

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

5 **HON. GERALD KAFUREEKA KARUHANGA.....PETITIONER**

VERSUS

ATTORNEY GENERAL.....RESPONDENT

CORAM:

HON. JUSTICE REMMY KASULE, JA

10 **HON. JUSTICE ELDAD MWANGUSYA, JA**

HON. JUSTICE RUBBY AWERI OPIO, JA

HON. JUSTICE SOLOMY BALUNGI BOSSA, JA

HON. JUSTICE PROFESSOR L.E.TIBATEMWA, JA

15 **DISSENTING JUDGMENT OF HON. JUSTICE RUBBY AWERI OPIO, JA/JCC**

Introduction

This is a Constitutional Petition brought under **Article 137 of the Constitution** of the Republic of Uganda, 1995 (as amended) and the Constitutional Court (Petitions and References) Rules S.I.91 of 2005 and other enabling laws.

20 **Background**

The background facts to this Petition are well set out in the lead judgment of the Court by Hon. Justice Professor L.E Tibatemwa, JA but for the purpose of this judgment, I would summarise the same as follows:-

25 On 23rd June 2013, Hon. Justice Benjamin Odoki retired from the Judiciary as Chief Justice of Uganda after reaching the mandatory retirement age of 70 years as provided under **Article 144 (1) (a)** of the Constitution.

Following his retirement, the President, on 9th July 2013, wrote to the Chairperson of the Judicial Service Commission (JSC) appointing him Chief Justice of Uganda for two years he was to serve as Acting Justice of the Supreme Court contrary to the advice of the JSC. The JSC had advised the President and forwarded names of candidates they felt were fit and competent for the office of Chief Justice. The said appointment was said to have been done in the exercise of powers vested in the President by **Articles 142(1) 143 and 253** of the Constitution. In the same exercise four other retired Justices of the Supreme Court were appointed Acting Justices of the Supreme Court, including Justice Benjamin Odoki.

On 26th July 2013, the Petitioner who is an honourable Member of Parliament, filed this Constitutional Petition challenging the constitutionality of the re-appointment of the retired Chief Justice as Chief Justice of Uganda. The Petitioner challenged the decision of the President of reappointing the retired Chief Justice Benjamin Odoki now Acting Justice of the Supreme as Chief Justice of Uganda as being inconsistent with/ and or in contravention of **Articles 130, 133, 142(1)(2)(3), 143(1), 144(1) (a), 147(1) (a) (2)** of the 1995 Constitution of the Republic of Uganda, (as amended).

The Petition was supported by the affidavits of the Petitioner filed on 26th July 2013 and another filed on 13th November 2013, respectively.

The Petitioner sought the following declarations and orders:-

- 1. That the decision of the President to re-appoint 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 and is therefore null and void.**
- 2. That the President does not have the legal mandate or power to advise the JSC on who should be appointed Chief Justice.**
- 3. That the decision of the JSC to advise the President to request retired Chief Justice Benjamin Odoki is illegal.**

4. That when a Chief Justice retires he/ she does not qualify for re-appointment under the Constitution.
5. 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.
6. That a permanent injunction doth issue against the respondent, the JSC and any other agencies of Government from purporting to amend the Constitution through unlawful means in the guise of re-appointing a retired Chief Justice as Chief Justice.
7. That the said re-appointment of a retired Chief Justice as Chief Justice is unknown and/ or strange to the law.
8. Costs of this Petition be borne by the respondent and a Certificate for two counsel be issued in that regard.

15 The respondent opposed the petition through two affidavits, one deponed by Peter Nyombi, in his capacity as the Attorney General and Chief Legal Advisor of Government, and another by Kagole E-Kivumbi, Secretary to the Judicial Service Commission.

In the two affidavits the deponents contended interalia, that in reappointing Justice Benjamin Odoki as Chief Justice, the president did not contravene **Articles 130, 133, 142(1)(2)(3), 143(1), 144(1)(a), 147(1)(a)(2)** of the Constitution as alleged by the petitioner. That, the president acted within his powers to recommend the reappointment of the retired Chief Justice Benjamin Odoki and the reappointment was not illegal; that the constitution provides for the reappointment under **Article 253**;

That, the appointment was done in line with Articles, **142, 143 and 253** of the Constitution. That, there was no provision prohibiting the reappointment of a Justice of the courts of Judicatures even though he or she has attained the retirement age spelt out by the Constitution. That, the President did not ignore

the advise given by JSC on the illegality of reappointment of retired Chief Justice Benjamin Odoki and that the reappointment of the retired Chief Justice Benjamin Odoki did not contravene the rule of law, good governance and constitutionalism and would not undermine the independence of the judiciary.

