THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMAPALA

CONSTITUTIONAL PETITION NO. 30 OF 2011

(Under Article 137 of the Constitution of Uganda, 1995 as amended and the Constitutional Court [Petitions and References] Rules SI No. 91 of 2005 and all enabling laws)

PROF. GILBERT BALIBASEKA BUKENYA ::::::: ***PETITIONER***

VERSUS

THE ATTORNEY GENERAL :::::::::::: ***RESPONDENT***

CORAM: HON. LADY JUSTICE A. E. N. MPAGI BAHIGEINE, DCJ/JCC
HON. JUSTICE S. B. K. KAVUMA, JA/JCC
HON. JUSTICE A. S. NSHIMYE, JA/JCC
HON. LADY JUSTICE M. S. ARACH AMOKO, JA/JCC
HON. JUSTICE REMMY KASULE, JA/JCC

AMENDED PETITION

JUDGMENT OF THE COURT

This Amended Petition was filed by Prof. Gilbert Balibasekka Bukenya, on 5-07-11, with leave of court, alleging:

"1. That the act of charging your petitioner, by the Inspector General of Government for the offences of abuse of office contrary to ***section 11 of the Anti Corruption Act 2009 and Fraudulent Practice contrary to section 95 (1) (d)*** *of the* ***Public Procurement and Disposal of Public Assets Act 2003****, before the Anti-Corruption Court on the 16th day of June 2011, which charges were based on*

acts done in his official capacity as the Vice President of Uganda, is inconsistent with and in contravention of ***Articles 98 (5), 108 (3) and 112*** *of the Constitution of the Republic of Uganda, 1995.*

2. *Your petitioner states that the criminal charges preferred against your petitioner arose from acts done by your petitioner in his official capacity as Vice President of Uganda while chairing a cabinet sub-committee on CHOGM, between the years of February 2004 and 2007, following a directive from His Excellency the President of Uganda. That in preferring the said criminal charges against your petitioner, the Inspector of Government contravenes the immunity of the Presidency as provided for under the constitution of the Republic of Uganda*

3. *That the Acting IGG's actions of preferring criminal charges against the petitioner are in contravention of* ***Article 223*** *of the Constitution and are therefore null and void.*

4. *That the act of the IGG of preferring criminal charges against your petitioner on the basis of actions and decisions of the sub-committee is in contravention of the provisions of* ***Article 21*** *of the Constitution of Uganda 1995 and is therefore null and void."*

The petitioner sought the following declarations:

" *i) That the act of preferring criminal charges against your petitioner under the* ***Anti-Corruption Act*** *2008 and under the* ***Public Procurement and Disposal of Public Assets Act,*** *2003 contravenes and is inconsistent with* ***Articles*** *21,* ***98*** *(5),* ***105*** *(3),* ***112*** *and* ***223*** *of the Constitution of the Republic of Uganda 1995 and hence unconstitutional.*

ii) That the court declares that the act of preferring charges against your petitioner in circumstances outlined herein above is null and void.

iii) *That costs be provided for."*

The petition is supported by two affidavits deponed by the petitioner, the first dated 14th January 2011 and the supplementary one sworn on 4th July 2011.

On 22nd June 2011, the respondent filed an answer to the petition disputing all the allegations in the petition and contending that the petitioner is not entitled to any redress in respect of all orders and declarations sought.

An affidavit of the same date sworn by Robinah Rwakooja, the Ag. Director of the Directorate of Civil Litigation, was filed in support of the answer. Mr. Raphael Obudra Baku filed the supplementary affidavit in support of the answer, dated 11th July 2011.

Mr. Ben Wacha appearing with Mr. Macdusman Kabega represented the petitioner while Mr. Henry Oluka, Principal State Attorney, (P/SA), assisted by Mr. Daniel Gantungo, State Attorney, (S/A), appeared for the respondent.

The amended petition was filed after the scheduling conference and gave rise to two additional issues all of which by consent read as follows:

Issue No. 1.

