

PUBLIC INTEREST LITIGATION IN UGANDA

PRACTICE & PROCEDURE

SHIPWRECKS AND SEAMARKS

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“And what is the argument for the other side? Only this that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything, which has not been done before we, shall never get anywhere. The law will stand still while the rest of the world goes on and that will be bad for both”

Lord Denning

PACKER-V-PACKER
[1953] 2 AER 127 @ 129

A. INTRODUCTION

Public interest litigation describes legal actions brought to protect or enforce rights enjoyed by members of the public or large parts of it. It has been used as a tool of great social change in India, Pakistan, Bangladesh and the Philippines on such diverse issues as the environment, health and land issues.

According to BHAGWATI J in BANDHUA MUKTI MORCHA-V-UNION OF INDIA AIR 1984 S.C;

*“Public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice, which is the signature tune of our Constitution”.*¹

In Australia, the criteria used by the Public Interest Law Clearing House (Vic) Inc. and the Public Interest Law Clearing House Inc. (NSW) to determine public interest cases to support are;

The matter must require a legal remedy and be of public interest, which means it must;

- a) affect a significant number of people not just the individual or;
- b) raise matters of broad public concern or;

¹ NARAYAMA: Public Interest Litigation [2nd Edn 2001]

- c) impact on disadvantaged or marginalized group, and
- d) it must be a legal matter which requires addressing *pro bono publico* ('for the common good')²

In Tanzania, closer to home in MTIKILA-V-ATTORNEY GENERAL [H.C.C.S No. 5 of 1993] public interest litigation was described as follows;

“It is not the type of litigation which is meant to satisfy the curiosity of the people, but it is a litigation which is instituted with a desire that the Court would be able to give effective relief to the whole or a section of the society...the condition which must be fulfilled before public interest litigation is entertained by the Court is that the court should be in a position to give effective and complete relief. If no effective relief can be granted, the court should not entertain public interest litigation.”

In Uganda, public interest litigation is coming of age. Some examples of public interest litigation are the Rwanyarare/Ssemogerere petitions in the Constitutional Court in respect of political rights; Uganda Law Society (ULS) petition on the Referendum Act; ULS petition on execution of death penalty sentences passed by a field court martial without affording a right of appeal; the constitutional petition on the Divorce Act; Greenwatch actions; (Butamira, AES access to information, Golf Course development (now Garden City Shopping Centre), curry powder, chimpanzees kaveera), constitutional petition against the death penalty, petition on freedom of worship by Seventh Day Adventists; TEAN actions on smoking in public places and on stronger warning labels for tobacco products.

“The harvest is plentiful but the labourers are few”. Many more issues abound all bedded in the Constitution but hot with controversy for example, issues of torture of suspects in detention, arrest of persons released by the Courts, street vendors’ rights, pornography, prostitution, dismissal of alcoholics from police.

As you will see from the list, public interest litigation attracts a lot of attention and for this reason is often wrongly called *“publicity interest litigation”*. Nonetheless the media are an important and indispensable ally in any battle for societal rights.

Public interest litigation is a new tool in the arsenal of civil society. It presents a strategic opportunity to engage the Judiciary in ordinary societal issues. It allows civil society

² PENNY MARTIN Defining and refining the concept of practicing in the public interest [Alternative Law Journal Vol. 28 Number 1 February 2003 P.4]

organizations to jump from conference table lamentations to strategic, decisive and enforceable action. It also allows the Judiciary to take its rightful place in the shaping and development of society.

The attempts at public interest litigation in Uganda have been beset with technicalities, which we propose to discuss below in a humble attempt to bring clarity to this area of the law and, by so doing, promote a culture of constitutionalism, of human rights enforcement and the Rule of Law.

B. THE ENABLING LAW;

*“Defend the poor and the fatherless.
Do justice to the poor and afflicted and needy
Deliver the poor and needy. Free them from the hand of the wicked.”*

Psalm 82.3-4

The bedrock of public interest litigation lies in Article 50(2) of the Constitution. It provides:

“Any person or organization may bring an action against the violation of another person’s or group’s human rights.”

This is set against the backdrop of Article 50(1), which provides for the enforcement of individual constitutional rights. In the words of the Former President of the Law Society Mr. Andrew Kasirye, Article 50(2) makes us “*our brother’s keeper*”.³ By using the expression “*any person*” instead of say “*an aggrieved person*” it allows any individual or organization to protect the rights of another even though that individual is not suffering the injury complained of. It effectively abolishes *locus standi* as we know it in the Common Law tradition. Whenever there is an injury caused by any act/omission contrary to the Constitution, any member of the public acting *bona fide* can bring an action for redress of such wrong.

Another avenue to public interest litigation lies in Article 137(3), which allows any person who alleges a violation of the Constitution to have taken place to petition the Constitutional Court. Such a violation may stem from an act or omission of a person/organization or from an Act of Parliament being inconsistent with the Constitution. The article provides;

3) “*A person who alleges that;-*

³ Opening speech at Regional Workshop on Tobacco: “The Role of Civil Society Organisations in the development of Tobacco Control Legislation 18-20 August 2002.

- a) *an Act of Parliament or any other law or anything in or done under the authority of any law; or*
- b) *any act or omission by any person or authority,*

is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.”

Justice Mulenga JSC in ISMAIL SERUGO -V- KCC & ATTORNEY_GENERAL [Constitutional Appeal No. 2 of 1998] was emphatic that the right to present a constitutional petition was not vested only in the person who suffered the injury but also in any other person.

This is particularly pertinent since Article 3(4) of the Constitution imposes a right and duty on every citizen of Uganda to defend the Constitution.

We shall return to the matter of locus standi later.

Also worthy of mention is S.71 of the National Environment Act (Cap. 153) that empowers any person to apply for an environmental restoration order even though such person is not suffering any harm and has no interest in the land in issue.

There is also a now probably archaic S. 62(1) of the Civil Procedure Act (Cap. 71), which requires that suits for a public nuisance may be instituted by the Attorney General or two or more persons with the consent of the Attorney General.

We will move to a consideration of some of the issues that have beset public interest litigation.

C. PROCEDURE IN PUBLIC INTEREST LITIGATION

“Speak up for those who cannot speak for themselves, for the rights of all who are destitute, speak up and judge fairly; defend the rights of the poor and needy.”

Proverbs 31: 8-9

Procedure under Article 50:

We will focus first on procedure under Article 50. It presents a classic case of needing to know where one is coming from to know where one is going.

Article 50(4) provides for the making of laws by Parliament for the enforcement of the rights in and freedoms under chapter 4 of the Constitution. As a matter of fact and as has been held in cases, no rules have been made under Article 50(4).

In UGANDA JOURNALISTS SAFETY COMMITTEE –V- ATTORNEY GENERAL [Constitutional Appeal No. 7 of 1997] the Supreme Court accepted the Attorney General’s argument that there was no law in place for the enforcement of rights under Article 50. Similarly in JANE FRANCES AMAMO –V- ATTORNEY GENERAL [High Court Misc. Application No. 317 of 2002], the case was roundly dismissed in the following words;

“The Constitution clearly and in no uncertain words said Parliament was to make laws for the enforcement of the rights and freedoms under the said Constitution. In my humble opinion this means that Courts can no longer apply the Rules passed in 1992. That would mean to me that until Parliament makes laws under Article 50(4), Article 50(1) is in abeyance.”

However, Article 273 read with S. 48 of the Judicature Act (Cap. 13) allows the preservation and continued application of the Fundamental Human Rights (Enforcement Procedure) Rules S.I No. 26 of 1992.

This was the prescribed procedure for enforcement of the rights under Article 22 of the 1967 Constitution that was the precursor of today’s Article 50. It is testimony to our turbulent past that the rules for enforcement of fundamental rights were only put in place 25 years later. However the numerous cases now under Article 50 is good testimony to our recovery and restoration of the Rule of Law.

Following the coming into force of the 1995 Constitution, these rules continue to have effect by virtue of Article 273 which preserves the existing law subject to modifications as to bring them into compliance with the 1995 Constitution.

The 1992 Rules were further saved under the Judicature Act (Cap. 13) and therefore continue to have full force and effect.