5 **Representation**

The Petitioner was represented by Prof. G.W Kanyeihamba (retired Justice of the Supreme Court) assisted by Mr. Nicholas Opio and Mr. Orono Emmanuel. The respondent was represented by Mr. Wanyama Kodoli, Principal State Attorney assisted by M/s Nabaasa Charity and Ms Jane Frances Nanvuma, State Attorney
10 from the Attorney General Chambers.

Issues:-

- 1- **Whether or not the decision of the President in re-appointing retired chief Justice Benjamin Odoki as Chief Justice of Uganda is inconsistent with and or in contravention of Articles 130, 133, 142(1)(2)(3), 143(1), 144(1)(a), 147(1)(a)(2) of the 1995 Constitution of the Republic of Uganda (as amended)**
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- 2- **What remedies are available to the petitioner?**

Case for the petitioner

The legal position of the petitioner based on the documents and legal arguments
20 filed in this court in the joint scheduling memorandum can be summarised as follows:-

- 1- **That following the retirement of Chief Justice Benjamin Odoki on June 2013, he was no longer legible and qualified to be reappointed as Chief Justice of the Republic of Uganda under the 1995 constitution (as amended)**
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2- That the constitution does not provide for reappointment of a retired Chief Justice.

3- That it is against the spirit of the constitution for the President to disregard the advise of the JSC in contravention of Article 147 (1) (a) of the constitution.

4- That the reappointment of a retired chief justice would undermine the independence of the judiciary and the provisions of the constitution.

5- That the act of the President is illegal, ab initio for being in contravention of and inconsistent with Articles 130, 133, 142(1)(2)(3), 143(1), 144(1)(a), 147(1)(a)(2) of the Constitution of the Republic of Uganda.

Case for the respondent

Mr. Wanyama counsel for the respondent adapted their legal arguments contained in the Joint scheduling memorandum that was filed on 13th November 2013 but added some highlight in his oral submissions. He submitted that the petition was misconceived and an abuse of court process in that in reappointing Chief Justice Benjamin Odoki as Chief Justice, the President had not contravened **Articles 130, 133, 142(1)(2)(3), 143(1), 144(1)(a), 147(1)(a)(2)** of the Constitution as alleged by the petitioner. The Learned Counsel submitted that the reappointment was provided under **Article 253** of the Constitution and as such, the reappointment was not illegal. The learned Counsel contended further that the re-appointment was executed in line with **Articles 142, 143 and 253** of the Constitution as evidenced by the President's opinion expressed in his letter to the chairperson judicial service commission dated 17 July 2013.

Counsel contended that the retired Chief Justice Benjamin Odoki as a person, vacated his office which is established by the Constitution under **Article 130** of the

constitution, the vacation of the office was pursuant to the demands of **Article 144 (1) (a)** of the Constitution which is one of the terms and conditions of service of Judicial Officers. However under **Article 143 (1) (a) and Article 253**, Benjamin Odoki would still be reappointed as Chief Justice because **Article 253** allows any person who had vacated office to be reappointed to hold the same again. The learned counsel pointed out that the issue of appointing of an Acting Chief Justice or Acting Deputy Chief Justice and Principal Judge as provided under **Articles 130, 133, 142(1)(2)(3), 143(1), 144(1)(a), 147(1)(a)(2)** of the Constitution are distinguishable from the instant case as they apply where there are substantive holders of the particular offices unlike in the instant case, where there was no deputy chief justice. In conclusion, the learned counsel invited court to find that the re-appointment of the retired Chief Justice Benjamin Odoki by the President pursuant to **Articles 253** which automatically brings into play **Article 142 and 143** of the constitution was consistent with the Articles of the Constitution and that the President acted within the mandate given to him by the constitution. It was his view that if the enactors of the constitution had intended to prohibit the reappointment of a person holding the office of the Chief Justice they would have put an express clause to that effect may be under **Article 253** of the Constitution.

Decision of the Court.

The borne of contention here is whether or not the decision of the President in reappointing retired Chief Justice of the Republic of Uganda is inconsistent with and in contravention of **Articles 130, 133, 142(1)(2)(3), 143(1), 144(1)(a), and 147(1)(a)(2)** of the Constitution.

In the lead judgment, the Hon. Justice Professor L.E. Tibatemwa, JA was of the considered opinion that after clocking retirement age at 70 years, the Learned Chief Justice could not be appointed Chief Justice under any law, including **Article 253** of the Constitution.

I am of the contrary view with greatest respect. A retired Chief Justice is eligible for reappointment.