1. *Whether the petitioner was entitled to immunity in terms of **Article 98 (5), 108 (3), 111 (1), (2) & (4) and 112 (1)** of the Constitution for acts arising from his chairing the Cabinet Sub-Committee meetings for CHOGM.*

2. *Whether the prosecution of the petitioner is in contravention of **Article 21 (1)** of the Constitution.*

3. *Whether the Ag. Inspector of Government (IGG) has authority to perform functions of the IGG under **Article 223** of the Constitution.*

Submissions for the Petitioner by Mr. Ben Wacha were as follows:

1st Issue

The petition is brought under **Article 137 (3) (b) which** states:

"(3) Any person who alleges that:

a) ……

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."

The facts as admitted are that the petitioner was the Vice President of the Republic of Uganda from 23rd May 2003 to 23rd May 2011. The petitioner on various occasions during that term of office chaired Sub-committee meetings in preparation of CHOGM 2007. After vacation of office of Vice President, the petitioner was criminally charged in the Anti-Corruption Court for his actions arising out of the sub-committee cabinet meetings. The petitioner alleges that the act of charging and prosecuting him in his personal capacity is inconsistent with **Articles 98 (5), 108 (3), 111 (1), (2), (4), 112 (1)** of the Constitution.

He submitted that **Article 98 (4)** gives immunity to the President while in office. It reads:

"(4) While holding office the President shall not be liable to proceedings in any court."

Article 98 (5) extends that immunity while the President is out of office. It provides:

"(5) Civil or criminal proceedings may be instituted against a person after ceasing to be President in respect of anything done or omitted to be done in his or her personal capacity before or during the term of office of that person...."

He referred to **Pinochet's** case and ***Tumukunde V Attorney General, Constitutional Petition No. 5 of 2006*** in support of their contention and contended that they were trying to extend this immunity to the Vice President. The Vice President does things that the President would normally do by virtue of **Article 108 3(a) and (b).**

This provides:

"108 (3) The Vice President shall –

a) deputise for the President as and when the need arises; and

b) perform such other functions as may be assigned to him or her by the president, or as may be conferred upon him or her by this Constitution."

As regards meetings, these are summoned and presided over by the President and in his absence, the Vice President.

Paragraphs 3, 4 and 5 of the petitioner's supplementary affidavit aver to this that the Vice President does not have an independent mandate but derives functions from the office of the President when he mandates or directs him to that effect.

Paragraph 9 of the same affidavit specifically states:

> *"9 That the mandate of the cabinet sub-committee on CHOGM chaired by myself on the directive of His Excellency was to provide a political framework that was required to oversee the smooth preparations and arrangements for the Commonwealth Heads of Government Meeting of 2007 in Kampala, Uganda."*

In doing all the foregoing, the petitioner was deputising for the President. There is no evidence that this was done in a manner off the mark of the President's directions. No affidavit has been filed to controvert these assertions. They thus remain unchallenged.

In accordance with ***Constitutional Petition No. 6 of 2005 Tumukunde V Attorney General*** the petitioner acted in good faith in all that he did. His actions were in his constitutional capacity. He must be protected and given the same immunity as the President. It could not have been the intention of the Constitution that immunity be given to the President and not to the Vice President deputising for him because if that were so, one would be protecting the Presidency from above and leaving the "soft underbelly of the President" unprotected. It would be easy to challenge the actions of the Presidency done by his deputy. A broad and liberal meaning should be given to the term "deputise".

Mr. Wacha pointed out that having canvassed immunity under Issue 1, the petitioner was praying for declarations under Issue No. 2. He was praying

for protection under the law. The petitioner chaired meetings in which there were several participants. The decisions taken were collective. The act of preferring charges against the petitioner alone for collective decisions cannot be said to be reasonable. **Article 117** stipulates that:

> *"Members shall individually be accountable to the President for the administration of their ministries and collectively be responsible for any decision made by the cabinet."*

He cited ***Waweru V Republic 2006 EE 349 HCK*** and ***Constitutional Petition No. 14 of 2005, Eddie Kwizera V Attorney General*** and pointed out that the petitioner had not been treated equally before and under the law. The action of charging him alone is discriminatory to **Article 21** of the Constitution. Learned counsel prayed court to find that the petitioner had been treated unequally before and under the law.

