THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

CORAM: HON MR JUSTICE G. M. OKELLO, JA.
HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.
HON. MR. JUSTICE S. G. ENGWAU, JA.
HON. MR. JUSTICE A. TWINOMUJUNI, JA.
HON. LADY JUSTICE C.N.B. KITUMBA, JA.

CONSTITUTIONAL PETITION NO. 2 OF 2002

BETWEEN

(1)- Uganda Association of Women Lawyers]
(2)- Dora Byamukama
(3)- Jacqueline Asiimwe Mwesige] PETITIONERS
(4)- Peter Ddungu Matovu
(5)- Joe Oloka Onyango]
(6)- Philips Karugaba

AND

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

JUDGMENT OF G.M. OKELLO, JA.

I have had the chance to read in draft the judgment of my brother Justice Twinomujuni, JA, just delivered and I agree with him that the petition must succeed.

The petitioners brought this petition under article 137(3)(a) of the Constitution and under Modifications To The Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992 Directions, 1996 (Legal Notice No. 4 of 1996). In the petition they challenged certain sections of the Divorce Act (now Cap 249) as being inconsistent with various articles of the Constitution and prayed for the following declarations:-

> **"(a) Section 4(1) of the Divorce Act Cap. 249 contravenes and is inconsistent with Articles 21(1) & (2), Article 31(1) and Article 33(1) & (6) of the Constitution;**
>
> **(b) Section 4(2) of the Divorce Act (Cap 249) contravenes and is inconsistent with Articles 21(1) & (2), Article 31(1) and Article 33(1) & 6 of the Constitution;**

(c) Section 5 of the Divorce Act (Cap 215) is inconsistent with and contravenes Articles 21(1) & (2); Article 31(1) and Article 33(1) & (6) of the Constitution;

(a) Section 21 of the Divorce Act (Cap 249) is inconsistent with and contravenes Articles 21(1) & (2), Article 31(1) and Article 33(1) & 6 of the Constitution;

(b) Section 22 of the Divorce Act (Cap 249) is inconsistent with and contravenes Article 21(1) & (2); article 31(1) and Article 33(1) & (6) of the Constitution.

(c) Sections 23 and 24 of the Divorce Act (Cap 249) are inconsistent with and contravene Article 21(1) and Article 31(1) of the Constitution.

(d) Section 26 of the Divorce Act (Cap 249) is consistent with and contravenes Article 21(1) & (2), Article 31(1) and Article 33(1) & (6) of the Constitution.

(e) No order be made as to costs in any event;

(f) Any other or further declaration that this Honourable Court may deem fit to grant."

The petition was accompanied by the affidavit of Jacqueline Asiimwe, the coordinator of Uganda Women Network (UWONET) an NGO. The affidavit set out the grievances complained of in the petition. The affidavit evidence in support of the petition was also supplied by all the petitioners. The respondent filed his answer to the petition. It was accompanied by the affidavit of L. Tibaruha, the acting Solicitor General, setting out the facts to support the answer.

At the commencement of the hearing, Ms Caroline Mayanja, a Senior State Attorney, who appeared for the respondent, raised three preliminary points of objection namely:-

(a) That the petition was time barred in as far as it was not filed within the thirty days period prescribed by rule 4(1) of Legal Notice No. 4 of 1996;

(b) That this court has no jurisdiction to entertain the petition as it raised no issue of constitutional interpretation and

(c) That the petition was frivolous and vexatious.

Learned Senior State Attorney however later abandoned points (b) and (c). She argued only (a) above. We heard the arguments of counsel from both sides on the objection and we overruled it reserving our reasons to be incorporated in the final judgment on the petition. I now propose to give my reasons here.

The thrust of Ms Mayanja's argument is that the petition was incompetent because it was filed out of the thirty days period prescribed by rule 4(1) of Legal Notice No 4 of 1996. According to her, the rule provides that such a petition must be lodged in court within thirty days after the date of the breach complained of in the petition. She submitted that in **Zachary Olum, and others vs Attorney General, Constitutional Petition No. 6 of 1996**, this court laid down a principle that computation of the thirty days starts from the date when the petitioner perceived the breach. Because of the difficulty in setting a general formula for determining the date of perception in all cases, she pointed out, this court stated so in **James Rwanyarare vs Attorney General, Miscellaneous Application No. 3 of 2003**. She further pointed out that in **Joyce Nakachwa vs Attorney General and others, Constitutional Petition No. 2 of 2001**, this Court eventually held that each case must be decided on its peculiar facts. That meant that the date of perception in each case must be decided on the peculiar facts of the case.