To resolve the controversy in this case, the import of **Article 133 (2) 142 and 253** of the Constitution ought to be put into proper perspective.

5 **Article 133 (2) of the Constitution** is to the effect that where the office of the Chief Justice is vacant or where the Chief Justice is for any other reason unable to perform the functions of his or her office, then until a person has been appointed to and has assumed the performance of the function, those functions shall be performed by the Deputy Chief Justice.

10 **Article 130** of the constitution establishes the office of the chief justice as a substantive office. **Article 133 (2)** of the Constitution envisages a situation where the office of the Chief Justice may temporarily fall vacant through retirement or for any other reason such as official duties abroad, sickness or disciplinary proceeding etc. In those circumstances a temporary/casual vacancy would arise which would
15 be filled in the meantime, by the Deputy Chief Justice who would perform the functions of the Chief Justice.

Articles 136 (2) and 141 (2) of the Constitution provide for a similar situation in case of the Deputy Chief Justice and the Principal Judge, respectively.

On the other hand **Article 142 (2)** provides for a similar situation in case, a justice
20 of the Supreme Court, a justice of Appeal Court or a Judge of the High Court. It provides as follows:-

“**142 (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;*
- 25 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 of business in the supreme Court, Court of Appeal or the High Court so requires.*

5 *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”*

Import of Article 142 (2) of the Constitution:-

10 It is my considered view that **Article 142 (2)** of the Constitution operates under the following circumstances:-

I. When the office of a Justice of Supreme Court or a Justice of Appeal or a judge of the High Court falls vacant.

15 This may arise where the officer takes a sabbatical leave for studies or for foreign assignment or is appointed on a permanent commission like the case of the current Amnesty Commission which is being headed by a High Court Judge.

20 II. Where a justice of 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.

This may arise due to illness, during disciplinary proceedings etc...

III. Where the state of business in the courts require temporary appointment of Justices or Judges.

25 The state of business may demand for appointment of Acting Justices or Judges of the courts of judicature for instance to fight case backlogs or caseload. Furthermore, the state of business may also arise as in the Supreme Court or Court of Appeal where the nature of business would be such that it would not be possible

to realise a Coram, possibly because of conflict of interest or for any other reasons. This may be a rear occurrence but the remedy would lie in the appointment of Acting Justices to fill such temporary vacancies.

5 In the above circumstances *ANY PERSON* who may qualify for appointment may be appointed even after attaining the retirement age required for those offices. To appear emphatic and for avoidance of doubt the articles do not mention specifically that a retired Justice or Judge shall be appointed.

The **1967 Constitution of the Republic of Uganda** had a similar provision for the same reasons i have outlined above.

10 There is therefore a clear distinction between **Article 133 (2), 136 (2), 141 (2) and Article 142 (2)** of the Constitution. The difference is that whereas there exist a hierarchy of filling temporary/casual vacancies in the office of the Chief Justice, Deputy Chief Justice and the Principal Judge as provided under **Articles 133 (2), 136 (2) and 141 (2)**, of the Constitution, the same does not exist in respect of those
15 temporary vacancies in the offices of the justice or Judge of the High Court or where the state of business demands under **Article 142 (2)** of the Constitution.

In effect therefore, **Articles 133 (2), 136 (2), 141 (2) and 142 (2)** of the Constitution have nothing to do with the reappointment of a Chief Justice or Justices or Judges
20 of the courts of judicature. I must at this juncture point out that the reappointment of the four retired Justices could not have been envisaged under **Article 142 (2)**, of the Constitution as is being perceived by the petitioner. I have explained very clearly the circumstances under which appointments may be made under the above article. Having vacated their offices upon attaining mandatory
25 retirement ages, substantive vacancies were created to be filled under **Article 142 (1)** of the Constitution and not under **Article 142 (2)** of the Constitution because they did not leave temporary vacancies. As a matter of emphasis once a judicial officer retires upon attaining the retirement age, the door to judicial appointment

is closed pursuant to Article 144 (1) (a) of the Constitution which is manifestly clear and it states as follows:-

“Article 144 (1) Tenure of office of Judicial Officers.

A judicial officer may retire at anytime after attaining the age of sixty and shall vacate his 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 (emphasis with)”

Reappointment and concurrent appointments under Article 253 (1), of the Constitution.

The only avenue open for reappointment of judicial officers is provided under **Article 253** of the Constitution which opens a window for reappointment of all public officers who have vacated office.

Article 253 of the Constitution (1) provides as follows:-

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...”