Mr. Macdusman Kabega also for the petioner in rejoinder to Issue No. 1 submitted that:

The qualifications prescribed for the office of President under **Article 108 (4)** are stipulated under **Article 102** to apply to the office of the Vice President. The person standing for election as President is required to be:

a)A citizen of Uganda by birth;

b)Not less than thirty five years and not more than seventy five years of age and

c) A person qualified to be a member of parliament.

Furthermore under **Article 108 (8)** both the President and the Vice President prescribe to the same oath of allegiance. Therefore they enjoy the same immunity.

Mr. Kabega dealt with **Issue No. 3** concerning the actions of the Acting IGG, in preferring criminal charges against the petitioner.

He submitted as follows:

These are in contravention of **Article 223** which stipulates that the Inspectorate of Government shall consist of:

> *"223 a) the Inspector General of Government; and*
>
> *b) such number of Deputy Inspectors General as Parliament may prescribe."*

There is no position of Acting IGG established under the law. This is confirmed by **Act No. 5/2002 (Cap 13)** which operationalises **Article 223**. **Section 3** thereof reiterates the provisions of **Article 223** by confirming the position of the IGG and two deputies. Neither **Article 223 nor** the **Act** provide for the position of Acting IGG. There is no Acting position of IGG because of the importance of the Inspectorate. That is why the remuneration attached to it is charged on the Consolidated Fund and is considerably hefty. The position has security of tenure and is independent. It is not controlled or influenced by anyone or authority. The present

Acting IGG is not lawfully holding office since it is not provided for by the Constitution. Therefore, the charge sheet "A", was signed in a capacity not recognised under the **Constitution or Act No. 5/2002**. It is thus null and void in as much as it was signed by an Acting IGG who is not provided for or recognised anywhere.

Learned Counsel prayed for the charge sheet "A" to be declared a nullity.

Submissions of the Respondent – Mr. Henry Oluka, Principal State Attorney (P/SA)

The learned Principal State Attorney, responding to **Issue No. 1** pointed out that the respondent opposed the petition.

He submitted that the question of immunity is a point of law going to the root of the petition. It is defined in **Stephen H. Griffith's Law Dictionary** *as a right of exemption from duty or penalty; favour granted to one contrary to the general rule.* **Article 2 (2)** of the Constitution subjects everybody to the Constitution which is paramount. However, **Article 98 (4)** grants exemption from penalties, duties or other responsibilities against anybody holding the position of President. The exemption is created in specific reference to the position of President. This exemption is at the same time subject to **Article 2 (2)**. No other citizen in Uganda is accorded this status of exemption as regards his actions or deed. **Article 98** is very clear. The marginal note states "The President of Uganda". It refers to the President of Uganda and not to anybody else. **Article 108** creating the

Vice Presidency adopts the qualifications required of the Presidency under **Article 102** to apply to the Vice Presidency. Further, **Article 108 (6)** stipulates that the terms and conditions of service of the President, provided under **Article 106** shall apply to the Vice Presidency. Most importantly **Article 108** creating the Vice Presidency is absolutely mute about any reference to **Article 98** creating the Presidency, even where it makes mention of deputising for the President. No mention is made of the Vice President becoming President in the absence of the President. The import of all this is that while there is a sitting President in Uganda, whether present in Uganda or outside, no person in line of precedence conferred by **Article 98 (2)** can take on the roles conferred by **Article 98 (1).** Therefore nobody will be Head of State, Head of Government, Commander in Chief or fountain of honour while the country has a President.

The learned Principal State Attorney reasoned that **Article 98** is an exclusive article whose effect only applies to one person, that is the President of Uganda. Immunity is only lifted in court actions only in relation to Presidential Elections. If the framers of the Constitution wanted to expand the exclusive-one-man's club, they would have stated so. However, the constitution is silent. Thus the provisions of **Article 98 (1) – (4)** only apply to one person i. e. the President. No other interpretation can be given to allow any individual in Uganda to be party to **Article 98**. The same Article is silent on not conferring status of President to anybody else. Provisions of other Articles cannot be married into other Articles.