There is therefore a clear and proper legal basis for the enforcement of Article 50 and several matters have been heard under these rules.

In NATIONAL ASSOCIATION OF PROFESSIONAL ENVIRONMENTALISTS -V- AES NILE POWER LTD [High Court Misc. Application No. 268 of 1999] probably the first action under Article 50, Court was quite clear that the correct procedure for the Plaintiffs to have followed in that case was by notice of motion as prescribed under the 1992 Rules.

In TEAN-V-ATTORNEY GENERAL AND NEMA [Misc. Application No. 39 of 2001], [Non-Smokers rights case] and TEAN-V-BAT [Misc. Application No. 70 of 2002] (warning labels), PASTOR MARTIN SEMPA-V-ATTORNEY GENERAL [Misc. Application No. 71 of 2002] (on electricity tariffs), GREENWATCH-V-ATTORNEY GENERAL [Misc. Application No. 140 of 2002] (the Kaveera suit) and several cases thereafter the Judges have had no problem in applying the 1992 Rules. It therefore appears and is certainly hoped that the AMAMO line of decisions will remain isolated.

The AMAMO decision presents a tragedy in that the Court was in effect suspending the Constitution by declaring it unenforceable on account of absence of procedural rules. Sadly the Court was turning away a citizen, who was complaining of a violation of his fundamental constitutional rights, on the basis of lack of procedure! The AMAMO decision contrasts rather sharply with the approach of the Tanzanian Courts when faced with actions to enforce human rights before the relevant rules were made. In CHUMCHA MARWA -V- OFFICERI/MUSOMA PRISON [Misc. Crim Case No. 2 of 1988] (MWANZA) Justice Mwalusanya ruled that since the Articles provided that Government “may” enact such rules, then it was not a must that the rules were enacted prior to the enforcement of the Bill of Rights.⁴

The Tanzanian Court of Appeal took the same position in DPP -V- DAUDI PETE [1991] LRC (Const) stating that until Parliament passed the relevant legislation the enforcement of the basic rights, freedoms and duties may be effected under the procedure that is available in

⁴ Cited in JUSTICE KAHWA LUGAKINGIRA: The Judiciary and the interpretation of Tanzania’s Constitution: Problems and Prospects [East African journal of Peace and Human Rights Vol 7 1 2001 p.1]

the High Court in the exercise of its original jurisdiction, depending on the nature of the remedy sought.⁵

This certainly appears to be the more deserving approach, as every effort should be made to give effect to the fundamental human rights enshrined in the Constitution, as the supreme law of the land. Speaking at the lower level of tortious liability and calling for the need for judicial creativity, a Kenyan Court had this to say;

“The law is a living thing and a court would be shirking its responsibility were it to say assuming that there be no existing recognized tort covering the facts of a particular case “why then, this must be the end to it”. It would undoubtedly be shirking its responsibilities, for instance in a case in which injustice has been done, were it to take that stand. The law may be thought to have failed if it can offer no remedy for the deliberate act of one person, which causes damage to the property of another. The law must of necessity, adapt itself: it cannot stay still. If a person has a right he must of necessity have the means to vindicate it and a remedy if he is injured in the enjoyment or exercise of it; and indeed, it is a vain thing to imagine a right without a remedy: for the want of right and want of remedy are reciprocal.”

Trevelyan J.
KIHARA KIMANI –V- AG
H.C.C.No. 711 of 1968

It is most strange that the Rules Committee made all the other rules prescribed in S. 48 of the Judicature Act (Cap. 13), being Supreme Court Rules, Court of Appeals Rules, and Constitutional Court Rules but fell just short in making new rules for the enforcement of fundamental human rights in the High Court.

In these murky waters, comes yet another issue to befuddle us yet further. Some gazetted copies of S.I 26 of 1992 contain an error. The Government Printer printed rules 3-8 of S.I 25 of 1992 Interpretation of the Constitution (Procedure) Rules⁶ as those of S.I 26 of 1992 and vice versa.

Thus, rules 3-8 of S.I 25 appear on the back of S.I 26 and rules 3-8 of S.I 26 appear on the back of S.I 25. Given the similarity of the subject matter of both instruments and the coincidence of numbering the error is easy to make.

⁵ Ibid

⁶ replaced by L.N. No. 3 of 1996, The Interpretation of the Constitution (Procedure) Rules 1992 (Modification) Directions 1996

It was on account of this printing error that the Court of Appeal in CHARLES HARRY TWAGIRA –V- ATTORNEY GENERAL [Civil Appeal No. 61 of 2002] concluded that Article 50 actions had to be filed by plaint. This was also followed by the dicta in TEAN –V- ATTORNEY GENERAL [Civil Application No. 63 of 2003.arising from Court of Appeal Civil Appeal No. 23 of 2003].

In these decisions, he Court of Appeal stated that the proper procedure for an action under Article 50 would be by suit commenced by ordinary plaint and that a notice of motion in the absence of a pending suit was an improper procedure.

Properly read and applied under the 1992 rules, the procedure is by notice of motion in the High Court. Fortunately, the hard working staff of the Chambers of the First Parliamentary Counsel have located the original instruments signed by the Chief Justice and have initiated the correction process.

Another false argument is that S.I 26 of 1992 was supplanted by Legal Notice No. 4 of 1996 (The Rules of the Constitutional Court Petitions for Declarations under article 137 of the Constitution) directions 1996. This creates the rules of the Constitutional Court by effecting modifications to S.I 26 of 1992 in so far as it applied to the Constitutional Court.

We submit that the provisions of S. I 26 of 1992 relating to the High Court as High Court, were not modified and therefore remain in full force and effect in respect of actions under article 50 to enforce fundamental human rights.

Before leaving the subject of procedure under Article 50 it is important to note that to proceed under Article 50, the matter must relate directly to a fundamental human right in the Constitution. PASTOR MARTIN SEMPA’s action (supra) was brought to object to new electricity tariffs that had been imposed without giving the members of the public a hearing and that accordingly the Applicant’s right to fair treatment under Article 42 of the Constitution had been infringed. The Learned Trial Judge struck out the action on the ground that it did not disclose violation of a constitutional right. He ruled

“It is not enough to assert the existence of a right. The facts set out in the pleadings must bear out the existence of such a right and its breach would give rise to relief.”

Procedure under Article 137(3);

With respect to Article 137(3) petitions to the Constitutional Court, the procedure is governed by Legal Notice No. 4 of 1996 Rules of the Constitutional Court (Petitions for Declarations under Article 137 of the Constitution) Directions 1996. These Rules were made under S.51(2)(c) of the Judicature Act (Cap. 13).

Some aspects on these Rules have given rise to contention, which we discuss below.

D. THE DISABLING LAW

“It has been said that the Courtroom is the last forum in which the oppressed can speak their minds. Our job as lawyers is to facilitate that opportunity.”⁷

By “*disabling law*” we refer to that body of jurisprudence that has arisen mainly from the preliminary objections raised by the Attorney General and other respondents to have public interest actions struck out.

We set the objections in quotations in the popular form in which they are raised and we seek to discuss the relevant cases and provide some answers to the objections. Hopefully what was a shipwreck for those who went before will become a seamark for those to come.

1. *“The applicant has no locus standi to bring this action”*

The Constitutional Court in RWANYARARE-V-ATTORNEY GENERAL [Constitutional Petition No. 11 of 1997] found it difficult to accept that an action could be brought on behalf of an unnamed group of persons. Justice Manyindo DCJ (then) ruled that the implications on costs and the doctrine of *res judicata* would be too great.

To quote the Learned Judge;

⁷ International Bar News September 2003. “Driven to defend the disadvantaged. A profile of George Bizos”

“We cannot accept the argument of Mr. Walubiri that any spirited person can represent any group of persons without their knowledge or consent. That would be undemocratic and could have far reaching consequences. For example, how would the Respondent recover costs from the unknown group called Uganda Peoples’ Congress? What if other members of Uganda Peoples’ Congress chose to bring a similar petition against the Respondent, would the matter have been foreclosed against them on the grounds of res judicata.”

The petitioners in that case sued on behalf of the members of Uganda Peoples’ Congress (UPC) alleging that their political rights had been infringed. The action was brought before the Constitutional Court under Articles 50 and 137 and the Court went on to hold that it could not be brought on behalf of unnamed persons.

