officers**

(1) *A person shall be qualified for appointment as_*
(a) *Chief Justice if he or she has served as a justice of the Supreme Court of Uganda or of a court having similar jurisdiction or has practiced as an advocate for a period not less than twenty years before a court having unlimited jurisdiction in civil and criminal matters;*

Article 144. Tenure of judicial officers

(1) *A judicial officer may retire at any time after attaining the age of sixty years, and shall vacate his or her office-*
(a) *In the case of the Chief Justice, the Deputy Chief Justice, a justice of the Supreme Court and a justice of Appeal, on attaining the age of seventy years;*

25 While therefore **Article 143** stipulates the qualifications i.e. skills and experience required, the duration for the office is laid down in **Article 144**.

30 The **21st Century English Dictionary** defines ‘qualify’ to mean **"to meet or fulfill the required conditions or guidelines (in order to receive an award or privilege etc)**. It is therefore my understanding that this **Article** is only applicable if the nominee fulfils the other requirements that appear in the **Constitution**, including age. In this context therefore, age is part of the requisite qualifications.

The following constitutional rules of interpretation offer ample guidance to this court in this regard. They are that;

- 5 **1.** In interpreting *the Constitution*, the rule of harmony or completeness requires that Constitutional provisions should not be looked at in isolation. Rather, *the Constitution* should be looked at as a whole with no provision destroying another but supporting each other. This is the rule of harmony, completeness, exhaustiveness and the rule of paramountcy of *the Constitution*. (***Paul Semogerere v. Attorney General Constitutional Appeal No. 1 of 2002 (SC); Attorney General v. Susan Kigula and Others Constitutional Appeal No. 03 of 2006 (SC);)***)
- 10 **2.** Where several provisions of *the Constitution* have a bearing on the same subject, they should be read and considered together so as to bring out the full meaning and effect of their intent. None should be
15 ignored or preferred over the other. (***Twinobusingye Severino v. Attorney General Constitutional Petition No. 47 of 2011 (CC)***)

Applying the above rules to the facts of this case, i.e. reading the above articles together and according each **Article** its due importance and weight
20 within the **Constitution** as a whole, it becomes crystal clear that one of the conditions precedent that a nominee for appointment or re-appointment to the office of the Chief Justice must fulfill is that he should not be above 70 years, the mandatory age for retirement stipulated in **Article 144(1) (a)**. Therefore, there would be no legal basis on which to
25 make the appointment and doing so would violate the letter and spirit of **the Constitution Articles 143, 144, and 253**.

I also agree with the comments of my brother Justice Kasule on the conduct of Counsels for the Petitioner. I would only add that the appointment of the Chief Justice or any other judicial officer is a matter of
30 great public importance and would form, in my humble opinion, an additional reason to make no order as to costs.

Dated August 4, 2014

Signed: Solomy Balungi Bossa

Justice of the Constitutional Court