Counsel further submitted that the hallmark of the preamble to the Constitution is that there shall be no more impunity. The President while in office is duty bound to do anything that he does within that capacity and confines of the law. Anything outside the ambit of the law attracts the wrath of the law. Therefore **Article 98 (4)** and (5) do not apply to the petitioner. **Article 98** is about the President. The Vice President is not the President.

Articles 105, 112, 111 (1), (2) and **(4)** do not render any immunity to the petitioner in terms of actions arising out of his chairing of CHOGM sub-committees for CHOGM. Learned Counsel prayed court to find and hold that there is no immunity to any other person in Uganda and to answer the first issue in the negative.

Submitting on Issue No. 3, first, learned Principal State Attorney pointed out that the office of IGG is created under **Article 223 and Act No. 5/2002, sections 3** and **4**.

The functions and jurisdiction of the IGG are covered under **Articles 225, 226** and **section 9** of **Act No. 5/2002. Section 14 (6) mandates** the IGG to make such orders and directions as are necessary. **Section 3** of the **Act** states that the IGG and the deputy IGG are one and the same. Thus the Acting IGG in signing the charge sheet "A" acted constitutionally. Mr. Baku was "a person lawfully holding office" because he was a substantive Deputy IGG. The Acting IGG signed the documents coming before him in

execution of his duties as IGG as defined under section 2 of Act 5/2002. Therefore the charges the IGG preferred against the Vice President are constitutional.

He prayed court to dismiss all the prayers by the petitioner. The criminal charges preferred against him are legally consistent with Article 223.

Issue No. 2

Turning to Issue No. 2, the learned Principal State Attorney argued that the act of prosecuting the petitioner does not fall within categories specified under **Article 21 (1), (2)** and **(3).** The alleged discrimination by the petitioner is not related to sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability. The prosecution of the petitioner is within the prosecutional discretion of the office of the IGG. Everybody is equal under the law, even where the IGG chooses to investigate, instigate or prosecute any individual.

In the instant petition since the act of discrimination alleged does not fall within **Article 21 (2) (3)** and since the petitioner has not shown that the actions of the IGG to prosecute him were instigated by malice, bias or any other ill feeling, then there is no room for one to state that there is an act of discrimination as regards the acts of the petitioner.

Learned Principal State Attorney asked court to find no merit in this petition and to dismiss it with costs.

Mr. Ben Wacha

In Rejoinder

Mr. Wacha pointed out that they were not challenging the powers of the IGG, only that he must act constitutionally within the powers of the Constitution. They also recognised the independence of the IGG under **Article 227.** The petitioner did not claim he was discriminated against under **Article 21 (1).** The petitioner's only complaint is that he was treated unequally before the law. **Article 21** is about equality and freedom from discrimination. The petitioner is not alleging discrimination under **Article 21 (1).** Mr. Oluka, learned Principal State Attorney has given a restrictive interpretation to the relevant **constitutional provisions.** He prayed court to construe all relevant aforementioned articles together and give a broader interpretation. The activities of the IGG in prosecuting the petitioner is contrary to **Articles 98 (5), 108 (3), 112** and the acts of preferring criminal charges against the petitioner alone contravene **Article 21 (3).** Further, the Acting IGG in preferring criminal charges against the petitioner contravenes **Article 223** of the Constitution.

Mr. Wacha prayed court to allow the petition with costs and also sought a certificate for two counsel.

Court's Findings

While discharging our mandate to interpret the articles in issue under **Article 137 (1)** of the Constitution, we consider that the relevant and appropriate guideline is the primary or literal rule of interpretation. This is

the rule applicable in the absence of any ambiguity or absurdity in the text, the subject of the interpretation. The rule is to the effect that:

> *"..... if the words are themselves precise and unambiguous, then no more can be necessary than to expound these words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law-givers. Where the language is clear and explicit, we must give effect to the text whatever may be the consequences for in that case the words ..... speak the intention of the legislators"* ***CRAIES ON STATUTE LAW, 7th Edition page 65.***

This rule cannot be overlooked, in preference to the liberal rule of interpretation as suggested by Mr. Wacha, because of its primacy.