The question arose again in the Non-Smokers rights case (Supra). This was an action brought on behalf of non-smokers for declarations that smoking in public places violated the non-smokers constitutional rights to a clean and healthy environment and to life. It went without saying that all the non-smokers in Uganda could not be and were not named in the motion.

The Attorney General raised the objection that the action was not maintainable on the basis of the RWANYARARE decision.

The Court overruled the objection and found that in public interest litigation there was no requirement for *locus standi*. The Court relied on the English decision of IRC -V- EXP. FEDERATION OF SELF-EMPLOYED [1982] AC 643 and the Tanzanian decision of REV. MTIKILA -V- ATTORNEY GENERAL [H.C.C.S No. 5 of 1993]. The Court further ruled that the interest of public rights and freedoms transcend technicalities, especially as to the rules of the procedure leading to the protection of such rights and freedoms. The Judge ruled that it was compelling that the Applicant would stand up for the rights and freedoms of others and he would accordingly grant them a hearing.

Unfortunately no reference was made to the RWANYARARE decision in the ruling and the Attorney General’s application for leave to appeal on this point was struck out as being out of time.

In MTILIKA, (supra) the Tanzanian Court relied on a similar provision in the Constitution, which enabled citizens to bring actions in defence of the Constitution. The Court found that this provision vested citizens with both a personal and a communitarian capacity. The Court further justified public interest litigation based on the prevailing socio-economic conditions; the low literacy level, financial disablement and the culture of apathy and silence deriving from years of ideological conditioning. To the Court this justified any public spirited individual taking on the burden of the community and it would be contrary to the Constitution to deny him or her standing.⁸

This reasoning was echoed in BATU LTD -V- TEAN [High Court Misc. Application No. 27 of 2003 Arising from Misc. Application No. 70 of 2002] where the trial Judge overruled an objection by BATU who argued that since the words “public interest” did not appear in our Constitution as they did expressly in the South African Constitution, then public interest litigation was prohibited. The learned Judge stated;

“It is elementary that “person”, “organizations” and “groups of persons” can be read into Article 50(2) of the Constitution to include “public interest litigants” as well as all the litigants listed down in (a) to (e) of the South African Constitution. In fact the only difference between the South African provisions (i.e Section 38) and our provision (under Article 50(2)) is that the former is detailed and the latter is not. That is my considered view based on the reality that there are in our society, persons and groups of persons whose interest is not the same as the interest of those who Lord Diplock referred to as “spirited” persons or groups of persons who may feel obliged to represent them i.e persons or groups of persons acting in the public interest. To say that our Constitution does not recognize the existence of needy and oppressed persons and therefore cannot allow actions of public interest groups to be brought on their behalf is to demean the Constitution.”

Locus standi in the context of actions to enforce environmental rights also holds some potential issues. As we have seen from the treatment of Article 50, it entitles any person to enforce any of the constitutional rights including the right to a clean and healthy environment (Article 39)

Article 17(j) of the Constitution makes it the duty of every citizen, including members of the Bench, to create and protect a clean and healthy environment.

⁸ LUGAKINGIRA (Ibid)

In BYABAZAIRE THADEUS –V- MUKWANO INDUSTRIES [H.C.C.S No. 466 of 2000] it was held that it was only the National Environment Management Authority (NEMA) that could bring an environmental action, based on the provisions of S.3 of the National Environmental Act (Cap. 153)

It is submitted that a purposive reading of the Constitution read with the National Environment Act (Cap. 153), should open the gates to all citizens seeking to do their duty in protecting the environment.

It is surprisingly the Commercial Court that has sought to bring clarity to this area of *locus standi*. In KIKUNGWE ISSA & 4 OTHERS –V- STANDARD BANK & 3 OTHERS [High Court Misc. Application No. 394 OF 2004 and 395 OF 2004], His Lordship Hon. Justice Geoffrey Kiryabwire considered that the grant of *locus standi* was one of judicial discretion to be granted where the Applicant can show;

- a) that he/she is a citizen of Uganda;
- b) “sufficient interest” on the matter and must not be a mere busybody;
- c) that the issues raised for decision are sufficiently grave and of sufficient public importance;
- d) that they involve a high constitutional principle;

The Court went further to state that the Applicant should show Court what other steps he/she has taken to protect and preserve the matter at stake and that these steps led to nothing before Court can exercise its discretion to grant locus.

In that case, 5 Members of Parliament filed an action seeking to restrain the sale of what they believed to be public property. The action was premised on Article 17(1)(d) which imposes a duty on citizens to preserve public property and the reference to citizenship must be construed in the context of that article.

However, the tests outlined by the Court and the emphasis on discretion to grant locus seem to fly in the face of Article 50 which is clear, unambiguous and unqualified. It provides that any person or organization may bring an action against a violation of rights.

2. *Competent Court*

Article 50 prescribes the forum for enforcement of human rights actions as a “*competent court*” The expression is not defined. The 1992 Rules state that the application shall be filed in the High Court.

For Article 137 actions the correct forum is the Constitutional Court. The challenge always arises in determining whether the action should be under Article 50 or Article 137 and therefore deciding which the correct forum is.

WAMBUZI CJ (as he was then) in ATTORNEY GENERAL -V- DAVID TINYEFUZA [Constitutional Appeal No. 1 of 1997] said;

“In my view, jurisdiction of the Constitutional Court is limited in Article 137(1) of the Constitution. Put in a different way no other jurisdiction apart from interpretation of the Constitution is given. In these circumstances I would hold that unless the question before the Constitutional Court depends for its determination on the interpretation or construction of a provision of the Constitution, the Constitutional court has no jurisdiction.”

In ISMAIL SERUGO –V- KCC & A.G [Supreme Court Constitutional Appeal No. 2 of 1998] the Court ruled that in the course of handling Article 137 matters, the Constitutional Court could deal with Article 50 matters. However unless the action requires interpretation of the Constitution, the Court of first instance should be the High Court.

3. *‘Interpretation’ or ‘enforcement’ or ‘applying’*

This use of the word “*interpretation*” in the mandate of the Constitutional Court prescribed in Article 137(1) of the Constitution has given rise to some difficulty. Actions have been dismissed in the Constitutional Court on the grounds that the requisite remedy is not Article 137 interpretation but Article 50 enforcement.

In ALENYO -V- THE ATTORNEY GENERAL [Constitutional Petition No. 5 of 2002] the Court considered the word “*interpretation*”

“The Constitution does not define the word “interpretation”. However Article 137(3) gives a clear indication of what the word means...

We hold the view that the allegations made to the Constitutional Court, if they are in conformity with Article 137(3), give rise to the interpretation of the Constitution and the Court has jurisdiction to entertain them...

In the instant petition, the petitioner alleges that the Law Council is guilty of commissions or omissions, which are inconsistent with or in contravention of the Constitution. He has petitioned this Court for a declaration to that effect. In our judgment these are the types of actions envisaged by Article 137(3)(b). He is not stating as a fact that he has a definite right that should be enforced. He is alleging that the conduct of the Law Council has violated his rights guaranteed by specified provisions of the Constitution and this Court should so declare. In order to do that the Court must determine the meaning of the specified provisions of the Constitution allegedly violated and whether the conduct complained of has actually violated those provisions. The carrying out of this exercise by the Court is an interpretation of the Constitution. It is not an enforcement of rights and freedoms. The Court is being called upon to interpret the Constitution. It can make a declaration and stop there or it can grant redress if appropriate. Whether the alleged acts and omissions of the Law Council contravene or are inconsistent with the Constitution is not relevant to the issue of jurisdiction. It is what the Court is called upon to investigate and determine after it has assumed jurisdiction. It is not relevant either that there is a remedy available to the petitioner elsewhere. That alone cannot deprive the Court of the jurisdiction specifically conferred on it by Article 137.”

WAMBUZI CJ said in SERUGO (supra) that;

“In my view for the Constitutional Court to have jurisdiction the petition must show on the face of it, that interpretation of a provision of the Constitution is required. It is not enough to allege merely that a constitutional provision has been violated. If therefore any rights have been violated as claimed, they are enforceable under Article 50 of the Constitution by another court.”