Article 253 (1) should be interpreted together with **Articles 133 (2), 136 (2), 141 (2) 142 (2) and 144 (1)** of the Constitution by applying the principle of harmonization which Manyindo DCJ (as he then was) elaborated in the case of **Major General David Tinyefuza versus Attorney General, Constitutional petition No. 1 of 1996**; as follow:-

“The entire constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of

completeness and exhaustiveness and the rule of paramonucy of the constitution”.

On appeal to the Supreme Court (**Attorney General VS Major General David Tinyefuza Constitutional petition No 1 of 1996, Justice Oder J.S.C (RIP)**)

5 crowned the same view this way:

Another important principle governing interpretation of the constitution is that all provisions of the constitution governing an issue should be considered all together. The constitution must be looked at as a whole.”

10

After applying the above principles, I find that Chief Justice Benjamin Odoki retired on 23rd June 2013 upon attaining the mandatory retirement age of 70, pursuant to **Article 144 (1) (a)** of the Constitution and his office fell vacant pursuant to **Article 133 (2)** of the Constitution. Under **Article 133 (2)** of the
15 Constitution, the office of the Chief Justice having fallen vacant, it was the Deputy Chief Justice who was to assume the functions of that office so that there would be no vacuum as for as the head of the judiciary is concerned as demanded by **Article 133 (1) (a)** of the Constitution.

20 It is on record that upon vacating office the Judicial Service Commission submitted names of persons they thought were fit and competent to replace the retired Chief Justice Benjamin Odoki. However before the process of recruiting a new Chief Justice could be completed, the President decided to appoint four Acting Justices of the Supreme Court; including Chief Justice Benjamin Odoki who was to
25 continue to serve as Chief Justice for two years.

In my view the President was justified in reappointing the retired Chief Justice under **Article 253** of the Constitution which provides for reappointment of any public officer who has vacated office to be reappointed again.

Under the above Article of the Constitution, Chief Justice Odoki vacated an office established by the Constitution and is qualified to be appointed.

5 The contention that after attaining the mandatory retirement Chief Justice Odoki could not qualify for reappointment is a serious misconception. Qualification for appointment of a Chief Justice is contained in Article 143 of the Constitution which provide as follows:-

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

10 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 practised as an advocate for a period of not less than twenty years before a court having unlimited jurisdiction in civil or criminal matters;”*

15 Having already served as a Chief Justice the retired Chief Justice automatically qualified for reappointment. Secondly reaching the mandatory retirement age is not a bar to reappointment. I say so because in the 1st place **Article 143** of the Constitution does not specify the age brackets upon which a person would qualify for appointment of a Chief Justice. If the framers of the Constitution had intended that to be so they would have specifically included it in the above Article the way
20 they did for the office of the Presidency in **Article 102** of the Constitution or for the District Chairpersons under **Article 183** of the Constitution.

25 It is further my considered view that the mandatory age of retirement provided under **Article 144 (1) (a)** of the Constitution is about tenure of office and not about qualification to access the office. It is mandatory because it is the duration of service which the officer shall hold office as a matter of right and not at the discretion of anybody or authority. As a matter of emphasis, I have to state the **Article 144** of the Constitution was intended to entrench the independence of the Judiciary by safeguarding the terms of service of the Chief Justice who under the

1967 Constitution used to be hired and fired at the pleasure of the sitting President.

From the spirit and letter of **Article 144** of the Constitution, there is a clear difference between qualification and tenure of office. The above distinction was persuasively explained by the **Supreme Court of India in the case of the State of Uttaranchal VS Balwant Singh Chautal & Others, Civil Appeal Nos. 1134-1135 of 2002.**

In that case the court was called to interpret **Article 217 of the Indian Constitution** which provides for the appointment and conditions of service of a Judge of the High Court.

“217 Appointment and conditions of the office of a Judge of the High Court.

*1) Every judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and in the case of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional Acting Judge, as provided in **Article 224**, and in any other case, until he attains the age of sixty two years.”*

In interpreting the above clause, the Learned Justice Dalveer Bhandari, J had this to say:

*“It is true that the first clause of **Article 217** say that a Judge of a High Court “shall hold office until he attains the age of 60 years” (at the relevant time the age of retirement of a judge of the High Court was 60 years and now it is 62 years)...The real question then is whether this provision is to be construed as one prescribing a qualification or as one prescribing the duration of the appointment of a judge of a High Court. As the provision does not occur in the second clause, it can only be construed as one prescribing the duration of the appointment of a Judge of A High Court...The provision that every Judge*

5 *of a High Court “shall hold office until he attains the age of sixty years” has two aspects to it. While in one aspect it can be viewed as a guarantee of tenure during good behaviour to a person appointed as a Judge of a High Court until he attains the age of sixty in another aspect it can be reviewed as a disability in that a Judge cannot hold his or her office as of right after he attains the age of sixty years”*

In line with the above authority, after attaining the mandatory retirement age, the Chief Justice can be reappointed at the discretion of **Article 253** of the
10 Constitution. The difference here is that **Article 142** of the Constitution provides for the appointment of a substantive Chief Justice while **Article 253** of the Constitution provides for reappointment of a retired substantive Chief Justice.