> *"It is only where there is some imprecision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put upon the words."* ***Per Mwendwa C. J in Republic V E. L. Mann (1969) E A 357***

We consider that there is no imprecision or ambiguity in the language of the Articles under consideration. We also point out for emphasis, that the Constitution establishes the State and creates the institutions of the State to which it allocates powers and defines the relationships between such institutions. The existence and the exercise of the powers of the institution of the State, therefore, depends on the terms of the Constitution.

As regards **Issue No. 1, Article 98 clauses (4) and (5) which** form the basis of the petition provide:

> *"98 (4) While holding office, the President shall not be liable to proceedings in any court.*

This immunity is extended under **clause (5)** to cover the period after the President leaves office:

> *"(5) Civil or criminal proceedings may be instituted against a person after ceasing to be President in respect of anything done in his or her personal capacity before or during the term of office of that person"*

The import of this is that the President is immune to prosecution for acts done in his official capacity during and after he/she vacates **the office** of president.

According to **Black's law Dictionary**, 8th Edition page 765, immunity means:

> *"Any exemption from a duty, liability or service of process ..... such exemption granted to a public official, most importantly this exemption must be granted by law." **(Emphasis added)***

It is thus clear that the immunity granted protects the holder of the office of the President from civil or criminal liability in his/her personal capacity while in office. It is not a defence to a legal action as the words themselves indicate. It is only a temporary protection which eliminates or

postpones the accuser's ability to slap a claim against the immune during the latter's time in office. The immunity is intended to ensure that the exercise of presidential duties and functions are free from any hindrance or distraction, considering that such an office is a job which, apart from requiring all the presidential time, also demands individual attention. It is, therefore, intended to bar any form of inhibition of the President in the performance of his/her duties while in office so that the wheels of governance are not held at ransom under any guise. Were the President to face suits or prosecutions while in office, the stakes would extend far beyond the individual himself/herself. To ignore this fact is to ignore the political context and the potential danger to the nation as a whole – ***the Supreme Court of the Philippines in Soliven V Makasiar 167 SCRA 393, 1988.***

We, however, observe that **Article 98 (5)** underscores the determination of Ugandans as expressed both as a preamble to and in the spirit of the Constitution, to do away with impunity and reaffirms the time honoured principle that no man is above the law. Even the Chief Executive of the Country in the Person of the President, is accountable for actions/omissions in his/her personal capacity once he/she leaves office.

Immunity thus complements the executive authority of the President. Under **Article 99** it is only the President and him/her alone who is vested with and exercises the executive authority of Uganda. Nobody can assume this role while there is a sitting President. This is so inspite of the fact that

the Constitution prescribes the same qualifications and terms and conditions of service for both the President and the Vice President – **Articles 102, 106,** and **108** and further that both subscribe to similar oaths – **article 98 (3)** and **108 (8).** Therefore the Vice President as the President's appointee derives his/her mandate from the office of the President.

The Vice President's functions include deputising for the President according to the need and may perform such other functions as may be assigned to him/her by the President or this Constitution. It is significant to note that while **Article 108** makes specific reference to **Articles 102** and **106** as pointed out above the same article is strikingly mute about **Article 98 (4) and (5).** We consider this omission to have been deliberate by the framers of the Constitution, for the wording of the entire **Article 108 is clear, precise and unambiguous.** This can only lead to one conclusion namely, that the Constitution intended the "immunity" under **Article 98 (4)** and **(5)** to be the exclusive preserve of the Head of State, Head of Government and Commander-in-Chief of the People's Defence Forces and the Fountain of Honour. The irrefutable presumption here is that the legislature must have intended it that way.

It thus emerges very clearly that the Vice Presidency is distinct from and inferior to the Presidency. It has no home in the immunity arena. In ***Tumukunde V Attorney General, Constitutional Petition No. 6 of 2005,*** Kavuma JA, while agreeing with the other Justices, commented:

*"The Presidential immunity provided for in **Article 98 (4)** is to be restrictively interpreted to exclusively apply to the person of the President where he/she personally exercises the powers and duties of the office of the president. Where the President assigns any of his executives powers to Ministers or other officers under **Articles 99 (4)** and **113 (3)** of the Constitution, that immunity does not extend to such other ministers or officers."*

We adopt that reasoning. We emphasise that immunity is a right or privilege given by law. - **Black's Law Dictionary (Supra)**. It cannot therefore be inferred from the language used. There must be clear and unequivocal expression conferring that right or privilege.