The position was graphically put by Justice KANYEIHAMBA in TINYEFUNZA and despite its length, it is most instructive to set it out in extenso;

“The marginal note to Article 137 states that it is an article which deals with questions relating to the interpretation of the Constitution. In my opinion, there is a big difference between applying and enforcing the provisions of the Constitution and interpreting it. Whereas any court of law and tribunals with competent jurisdiction may be moved by litigants in ordinary suits, applications or motions to hear complaints and determine the rights and freedoms enshrined in the Constitution and other laws, under Article 137 only the Court of Appeal sitting as the Constitutional Court may be petitioned to interpret the Constitution with a right of appeal to this Court as the appellate Court of last resort.

Under the Uganda Constitution, courts and tribunals have jurisdiction to hear and determine disputes arising from the application of such articles as 20, 23, 26, 28, 31,32, 35, 42, 44, 45, 50, 52, 53, 67, 84, 107, 118 and generally under chapter 8 of the Constitution. In my opinion, Article 137(1) and 137(3) are not mutually exclusive. I do believe that the jurisdiction of the Constitutional Court as derived from Article 137(3) is concurrent with the jurisdiction of those other courts which may apply and enforce the articles enumerated above, but there is an important distinction that I see and that is that for the Constitutional Court to claim and exercise the concurrent jurisdiction, the validity of that claim and the exercise of the jurisdiction must be derived from either a petition or reference to have the Constitution or one of its provisions interpreted or construed by the Constitutional Court. In other words, the concurrent original jurisdiction of the Court of Appeal sitting as a Constitutional Court can only arise and be exercised if the petition also raises question as to the interpretation or construction of the Constitution as the primary objective or objectives of the petition. To hold otherwise might lead to injustice and, in some situations, manifest absurdity.

Take the case of a pupil who comes late in a primary school. The teacher imposes a punishment upon the pupil who is required to clean the classroom after school hours. Can it have been the intention of the framers of the Constitution that as an alternative to the pupil's right to complain and seek redress from the head-teacher or the school board of governors, the pupil would be entitled to petition the Constitutional Court under Article 137(3)(b) on the grounds that his rights under Article 25(3) have been violated in that he or she has been compelled to do "forced labour"? A prison officer opens and reads a sealed letter addressed to one of the inmates suspecting that the letter contains secret information advising the prisoner how to escape from jail. Would it be reasonable for the prisoner to petition the Constitutional Court on the grounds that the opening of his mail was inconsistent with Article 27(2) of the Uganda Constitution which provides that no person shall be subject to interference with the privacy of that person's home, correspondence, communication or other property or should the prisoner complain to the Minister of State responsible for prisons?

A resident in suburbia is constantly awakened from sleep by the loud noise from a disco nearby. Should the resident petition the Constitutional Court under Article 43(1) on the ground that the enjoyment of music by musicians and dancers has directly interfered with the right of quiet and peaceful enjoyment of the property? Or should the resident be advised to go to the local government council for possible reconciliation and redress? In my opinion, it could not have been the intention of the framers of the Uganda Constitution that such matters inconsistent as they may appear with the provisions of the Constitution would have direct access to the Court of Appeal which happens to be one of the busiest courts in the land, entertaining appeals from other diverse courts and judges. This Court must give guidelines on these matters by construing the Constitution so as to avoid these absurdities and so direct such suits and claims to lower tribunals, magistrates' courts and, where appropriate to the High Court.

It is to be noted that the Constitutional Court consists of not less than five senior judges of the Court of Appeal. The Court hears many appeals involving grave and important issues of public importance. It cannot have been in the contemplation of

the makers of the Constitution for the present or the future that in the event of such small claims going direct to the Court of Appeal as a Constitutional Court, the Court of Appeal should be in a position of deciding whether or not to abandon appeals involving death sentences, treason and gross violations of other human rights originating from the High Court and entering the Court of Appeal by way of ordinary procedure in order first to resolve those trivial matters arising from allegations that they are inconsistent with the provisions of the Constitution under Article 137(3) and (7). Therefore it is my opinion that while the Constitutional Court would have jurisdiction to hear and determine the petition, in exercising that jurisdiction in this case it exceeded its powers by taking into consideration and determining matters not contemplated under Article 137.”

Hon. Justice Kanyeihamba appears vindicated in his view by the fact that Article 137(5) allows a Court before which a matter is pending to refer a question to the Constitutional Court if an issue of interpretation appears. But when does one “interpret” and when does one “apply” or “enforce”?

The High Court found itself on the horns of this dilemma in OSOTRACO –VS- ATTORNEY GENERAL [H.C.C.S NO. 1380 of 1986]. The Court was considering the constitutionality of S.14 of the Government Proceedings Act (Cap. 77). The Court had this to say,

“I am aware that under Article 137(5) of the Constitution, if any question arises as to the interpretation of the Constitution in a court of law, (which includes this court), the Court may, if it is of the opinion that the question involves a substantial question of law refer the question to the Constitutional Court to determine any question with regard to interpretation of the Constitution. But where the question is simply construing of existing law with such modifications, adaptations, qualifications and exceptions as to bring such law into conformity with the Constitution, in my view, this may be determined by the Court before which such a question arises.

The question before me implicit in the issue whether the plaintiff is entitled to an eviction order or not against the Attorney General is whether the existing law, in terms of the proviso to S. 15 of the Government Proceedings Act, is in conformity with the constitution of Uganda, and if not, whether it maybe construed in such manner as to bring it on conformity with the Constitution of Uganda. The task before me is not to interpret the Constitution but to subject existing law to the Constitution, and if necessary comply with Article 273 of the Constitution, and construe the existing law with such modification, adaptations, qualifications and exceptions, so as to bring it into conformity with the Constitution”.

This debate on the word “*interpretation*” has implications for Article 50 actions. In SERUGO it was stated that declarations cannot be made without interpretation of the constitutional provisions which the Act or Statute complained of allegedly contravenes.

It is perhaps on this basis that the Attorney General in the Non-Smokers rights case (supra) argued that before an Article 50 action can proceed, it must first go to the Constitutional Court for the requisite interpretation to be done and declarations then issued and that it is only after that that the enforcement can be done under Article 50. This argument was fortunately summarily dismissed with the Principal Judge drawing a distinction between “*interpretation*” and “*application*” of the Constitution.⁹

4. “*The applicant failed to comply with CPR O.1r.8 procedure for bringing representative suits*”

O.1r.8 CPR provides

“where there are numerous persons having the same interest in one suit, one or more of such persons may with the permission of the Court, sue or be sued, or may defend in such suit on behalf of or for the benefit of all persons so interested”.

This is the basis for representative suits, where all parties have the same interest and therein lies the distinction between representative actions and public interest litigation.

The issue arose in the Non-Smokers rights case (supra) where it was contended that TEAN did not have the authority of the non-smokers in Uganda to bring an action on their behalf. It was contended that TEAN should have first sought an order under O.1r.8 CPR to bring the action.

The Court found O.1r.8 inapplicable in so much as the Applicant did not have the same interest as the non-smokers on whose behalf the action was being brought. The requirement of having the same interest is key to the application of O.1r.8 while there is no such requirement in Article 50.

The issue arose again in BATU -V- TEAN (supra). The Court dealt with the RWANYARARE case on the point of whether one could sue for unnamed other persons without their authority and properly distinguished it.

⁹ Misc. Application No. 39 of 2001. Ruling dated 5th July 2002.

The learned Judge stated;

“I do not agree at all with Counsel’s argument that no distinction can be drawn between these groups of persons and the group of persons represented or purported to be represented by Dr. Rwanyarare and others in Constitutional Petition No. 11 of 1997. The distinction is quite obvious; Dr. Rwanyarare and another were representing the group described in the application or “specific and identifiable existing persons or groups”. Such group is the one referred to as Uganda Peoples Congress. With due respect to the Constitutional Court [they] cannot have been talking about the type of persons I have referred to above namely; the children, the disabled and the illiterates. These are persons who cannot be served under O1r.8 CPR, the reasons being they are not easily identifiable; they cannot be served as they would have no capacity to respond with a view to requesting to be joined in the action and they have no similar interest with those who represent them. To say that either these people are lumped together with the members of Rwanyarare’s interest or that they do not fall under the Constitution in Article 50(2) of the Constitution is to belittle the foresight of the framers of the Constitution.”