She further submitted that applying that principle to the instant case, the date when the petitioners perceived the breach must be the date when the Divorce Act came into force. She pointed out that this was the principle which this court had set in **Pyrali A.R. Esmail vs Andrian Sibo, Constitutional Petition No 9 of 1997**. In that case, the court held that the date of enforcement of a statute was the date of perception of its breach of the Constitution. According to her, this principle was repeated by the court in **Dr. James Rwanyarare vs Attorney General, Constitutional Petition No. 11 of 1997**.

She argued that the Divorce Act having been enacted on 1/10/1904 is one of those legislations which were in existence when the Uganda Constitution of 1995 was promulgated on 8/10/1995. It is one of those legislations that have been saved by article 273 of the Constitution as existing laws. Therefore, she argued, the enforcement date of the Divorce Act is 8/10/1995 when the Constitution was promulgated.

She stated that since the enforcement date of Divorce Act was as stated, computation of the thirty days period started on 9/10/1995. That meant that the petitioners had up to 8/11/1995 to file their petition. Learned counsel submitted that since the petitioners did not file their petition until 7/3/2003, without obtaining an extension of time, their petition was filed out of time, it was time barred and should therefore be dismissed for being incompetent.

In reply, Mr. Karugaba, learned counsel for the petitioners did not agree. He submitted that his client's petition was competently before the court as it was filed within time. He conceded that this court had earlier adjudicated on this rule 4(1).

He mentioned **AG vs Rwanyarare (supra) and Joyce Nakachwa (supra)**. He pointed out that in those cases this court attempted to mitigate the harsh effect of application of that rule so as to encourage rather than discourage citizens' access to the Constitutional Court. In doing so, he pointed out, this court had been deciding each case on its facts. In all those cases this court had been considering rule 4(1) in the context of new laws: ie laws made after the 1995 Constitution was promulgated until in the case of **AG. Vs**

Rwanyarare (supra) when it talked about a continuing breach of the Constitution by legislation.

In counsel's view, that opened the gate for consideration of the rule in the context of the laws that were in existence when the Constitution was promulgated. He submitted that continuing breach renders time limit set by rule 4(1) irrelevant.

He submitted that rule 4(1) is in fact inconsistent with article 3(4) of the Constitution and should be declared so. He explained that while that article bestows on the citizens of Uganda the right and duty at all times to defend this Constitution against its unconstitutional suspension, or overthrow, abrogation or amendment, rule 4(1), a subsidiary legislation, sets a time limit of 30 days within which a citizen can file his or her petition in the Constitutional Court.

It was retorted for the respondent that article 3(4) applies only to a situation where there is a violent attempt to unconstitutionally overthrow the established constitutional order.

I must admit from the outset that rule 4(1), is problematic. This court realised this fact soon after its inception. In its infancy, this court had adopted a literal interpretation approach to interpreting the rule. This approach produced a negative impact on the citizen's right to access to the Constitutional Court. It was stifling rather than encouraging access to the Constitutional Court. To mitigate that harmful effect, this court adopted another interpretive approach, to interpreting the rule.

In **Zachary Olum and others (supra)**, this court adopted a perception principle which is a more liberal approach. That meant that computation of the thirty days period starts from the date when the petitioner perceives the breach.

Even this approach did not provide absolute solution to the problem of the rule because it still remained difficult to fix a general formula for determining the date of perception in every case. The court, therefore, adopted a safety-valve system approach to overcome the problem. That is that each case must be decided on its peculiar facts. That meant that the perception date in each case must be determined on the peculiar facts of each case.

In the meantime, appeal was made by some Justices of the Supreme Court in **Ismail Serugo vs KCC and Anor, Constitutional Petition appeal No 2 of 1997** and by this court in **Joyce Nakachwa** (supra) to the appropriate authorities to do something about this rule. Unfortunately, to date, no steps have yet been taken by the authorities to remedy the situation.

No challenge had earlier been made before us about the constitutionality of the rule until today. Article 3(4) which the rule is alleged to be inconsistent with provides thus:-

"All citizens of Uganda shall have the right and duty at all times:-

(a) to defend this Constitution and in particular to resist any person or group of persons seeking to overthrow the established constitutional order; and

(b) to do all in their power to restore this Constitution after it has been suspended, overthrown, abrogated or amended contrary to its provisions."

It was argued for the respondent that the above article applies only to a violent attempt at or actual violent suspension, overthrow, abrogation or amendment of the constitution. I fully agree with my brother Justice Twinomujuni, JA, that the makers of this Constitution could not have intended such a narrow interpretation to be placed on that article which creates a right and duty to the citizens. Courts are the protectors of the rights of the citizens must give such an interpretation that will promote rather than destroy the rights. The narrow interpretation advocated by counsel for the respondent does not promote the right created by that article. It is, therefore, not a proper approach. The proper interpretation is that the article gives to the citizens wide powers at all times to defend the Constitution. They can use whatever means at their disposal necessary to counter the situation to defend the Constitution. This certainly includes filing petitions in the Constitutional Court as a mean of defending the Constitution.