It is my firm conviction that the framers of the Constitution did not fence the
15 applications of **Article 142 (2)** to Judicial Officers leaving **Article 253** to non-judicial officers. If that was the case mention would have been made of other judicial officers like Registrars and Magistrates. Furthermore **Article 253** of the Constitution would not have been applicable if the retirement age under **Article 144 (1)** of the Constitution had been fenced by fixing the duration of tenure of the
20 Chief Justice as it is in the case of Kenya. **Article 167 (2)** of the Constitution of the Republic of Kenya provides as follows:-

“The Chief Justice shall hold office for a maximum of ten years or until retiring under clause (1) whichever is the earlier”

In the above terms one would find that the tenure of the Kenya is close ended
25 since he or she has to serve for a maximum of ten years or until retiring whichever is the earlier.

In the case of Tanzania, the Constitution in **Article 120 (3)** provides an open door for the reappointment of retired Justices, including the Chief Justice in public
30 interest. In that regard, the President may direct the Justice who has attained the

age of retirement to continue in office for any period which may be specified by the President.

I have decided to bring out the above comparisons to emphasize the principle that in interpreting constitution one must bear in mind that different constitutions may provide for different things precisely because each constitution may be dealing with a philosophy and circumstances of each particular country: **See Attorney General VS Susan Kigula and Others Constitutional Appeal No. 03 of 2006.**

It is for the above reasons that Kenya and Tanzania do not have a similar provision to our **Article 253** of the Constitution. Kenya has a fixed term of tenure while Tanzania provides for reappointment after retirement.

In conclusion I find that **Article 142** of the Constitution was intended for the appointment of judicial officers in substantive and acting capacities. It does not provide for reappointment of judicial officers upon retirement and vacating their substantive offices. Such reappointments would only be made under **Article 253** of the Constitution which applies to all public officers. To think otherwise would tantamount to interpreting the two Articles of the Constitution against each other. I must also add that while appointment under **Article 142** of the Constitution would require parliamentary approval, reappointment under **Article 253** of the Constitution would not require a parliamentary approval. Being reappointment such appointment are normally made to maximise the services of exceptional public officers who have reached mandatory retirement ages. For the above reason I find that the reappointment of Chief Justice Odoki as Chief Justice for the two years was justified under **Article 253** of the Constitution. Under the above Article, it was not necessary for Chief Justice Odoki to first be appointed an acting Justice of the Supreme Court. In the same vein, it was not also necessary for the appointments, both of the Chief Justice and the acting Justices of the Supreme Court to be approved by the parliament.

In conclusion, **Article 142, and 144** of the constitution was intended to safeguard the terms of tenure of the chief justice who under the **1967 constitution** used to

be fired at any time at the pleasure of the sitting President. **Article 253 (1)** of the Constitution on the other hand was intended to maximise the services of exceptional public officers who have reached retirement ages. Under the above article, we have seen many retired public officers being recalled to optimize their expertise. These include retired permanent secretaries, Chief Administrative Officers name it. It cannot be argued that **Article 253** of the Constitution was not meant for reappointment of a retired Chief Justice. As a public officer, a Chief Justice who has retired qualifies for reappointment under **Article 253 (1)** of the Constitution for a specific period. The reason for the reappointment by the President was “... *in order to optimize the utilization of our scare human resources in the Judicial filed...*”

By entrenching the above principles of Constitutional interpretation, I have found harmonising **Article 142, 143, and 253 of the Constitution** easier than interpreting **Pharaoh’s dreams** by Joseph in the **Holy Books (Bible and Quran)**.

In a nutshell, retirement perse is not a bar to reappointment, the main objective of it is to allow a public officer to enjoy the fruits of his or her labour while allowing others to join service. The latter objective is important for institutional renewal. However the law as stated above provides for reappointment. In the instant case, legality of reappointment was out of question and should not have generated any alarms. The only challenge however, could have been if the said appointment was done under suspicious circumstances such as promoting selfish interest of the President, etc.

In the premises I find that there was no contravention of the Articles of the Constitution in respect of reappointment of a retired Chief Justice after attaining 70 years of age.

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

Hon. Justice Rubby Aweri Opio.