Later in the judgment

“Dr. Rwanyarare and another had similar interest with fellow UPC members. They could therefore sue on behalf of the fellow members of UPC and actually and logically O.1r.8 CPR should apply. The same should apply to members of a football club, of a golf club or of a trade union. But the question is can the rule apply to groups of people who because of inability or incapability engendered by say ignorance, poverty, illiteracy, etc cannot sue or be sued or defend a suit for the simple reasons that apart from being indigent, they cannot even identify their rights or their violations. These are the groups who badly need the services of “public interest groups” like TEAN to bring action on their behalf under what in paragraph 38(d) of the South African Constitution is referred to as “public interest persons” but who have no similar interest on the action with those they represent. It cannot be denied that such group of persons abound in our society and we cannot hide our heads in the sand by saying that the Constitution does not expressly mention them and therefore they must be excluded from the Constitutional provision regarding recourse to remedies when rights are violated. It is to be remembered that such groups cannot be served either directly or indirectly. They have neither postal address nor telephones. Their fate depends entirely on the public interest litigation groups or persons and they are not personally identifiable; yet they exist and can be identified only as a group or groups. The Constitution cannot escape from authorizing representative action without interest sharing with those who represent them. That is why Article 273 of the Constitution becomes handy because the rules of procedure [O.1r.8] are in this respect, rendered inoperable by the Constitution. Needless to say that it would be illogical to argue that actions brought by such persons or groups of persons for the redress of the violation of their inalienable rights should be governed by the procedure under O.1r.8CPR. The procedure cannot govern them simply because they do not share the concerns of violating their rights with those who bring action on their behalf.”

A subsequent case the Kaveera suit (supra) also followed the reasoning in the Non-Smokers case on distinguishing representative suits from public interest litigation.

It is submitted that this is the proper construction. O.1r.8 CPR must be made to comply with Article 50 and not vice versa.

There is a strategic reason for using such “an outsider” in public interest litigation as opposed to representative suits in some matters. In the case of SIRAJE WAISWA -V- KAKIRA SUGAR, [H.C.C.S No. 69 of 2001] the Plaintiffs brought an O.1r.8 representative action to restrain the Defendants from depriving them of their woodlots in the Butamira Forest. The Court ruled that the suit was effectively and fully withdrawn by the lead Plaintiff when he signed a notice of withdrawal, even though he did so improperly without the full consent of the parties he was representing. The situation was remedied by the woodlot farmers filing a fresh suit and having all of them remain as independent plaintiffs.

If however the civil society groups that backed the woodlot farmers had in the first place, brought the action themselves on behalf of the woodlot farmers, this could have been avoided and it is submitted, the trial would have proceeded much faster.

5. *“The applicant did not give statutory notice”*

This refers to the requirement under the Civil Procedure & Limitation (Miscellaneous Provisions) Act (Cap.71) that a 45-day notice be issued before commencing any proceedings against the Government, or any scheduled corporation.

This was another ground of objection in the Non-Smokers’ rights case (supra). Fortunately the matter had already been adequately laid to rest in the previous decisions of RWANYARARE –V-ATTORNEY GENERAL [High Court Misc. Application No. 85 of 1993] and OKECHO –V- ATTORNEY GENERAL. [high Court Misc. Application No. 124 of 1999].

In RWANYARARE, (1993) (supra) Court considered the equivalent Article of the 1967 Constitution and 1992 Rules and found that the Civil Procedure & Limitation (Miscellaneous Provisions) Act (Cap. 71) did not apply to actions to enforce human rights.

The Learned Judge found that it would be incompatible with human rights enforcement if the applicant had to give notice.

The Court found that the 1992 Rules create a specific procedure to be followed and they make only the Civil Procedure Act applicable. This position has been further affirmed by in GREENWATCH-V-ATTORNEY GENERAL [High Court Misc Application No. 92 of 2004 arising from Misc Cause No. 15 of 2004].

6. *“The matter is Res Judicata”*

Certainly it would appear from the wording of S.7 Civil Procedure Act (Cap. 71) that the doctrine of *Res Judicata* therein prescribed, does apply to public interest litigation matters. The doctrine provides that once a matter has been heard and determined by a competent court, it cannot be tried again. Explanatory note no. 6 under this section, provides that

“where persons litigate bonafide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall for the purposes of this section be deemed to claim under the person so litigating”

It is however suggested that the construction would be stretching the interpretation of the section to cover a form of action not anticipated by nor created by the Civil Procedure Act (Cap. 71). Public interest litigation is a creature of the 1995 Constitution and it cannot be limited by an earlier Act that is premised on requirements of *locus standi*.

The question arose in HON. NORBERT MAO -V- ATTORNEY GENERAL [Constitutional Petition No. 1 of 2002]. In that case, the Petitioner brought the action on behalf of 21 persons from his constituency for declarations under Article 137 and for redress under Article 50, arising from an incident in which UPDF officers attacked a prison and forcibly took away 20 prisoners and killed one in the process.

Unknown to the petitioner another action had been filed and had proceeded to judgment. HON RONALD REAGAN OKUMU-V-ATTORNEY GENERAL [Misc. Application No. 0063 of 2002] had been filed in the High Court of Gulu under Article 50 seeking similar relief.

The Constitutional Court dismissed the petition on the plea of res judicata and in accordance with that doctrine, ignored the petitioner's pleas that there were important constitutional declarations sought that had not been and could not be addressed in the lower court.

The doctrine of res judicata, allows a litigant only one bite. It prevents a litigant, or persons claiming under the same title from coming back to court to claim further reliefs not claimed in the earlier action. Accordingly Hon. Mao, like the Dickensian character, Oliver Twist, could not ask for more.

7. *A respondent?*

The 1992 Rules require that the Attorney General be served. It is not the same thing as requiring that he be named as a party. In considering similar provisions under Article 137, in SERUGO (supra) the Court ruled that a petition could be made ex parte, although the Attorney General could be joined at the instance of the Court.

The Constitutional Court has power to entertain a petition that does not name a respondent but may of its own motion join the Attorney General. Lack of a respondent does not in itself make the petition incompetent. [DR. JAMES RWANYARARE & BADRU WEGULO -V- ATTORNEY GENERAL (Constitutional Appeal No. 1 of 1999), PAULO SSEMWOGERE-V-ATTORNEY GENERAL (Constitutional Appeal No. 1 of 2000)].

In ZACHARY OLUM & JULIE RAINER KAFIRE [Constitutional Petition No. 6 of 1999] the Court took issue with the Attorney General raising a preliminary objection that the petition did not show any liability of Government and that consequently the petition did not disclose a cause of action against the Attorney General. Court followed earlier decisions of SSEMWOGERERE & OLUM -V- ATTORNEY GENERAL and RWANYARARE & ANOTHER [Constitutional Petition No. 5 of 1999], which held that in matters of great public interest, the Attorney General should be made a party even by Court on its own motion. Court therefore found it remarkable that the Attorney General would seek to be struck out of a petition seeking to strike down a provision of law concerning an important organ of state.

In BAKU RAPHAEL OBUDRA & ANOR (CONSTITUTIONAL APPEAL No. 1 OF 2003), the Appellants named the Attorney General as a party to the appeal to the Supreme Court even though he was not named in the constitutional petition in the lower court. The Supreme Court had little difficulty in striking out the Attorney General on that point and allowing the appeal to proceed *exparte*.

In BAT -V- TEAN (*supra*) an attempt was made to argue that a private organization cannot be named as a respondent in an action for enforcement of human rights. It was argued that as between private citizens only municipal law could be enforced. The premise for this is the theory of vertical versus horizontal application of the Constitution that the Constitution applies as between citizen and state and not as between private citizens.

Unfortunately the point was not addressed. It however seems settled by Article 20(1) which provides that all shall be bound by the Constitution.

As was stated in SARAH LONGWE-V-INTERCONTINENTAL HOTELS (1993) LRC 221 this would be tantamount to saying that a private organization was above the Constitution.