The impugned rule 4(1) provides thus:-

> **"The petition shall be presented by the petitioner by lodging it in person, or by or, through his or her advocate, if any, named at the foot of the petition, at the office of the Registrar and <u>shall be lodged within thirty days after the date of the breach of the Constitution complained of in the petition</u>."** (emphasis added).

That rule clearly conflicts with article 3(4)(a) which sets no time limit. Ms Mayanja submitted that the scope and purpose of this rule is to ensure that constitutional cases are attended to expeditiously. I agree that Constitutional cases are very important and that they must be given priority to dispose of them expeditiously. In fact even article 137(7) supports that view when it provides that:-

> **"…. The Court of Appeal shall proceed to hear and determine the petition as soon as possible and may, for that purpose, suspend any other matter pending before it."**

This provision shows however, that the urgency starts when a petition is filed not before it is filed. To extend the reasoning of expeditious dealing with Constitutional cases to the period before filing the petition exceeds what the makers of the Constitution had intended. Such a move leads to stifling the citizens' right to access to the Constitutional Court. That is not what the makers of the Constitution intended.

Mulenga JSC observed in Ismail Serugo (supra) thus:-

> **"I do appreciate that any constitutional case is very important and once it is filed it must be attended to expeditiously so that a constitutional issue is not left in abeyance for unduly long. The Constitution expressly commands the Court concerned to give the priority to such cases. However, to extend that reasoning to the period prior to he filing of a petition, can lead to unintended difficulties."**

Oder JSC saw irony in the rule and said,

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

It is clear from article 3(4)(a) that the right and duty created therein are exercisable under specified situations. The imposing question then is, whether the facts of this case bring it within any of those situations stated in the article? I think so. The provision by rule 4(1) of the time limit within which a citizen must file his/her petition when article 3(4)(a) does not set such a time limit amounts to a variation of what the article provides. The word "amend" is defined in Section 2 of the Interpretation Decree No. 18 of 1976 to:-

> "include repeal, revoke, rescind, cancel, replace, add or to **vary** and the doing of any two or more of such things simultaneously or in the same written law."

This fits within the definition of the word "amendment" as given by Kanyeihamba, JSC in **Paul Ssemogerere and others vs the Attorney General, Constitutional Petition Appeal No. 1 of 2002**. That amendment is not in accordance with the provisions of the Constitution. In such a situation, the petitioners were entitled under article 3(4) to take steps to defend the Constitution.

In **The Queen vs Big Drug Mart Ltd (other intervening)** (1996) LRC (Const) 332, the Supreme Court of Canada held that both purpose and effect are relevant to determine constitutionality of a legislation. This case was cited with approval by the Supreme Court of Uganda in **Attorney General vs Salvatori Abuki, Constitutional appeal No. 1 of 1998**.

In the instant case, the effect of application of rule 4(1) of Modifications To The Fundamental Rights And Freedoms (Enforcement Procedure) Rules 1992, Directions, 1996 (Legal Notice No 4 of 1996) is clearly inconsistent with article 3(4)(a) of the Constitution. It sets time limit within which a citizen must file a petition when article 3(4)(a) does not set such a limitation. The rule is, therefore, unconstitutional. I intended to so declare. That was the reason, which prompted me to agree with my colleagues to overrule the preliminary objection.

Turning now to considering the merits of the petition itself, two issues were framed as follows for determination of the court:-

(1) Whether the impugned sections of the Divorce Act are inconsistent with the stated articles of the Constitution as alleged;

(2) Whether the petitioners are entitled to the reliefs sought.

I have stated earlier in this judgment that I agree with my Lord Justice Twinomujuni, JA that the petition must succeed. I have only one or two observations to make for emphasis only.

(1) **Evidence:**

The affidavit evidence in support of the petition shows that sections 4(1) + (2); 5, 21, 22, 23, 24 and 26 of he Divorce Act discriminate on the basis of sex. Peter Ddungu Matovu and Andrew Lomonya deponed to what they personally experienced when they sought legal advice to institute divorce proceedings to terminate their respective marriages with their wives. Norah Matovu Winyi, the chairperson of the first petitioner, deponed to her practical experience with her clients seeking divorce. Dora Byamukama and Professor Oloka-Onyango deponed to their knowledge as lawyers on the interpretation of the impugned sections of the Divorce Act vis a vis the stated articles of the Constitution. According to them these sections discriminate on the basis of sex and therefore inconsistent with stated article of the Constitution.