By way of analogy, the Kenyan Constitution, **Article 143** conferring immunity specifically mentions:

"The President or a person performing the functions of that office during their tenure of office"

Similarly, the **1999 Constitution** of the Federal Republic of Nigeria **Section 308** confers immunity to **"A person holding or required to perform the functions of the office of the President ....."**

From the foregoing provisions, it becomes even more apparent that had the promulgators of the 1995 Constitution so wished, they could have, with ease, used similar language.

Thus no one else, not even the President who delegates or assigns duties can grant that immunity to anyone else.

The authorities of **Pinochet and Tumukunde (Supra)** were not relevant, with due respect to counsel Ben Wacha, in as far as they were dealing with Presidential immunity as opposed to that of the Vice President. We were not availed any direct authority on the Vice Presidency. We are, therefore, of the unanimous view that the office of the Vice Presidency is not covered under **Article 98 (4)** and **(5)**.

We thus answer Issue No. 1 in the negative for that reason.

Regarding **Issue No. 2** that the petitioner has been treated unequally before and under the law, it is well established that the IGG has wide statutory powers to investigate and prosecute cases involving corruption, abuse of authority or public office under **Article 225 of the Constitution and section 8 of the IGG Act**. See ***Gordon Sentiba V IGG; SCCA No. 6/2006.*** Preferring charges is a matter for the prosecutor who makes the decision to prosecute anybody depending on the facts of the case before him or her as to whom to criminally charge in a court of law.

Whilst this court would view victimization or unequal treatment before the law with disfavour, the suggestion that one could resist prosecution on the ground that others he wishes to be jointly charged with him are not so

jointly charged, would, in our view be contrary to the established principles of our criminal justice system.

This issue is unsustainable and is accordingly answered in the negative.

As regards **Issue No. 3** whether the Acting IGG has authority to perform the functions of IGG under **Article 223. Section 2** of the **Act No. 5/2002** provides that: "Inspector-General" means the Inspector-General of Government appointed under **section 3** of the **Act** and includes a Deputy Inspector General. It is correct that the Inspectorate is manned by the IGG and such number of Deputy Inspectors General as Parliament may prescribe. There is no position designated as Acting IGG currently. However, the current IGG, Mr. Raphael Obudra Baku is substantively a deputy IGG who now happens to be carrying out the duties of IGG since the position of the substantive IGG has not yet been filled. This, however, does not nullify his position and powers as Deputy IGG who is capable of prosecuting offences. We do consider this to be an internal administrative arrangement which does not affect the capacity of the officer to perform his constitutional duties. At any rate, the charge sheet "A" being impugned by the petitioner was also co-signed by the Director, Legal affairs, Inspectorate of Government, Mr. Asubo. We received no objection to the effect that the latter officer had no capacity to sign the said charge sheet.

In conclusion, the petition fails forthwith. The petitioner is not entitled to any of the declarations sought. The file is to be remitted to the trial court to proceed with the trial.

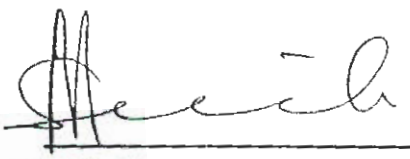
Considering all the circumstances and nature of this petition, we deem it appropriate to make no order as to costs.

We so order.

HON. LADY JUSTICE A. E. N. MPAGI BAHIGEINE, DCJ/
PRESIDENT OF THE CONSTITUTIONAL COURT

HON. JUSTICE S. B. K. KAVUMA, JA/JCC

HON. JUSTICE A. S. NSHIMYE, JA/JCC



HON. LADY JUSTICE M. S. ARACH AMOKO, JA/JCC



HON. JUSTICE REMMY KASULE, JA/JCC

10th August, 2011