8. *“There is no cause of action”*

This argument arises from the fact that there is no liability in the usual sense on the part of the Attorney General for say an Act of Parliament breaching the Constitution in so far as it would not be the fault of the Attorney General. In this light, judged by the ordinary standards for disclosure of a cause of action, there would be no cause of action.

However the subtle distinction was made in SERUGO (*supra*), by Mulenga JSC between a cause of action in an ordinary civil suit and a cause of action in a constitutional petition. He stated;

“A petition brought under this provision (Article 137), in my opinion sufficiently discloses a cause of action, if it describes the act or omission complained of and shows the provision of the Constitution with which the act or omission is alleged to be inconsistent or which is alleged to have been contravened by the act or omission and prays for a declaration to that effect. It seems to me therefore that a cause of action under Article 137(3) is not on all fours with the ordinary cause of action in tort or contract as described in AUTO GARAGE-V-MOTOKOV. Thus

apart from the drafting requirement introduced through the Rules under Legal Notice No. 4 of 1996, that the Petitioner be described as “aggrieved” it is not an essential element for the petitioner’s right to have been violated by the alleged inconsistency or contravention”.

In BAKU RAPHAEL OBUDRA (Supra) the Supreme Court re-affirmed their position in TINYEFUZA and SERUGO that for constitutional petitions brought under Article 137(3) of the constitution, a cause of action is disclosed if the petitioner alleges the act of omission complained of and cites the provision of the Constitution which has been contravened and prays for a declaration.

Chief Justice Odoki stated

“In my opinion, where a petition challenges the constitutionality of an Act of Parliament, it sufficiently discloses a cause of action if it specifies the Act or its provision complained of and identifies the provision of the Constitution with which the Act or its provision is inconsistent or in contravention and seeks a declaration to that effect. A liberal and broader interpretation should in my view be given to a constitutional petition that a plaint when determining whether a cause of action has been established.”

9. *“The affidavit in support is defective leaving the application without evidence”*

In CHARLES MUBIRU -V- ATTORNEY GENERAL [Constitutional Petition No. 1 of 2001] the petitioner contended that the law relating to the grant of bail was unconstitutional. The petitioner was released on bail before the determination of the petition and it was accordingly withdrawn. The Court however chose to deliver a ruling on preliminary objections raised earlier one of which was an objection to the affidavit in support of the petition.

It was contended that the affidavit in support of the petition offended 0.17r.3(1) CPR which provides that save in interlocutory applications, an affidavit must be restricted to such facts as the deponent is of his own knowledgeable to prove. It was argued that the affidavit was therefore defective since it included matters on information and belief.

The Court ruled that the affidavit offended O.17r.3(1) and was therefore defective and ordered it to be struck out. The Court then concluded;

“...clearly on the face of it, the provisions of S.14(A)(1) of the T.I.D as amended appear to conflict with Article 23(6)(a) of the Constitution. This Court therefore would have had jurisdiction in this aspect of the petition, if the petition was supported by evidence. As we have found the petition lacked evidence and could not be entertained”.

In all likelihood, following the liberal line on affidavits adopted in *KIIZA BESIGYE -V- YOWERI KAGUTA MUSEVENI* [Election Petition No. 1 of 2001] it is unlikely that this point would still be decided the same way.

However also worthy of comment is that the Constitutional Court, after observing a law in apparent contravention of the Constitution and governing such a fundamental right to liberty and to bail when charged with an offence, still chose to let the matter lie! Is this not countenancing an infringement of rights to continue? Even in ordinary civil matters the dictum is that Courts should not suffer illegalities.

10. *“The suit is time barred”*

Rule 4(1) of the Constitutional Court Rules 1996 (now declared void) required that a petition be filed within 30 days of the breach of the Constitution complained of.

The irony of a limitation provision for constitutional actions was well articulated by ODER JSC in *SERUGO* (supra) where he stated;

“It is certainly an irony that a litigant who intends to enforce his right for breach of contract or for bodily injury in a running down case has far more time to bring his action than one who wants to seek a declaration or redress under Article 137 of the Constitution”

From an initially very strict position on this requirement the Court attempted to mitigate its harshness. The case of *ATTORNEY GENERAL -V- DR. JAMES RWANYARARE* [Misc. Application No. 3 of 2002]¹⁰ arising from Constitutional Petition No. 7 of 2002] gives a full review of the Court’s approach on the 30-day limit.

They refer to what can only properly be called lamentations of the Supreme Court on the harshness of the 30-day rule made in the case of *SERUGO* (supra). The Justices of the Court noted that the 30-day rule had the effect of stifling the constitutional right to go to the

¹⁰ now on appeal

Constitutional Court rather than encouraging it and they called on the appropriate authority (who is in fact the Chief Justice) to do something.

The RWANYARARE case then reviews the post SERUGO cases where the Constitutional Court took steps to modify and mitigate the harmful effects of Rule 4(1). In its decisions in ZACHARY OLUM (1999), MUGERWA-KIKUNGWE (2000), ALENYO (2001) NAKACHWA (2002), the Court adopted the position that the 30 days would begin to run from the day the petitioner perceives the breach of the Constitution. Their Lordships felt that this would *“make the rule workable and encourage, rather than constrain the culture of constitutionalism”*.

The question in RWANYARARE was when does the perception that an Act of Parliament has breached the Constitution take place? The Court found that for a mature mentally normal person, the date of perception of breach of the Constitution by an Act of Parliament would be the date when the Act comes into force because of the presumption of knowledge of the law and the old adage that *“ignorantia juris nemien excusat”*

However, clearly the Court remained uncomfortable with their own interpretation. They went on to ponder the fate of infants and unborn children who may grow up to find that the continuing effect of a constitutional breach by an Act of Parliament contravenes their rights and freedoms or even threatens their very existence. The Court concluded on this note after reviewing part of the preamble to the 1995 Constitution.

“It seems to us that a Constitution is basic law for the present and future generations. Even the unborn are entitled to protection from violation of their constitutional rights and freedoms. This cannot be done if the 30-day rule is enforced arbitrarily. In our view Rule 4 of Legal Notice No. 4 of 1996 poses difficulties, contradictions and anomalies to the enjoyment of the Constitutional rights and freedoms guaranteed in the 1995 Constitution of Uganda. We wish to add our voice to that of the Supreme Court that this rule should be urgently revisited by the appropriate authorities”

Perhaps the most comprehensive attack on the rule has been made by maybe its most frequent victim. PETER WALUBIRI in his book *Constitutionalism at Crossroads* argues extensively why the 30-day rule should be done away with. Interestingly one of the lines of his attack is that the Chief Justice had no power to rule limiting access to the Courts.

The matter was laid to rest in UGANDA ASSOCIATION OF WOMEN LAWYERS & 5 OTHERS -V- ATTORNEY GENERAL [Constitutional Petition No. 2 of 2003]. The Court took the position that R.4(1) had the effect of amending Article 3(4) of the Constitution which gave the citizens of Uganda the right and duty at all times to defend the Constitution. The Court held;

“To the extent that R.4(1) of Legal Notice No. 4 of 1996 imposes restrictions on the right of access to the Constitutional Court which the Constitution itself does not provide for, it is seeking to adding to and or vary the Constitution and therefore to amend it without doing so through the amendment provisions of the Constitution. It is clearly against the spirit of the Constitution and it is now high time that this Court restored, in full, the citizens right to access to the Constitutional Court by declaring that the rule is in conflict with the Constitution and is therefore null and void. I would so declare.”

It could not have been better said! So ended the life of an infamous rule on which so many petitions had floundered and which had tied the court up on so many twists and contortions. The lesson learned is that persistence and perseverance pays. One is left only to moan the injustice to those that went before, whose shipwrecks have become our seamarks.

To put the matter beyond all doubt the whole history of Rule 4(1) was reviewed in FOX ODOI-OYWELWO & ANOR -V- ATTORNEY GENERAL [Constitutional Petition No. 8 of 2003] and the Court confirmed the nullity of Rule 4(1).

11. *An alternative remedy?*

The Constitutional Court has dismissed actions, which it felt were best left to alternative remedies. This was the case in RWANYARARE -V- ATTORNEY GENERAL [Constitutional Petition No. 11 of 1997] and also KABAGAMBE -V- UEB [Constitutional Petition No. 2 of 1999]. In the latter case a petition was dismissed because the Court felt that it was a disguised wrongful dismissal case better handled by a competent court under Article 50 and 129.