There is in my view, no serious dispute in the evidence before us. Mr. L. Tibaruha, the acting Solicitor General deponded an affidavit in support of the respondent's answer to the petition. His affidavit is to the effect that the impugned sections of the Divorce Act are not inconsistent with the stated articles of the Constitution because article 273(1) of the Constitution empowers courts among others to repeal, modify, add or adapt such laws to bring them into conformity with this Constitution or otherwise for giving effect to the Constitution.

Presenting his argument, Ms Mayanja contended that the divorce Act is or the impugned sections thereof are not inconsistent with the Constitution because of article 273(1). According to her, under this article, courts are enjoined to construe the existing law with the necessary modifications, adaptations, qualifications and exceptions as may be necessary to bring them or any of them within the Constitution.

Mr. Karugaba respondent that article 273 must be read together with article 274. The latter article provides for the making by the first President of law for Modification of existing law. Mr. Karugaba submitted that failure to comply with article 274 has produced practical difficulties in the application of article 273(1).

(2) The above arguments raise the question how courts should apply article 273(1)?

Other jurisdictions with similar provisions in their Constitutions like our article 273(1) have considered their provisions. Their consideration may offer guidance to us.

In Tanzania, their Constitution of 1984 contains section 4(1) of Act 16 of 1984 which provides in alia:-

> **"… The court will construe the excating law, including customary law with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity wit the provisions of the Fifth Constitutional Amendment Act 1984 ie Bill of Right."**

In **Ephrahim vs Pastory and Another**, Civil Appeal No 70 of 1989 (1970) LRC (Const) 757, the Tanzania court was confronted with a case where customary law was alleged to be inconsistent with a provision of the Bill of Rights. A woman in one of the clans in Tanzania had validly inherited a piece of land from her father by will. She later sold the land to a non-clan member. Their customary law does not allow a female member of the clan to sell clan's land. The position was different for a male member of the clan. Her nephew sued the buyer to recover the land claiming that the sale was void as under their customary law a female member, like his aunt, could not sell clan's land. The trial Magistrate ruled that the female member of the clan had the right under the Constitution to sell the clan land and that a male member had the right to redeem it only on refunding the purchase price.

On appeal, the Tanzanian Court of Appeal upheld that decision stating that the customary law, as an existing law was construed as modified to be void for being inconsistent with the provision of the Bill of Rights that provides against discrimination on the basis of sex.

In Zimbabwe, their Constitution which came into force in 1980, has section 4(1) which is in parimateria with our article 273(1). In the case of **Bull vs Minister of Home Affairs (1987) LRC (Const) 547** a certain provision in their Criminal Procedure and Evidence Act Cap 59 restricted the right to bail. This was alleged to be in conflict with the right to liberty in the Bill of Rights. Court agreed that if indeed that provision in the Criminal Procedure Act was inconsistent with the right to liberty prescribed in the Bill of Rights **then it would be taken as modified such that it did not exist but void**. However, the learned judge found as a fact that the section in question was not inconsistent with any provision in the Bill of Rights. The Supreme Court of Zimbabwe agreed with the reasoning of the trial judge.

The above cases provide persuasive guides as to how article 273(1) should be applied. The general principle of statutory interpretation is the purposive one. That meant that the purpose of the statute must be determined. In the instant case, what is the purpose of the article and what did the makers intend to achieve by it. What mischief did they intend to remedy.

Article 273(1) provides:

> "Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall be affected by the coming into force of this Constitution **but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution."** (Emphasis added).

I think that the message which the makers of the Constitution intended to send out in that article is loud and clear. They enjoined courts to clear away existing laws that they find to be inconsistent with any provision of the Constitution. They are to do that by modifying them such that they do not exist but void. That does not prevent the Constitutional Court from declaring such a law unconstitutional.

In the instant case, the evidence available reveals that sections 4(1) & (2), 5, 21, 22, 23, 24 and 26 of the Divorce Act discriminate on the basis of sex. This brings them into conflict with articles 21(1) (2), 31(1) and 33(1) & (6) all of which provide against discrimination on the basis of sex. This is a ground for modifying or declaring them void for being inconsistent with these provisions of the Constitution. To the extent that these sections of the Divorce Act discriminate on the basis of sexes, contrary to articles 21(1) & (2), 31(1) & 33(1) & (6) of the Constitution, they are null and void. This means that the grounds for divorce stated in section 4(1) & (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 24) and settlement under section 26 are now applicable to both sexes.

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

In the result, I would allow the petition. I would declare that all the above impugned sections of the Divorce Act are inconsistent with the above stated articles of the Constitution. They are, therefore, unconstitutional and void. As all the other Justices on the panel agree, the petition is hereby allowed. All the impugned sections of the Divorce Act are declared unconstitutional and void for being inconsistent with the stated articles of the Constitution. No order is made as to costs since the petitioners prayed so.

Dated at Kampala, this……..10th……day of…….March,……2004.

G. M. OKELLO.
JUSTICE OF APPEAL.