Also in KARUGABA -V- ATTORNEY GENERAL [Constitutional Petition No. 11 of 2002] the Petitioner sought to challenge Rule 15 of the Constitutional Court Rules 1996 which provided for the abatement of any petition after the death of a sole petitioner. The

Rule had been applied to this effect in NAKACHWA (supra). It was argued that the right to bring an action was “*property*” of the petitioner as a *chose in action* and could therefore not be taken away from the Petitioner’s estate (simply by the fact of the petitioner’s death) The Court found that the right of a citizen to petition the Constitutional Court for declarations (as opposed to redress) was a special right which was extinguished by the petitioner’s death. The petitioner’s claims for redress could be saved and continued in a competent court under the Law Reform (Misc. Provisions) Act (Cap. 79).

But how can this and the KABAGAMBE decision be reconciled with the dicta in ALENYO where the same Court clearly stated;

“...it is not relevant either that there is a remedy available to the petitioner elsewhere. That alone cannot deprive the Court of jurisdiction specifically conferred on it under Article 137.”

In SARA LONGWE-V-INTERCONTINENTAL HOTELS (supra) while considering the argument on alternative remedies, the Court held;

“I must also state that it is true that most if not all the rights which have been provided for by the Bill of Rights are also covered by personal or private law such as the law of torts or commercial law. But that state of affairs does not deprive an aggrieved person of his choice, whether to proceed under the Bill of Rights or under another branch of the law. The golden choice in this regard is the aggrieved person’s”.

The same position was reached in PUNBUM -V- ATTORNEY GENERAL [1993] 2 LRC 317, where it was held that it was no defence to a constitutional action that there are alternative remedies. A complainant was free to choose the most beneficial method legally open to him or her to prosecute his or her case.

It is certainly preferable that the citizen be free to choose his remedy. Should he seek the solace of a Constitutional Court declaration rather than the remedy of a civil suit then so be it.

12. *What remedy?*

A troubling question arose in the UGANDA WOMEN LAWYERS case (supra) regarding the remedy available from the Constitutional Court. What is the extent of the Court’s powers? Is it only empowered to make declarations and no more or may the Court make legislative prescriptions.

In the UGANDA WOMEN LAWYERS' case the Petitioners sought declarations that the Divorce Act (Cap. 249) was null and void in several respects for discriminating between the sexes by for instance specifying a different set of grounds for men and for women petitioning for divorce. The Constitutional Court agreed with the petitioners and declared the various impugned sections void but went a further step and made the sections applicable (again) to both sexes.

The Court put it as follows;

“To the extent that these sections of the Divorce Act discriminate on the basis of sexes, contrary to Articles 21(2) & (2), 31(1) & (6) of the Constitution, they are null and void. This means that the grounds for the divorce stated in S.4(1) and (2) are now available to both sexes. Similarly the damages or compensation for adultery (S.21) costs against a co-respondent (S.22), alimony (S.23) and (S.24) and settlement under S.26 are now applicable to both sexes.”

And further

“Application of this order is likely to meet some difficulties. It is therefore necessary that the relevant authorities should take remedial steps as soon as possible.”

This brings us to the principle of reading in as raised by WALUBIRI (supra p.26)

“Should the courts instead of striking down the whole statute as unconstitutional remove the offending part and leave the rest intact or imply some words so as to bring it in conformity with the Constitution?”

The learned author goes on to argue that “reading in” as was done in the instant case would constitute an intrusion by the Courts into the work of the legislature. He states that the Courts' constitutional duty is to strike down legislation inconsistent with the provisions of the Constitution and leave the legislature to amend or to repeal where the Court has struck down the offending legislations.

We could not agree more.

13. *Costs*

So far parties in public interest litigation appear to have been content with not seeking costs orders in their favour and the Courts have been “largely” pleased to oblige. This may have been a matter of strategy and prudence.

However as far back as EDWARD FREDRICK SSEMPBWA -V- ATTORNEY GENERAL [Constitutional case No. 1 of 1987] there is authority to support the proposition that where a matter is brought *bona fide* in the public interest, seeking clarification on important matters of law, that the costs be paid to the petitioner in any event. This is so in other jurisdictions as far flung as Australia.

In KARUGABA (*supra*) in their separate judgments, all Judges of the Court made no order as to costs on the grounds of public interest, however without further explanation.

One interesting aspect to this is that under the Constitutional Court Rules 1996, where no order is made as to costs, the petitioner is entitled to recover the deposit of Ug. Shs. 100,000/= made on filing of the action.

In BATU -V- TEAN (*Supra*) the High Court ordered costs against the Respondents after striking out their Article 50 application which sought declarations that BATU was violating the right to life of smokers by failing to give them full and proper information on the risks of smoking. BATU presented a bill of costs which was taxed and allowed at Ug. Shs. 41,450,000/=. The Respondent’s appeal is yet to be heard.

The Supreme Court in PRINCE JOHN RUKIDI -V- PRINCE SOLOMON IGURU [Supreme Court Civil Appeal No. 18 of 1994] refused to award costs to the successful party observing that the case brought to light a hotly contested dispute between members of a Kingdom whose importance went beyond its borders and that the desire to restore peace, reconciliation and harmony in the family dictated that no party should be condemned in costs.

In TINYEFUZA, the Court was explicit in saying that to encourage constitutional litigation, parties who go to Court should not be saddled with the opposite party’s costs if they lose.

Similarly in COL (RTD) DR. BESIGYE KIZZA- V- MUSEVENI YOWERI KAGUTA [Presidential Election Petition No. 1 OF 2001 the Court trashed the Respondent's arguments that the petitioner be condemned in costs so as to discourage frivolous petitions. The Court agreed that this was a historic and important case raising important legal issues crucial to the political and constitutional development of the country, following the RUKIDI and TINYEFUZA cases, each party was ordered to pay its own costs.

However the Constitutional Court seems to have lost sight of this allowing costs in FOX ODOI-OYWELWO (Supra)

It certainly is in the interests of justice that the RUKIDI position prevails and each party to constitutional and public interest litigation meet its own costs. Even more radical would be to adopt the Australian position to allow costs to the public interest litigant in any event provided that the litigation serves to bring clarity to an important area of law or matter.

E. THE FUTURE

Legislative reform;

Several civil society organizations submitted a joint memorandum on proposed amendments to Article 50 to facilitate public interest litigation. Some of the proposals address issues of costs and filing fees. There is also a proposal to extend Article 50 jurisdiction to the lower courts.

A courageous Judiciary:

The potential of public interest litigation to force issues that the Government is unwilling to legislate or otherwise act upon, will come to nought if the Judiciary is unwilling to take bold steps in this new direction. We need a bold and courageous Judiciary to take the challenge of public interest litigation and through judicial activism give life and vitality to the Constitution. We need judicial creativity to bring new thinking to old problems and seek new solutions. We also need judicial courage to follow on these new solutions to give full meaning to the Constitution.

The Courts should not plod on enforcing old laws that do not stand the test of the Constitution; the laws of sedition; the Divorce Act; the death penalty are only some of the offending ones.

The courage demonstrated by the Bench in OSOTRACO-V-ATTORNEY GENERAL [H.C.C.S No. 1380 of 1986] is a good development. In that case the learned Judge declined to apply S.14 of the Government Proceedings Act (Cap. 77) prohibiting making of orders for recovery of land against Government on the grounds that it did not conform to the Constitution. He ordered the Attorney General to give vacant possession of suit property to the Plaintiff.

In RWANYARARE-V-ATTORNEY GENERAL (Constitutional Application No. 6 of 2002 arising from Constitutional Petition No. 7 of 2002)] the Court also found courage to do away with the protections under the Government Proceedings Act (Cap. 77) and to grant an injunction against the Government.

The Non-Smokers rights case was also path-breaking by the trial Judge. As one commentator put it;

“by courageous and liberal interpretation to the Constitution, this decision seems not only to have potentially opened wide the flood gates for public interest litigation in Uganda, but to have torn out the gate posts and cast them asunder.”¹¹

In LUB-V-LUB [Divorce Cause No. 47 of 1997] the High Court applied Article 33(1) of the Constitution providing for equality in marriage and found that even though the Petitioner had not proved desertion or cruelty, as required under the Divorce Act (Cap. 249) she would still be entitled to a divorce solely on proof of adultery

However there are still very sad traces of restraint by the Bench. Lillian Tibatema – Ekirikubinza ¹² highlights a number of cases where the Bench while identifying a human rights problem has still shied away from resolving it. One such case is UGANDA -V- HAROUNA KANABI [Criminal Case No. 997 of 1995] where the accused was charged

¹¹ Law Africa Commentaries

¹² In her paper “The Judiciary and enforcement of Human Rights: Between Judicial Activism and Judicial Restraint [East African Journal of Peace and Human Rights Vol. 8 No. 2 2002]

with sedition and in the course of her judgment, the presiding Chief Magistrate of her own brought up the issue of the constitutionality of the charges. After expressing its doubt, the Court said

“This Court is not a constitutional court. It therefore lacks capacity to interpret the provisions of the Constitution beyond their literal meaning. As such I am of the view that where the State having regard to its supreme law keeps on its statute books a law that makes it an offence to do a certain act and hence to limit the enjoyment of a specified freedom, this Court will accept that restriction as lawful and shall go ahead to punish any transgression of the same according to the existing law until such a time as the State deems it fit to lift such restriction after realizing that such restriction violates a certain right”

The Court went on to use the existence of the Constitution and the individuals right to freedom of expression as a point of mitigation!

The question is why didn't the Court refer the matter for interpretation under Article 137. Why did it convict and sentence in light of what it felt was a contravention of the supreme law of the land. Even more strange, is that on appeal to the High Court, again though not raised by the parties, the Court ruled on the trial Magistrate's concerns on constitutionality and stated that it should have been referred to the Constitutional Court. The Court declined to do so itself since, the matter was not brought up before it.

In Uganda's context this is doubly important. DR. RWANYARARE's unrestricted access to the Courts should be seen as fundamental to the resolution of political disputes. As we have seen before and continue to see when out of choices disadvantaged citizens go to the bush.

Suo motu jurisdiction

Pondering the future of public interest litigation in the context of environmental protection raises interesting questions. So far the charge has been led by the non-governmental organizations burning great holes in their pockets in some cases.

Despite the abundance of local and international legislative material for environmental protection, a statutory body like NEMA and a responsible Minister, the carnage continues around us daily.

What will we leave behind for our children? What will we tell our grandchildren? Folklore usual consists of stories of mythical characters like talking hares. Are these to be replaced by stories of extinct plants and animals?

It is perhaps time for the Courts to grasp the nettle and take a more proactive role in the process by exercising *suo motu* jurisdiction. Rather than wait for actions to be brought to them, the Courts could seize the initiative as the custodians of justice and save the planet.

In SHEILA ZIA –V- WATER & POWER DEVELOPMENT AUTHORITY [Human Rights Case No. 15-K of 1992] the Supreme Court of Pakistan took action on a letter from individuals, that questioned the right of the respondent to endanger the right to life of the citizens by exposing them to electromagnetic hazards from the construction of a power grid installation in a residential locality.

The Court recognized that many citizens would not be able to move the Court properly on account of ignorance, poverty and disability and took the initiative to summon the Respondent and appoint a Commission to examine the matter.

In HUMAN RIGHTS CASE (ENVIRONMENT POLLUTION IN BALOCHISTAN) [Supreme Court PLD 1994 Supreme Court 102 Human Rights case No. 31 –K92Q] the Court was even more proactive. Having taken note of a newspaper article that nuclear waste was to be dumped in a coastal area in violation of Article 9 of the Constitution, issued orders to prevent such occurrence.

Suo motu jurisdiction may well be the untried answer to the challenges faced in environmental protection.

A rights based approach:

While legislative reform may take years and courage often needs to be fostered and mustered, there are some attitudinal changes that the Bench could adopt without much ado.

This is to focus on a rights based approach in the conduct of cases touching fundamental human rights. Priority should be given to upholding and protection of rights over all else.

As was stated in ATTORNEY GENERAL –V- ALL & 4 OTHERS [1989] LRC (CONST)474;

“In my view, a citizen whose constitutional rights are allegedly trampled upon must not be turned away from the Court by procedural hiccups. Once a complaint is arguable a way must be found to accommodate him so that other citizens become knowledgeable of their rights.”

As novel and as radical as it may sound, this is not a new concept in our law and practice. The landmark decision of UGANDA –V- COMMISSIONER OF PRISONS *Exparte Matovu* [1966] EA 514 was made in this spirit.

In that case, the High Court of Uganda sitting in reference as a Constitutional Court (comprising Udo Udoma C.J, Sheridan and Jeffrey Jones JJ) heard a habeas corpus application that was initiated only by the filing of two affidavits, one by the applicant Michael Matovu and the other by his Counsel Abu Kakyama Mayanja.

The Court was fully aware of the technical objections to the matter. It stated;

“In our view the application, such as it was, as presented to the High Court in the first instance was defective. Indeed but for the fact that the application concerns the liberty of a citizen the court would have been justified in holding that there was no application properly before it. In the first place the affidavits as intituled and headed are defective. There is no respondent named against whom the writ is sought and to whom the writ should issue. Surely a person or official against whom an order if this court is sought ought at least to be named in, if not made party to the proceedings...

In the second place the fact that the two affidavits were not accompanied by notice of motion or a motion paper signed by the counsel for the applicant setting out the relief sought and the grounds entitling the applicant to such a relief was so fundamental a defect as to be almost incurable. In effect it meant that there was in fact and in law no application capable of being entertained properly before the court....

The affidavit sworn by counsel is also defective. Again as a general rule of practice and procedure an affidavit for use in court being a substitute for oral evidence should only contain statement of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true. Such an affidavit must not contain an extraneous matter by way of objection or prayer or legal argument or conclusion. It is clearly bad in law... the affidavit by counsel in this matter contravenes 0.17r.3 of the rules of this Court and should have been struck out”

Then as now the application was dead in the water on account of the various defects. This is where the 1966 Court took the bold step. Instead of striking it out they proceeded with the following words;

“On examining the papers in this matter our first reaction was to send the case back to the judge with a direction that the matter be struck off as we were of the opinion that there was no application for a writ of habeas corpus properly before him. There was no motion in support of which the two affidavits were filed, it appearing that counsel for the applicant had erroneously treated the affidavits filed as the application. Further more, there was no respondent mentioned in the affidavits as beaded.

On reflection, however bearing in mind the facts that the application as presented in the first instance was not objected to by counsel who had appeared for the state (Binaisa Q.C and P.J Nkambo Mugerwa): that the liberty of a citizen of Uganda was involved; and that considerable importance was attached to the questions of law under reference since they involved the interpretation of the Constitution of Uganda; we decided in the interests of justice to jettison formalism to the winds and overlook the several deficiencies in the application , and thereupon proceeded to the determination of the issues referred to us.”

Suffice to end on this note, we have climbed a long way up the constitutional ladder. In looking back we find we have placed it on the wrong wall, the wall of technicalities.

Article 126(2)(e) of the Constitution the supposed white knight has also fallen on the sword of a technical rather than purposive interpretation.

It is time to head back down the ladder place it properly on the wall of fundamental human rights and start our climb with determination.

We owe it to those yet to come.

F. CONCLUSION

“Cowardice asks the question, “is it safe?” expediency asks the question, “is it politic?” Vanity asks the question, is it popular?”. But conscience asks the question, “is it right?” and there comes a time when one must take a position that is neither safe nor politic nor popular but one must take it because one’s conscience tells one that it is right.”

Martin Luther king Jr.

So it is in advancing the cause of observance and protection of fundamental human rights. There has been more human rights litigation in the last 5 years than probably the whole of Uganda’s history put together.

Sadly most of it still reflects restraint. Rather than expand the human rights through liberal interpretations, we have tended to remain shackled with technical and legalistic approaches

looking for safe, politic or popular positions. If we are to give full meaning to the rights and freedoms recognized in the Constitution, if we are to give it life, it is time for a change.

Let us all proceed as though there are no limits to our abilities.