**Baku and another v Attorney-General**

**Division:** Constitutional Court of Uganda at Kampala

**Date of judgment:** 11 March 2005

**Case Number:** 4 and 6/02

**Before:** Mpagi-Bahigeine, Engwau, Twinomujuni, Byamugisha and

Kavuma JJA

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*[1] Constitutional law – Election petitions – Whether an election petitioner can appeal to the Supreme*

*Court from the Court of Appeal – Whether section 67*(*3*) *of the Parliamentary Elections Act of 2001 is*

*inconsistent with the Constitution.*

**JUDGMENT**

**Mpagi-Bahigeine JA:** I have read in draft the lead judgment of my learned sister Byamugisha JA. I respectfully disagree that this petition lacks merit. I agree with Twinomujuni JA that it ought to succeed and this judgment is just for emphasis in that respect.

Both petitioners, Baku Raphael Obudra and Obiga Kania, filed this petition under Article 137 of the

Constitution of Uganda, 1995 and the Fundamental Rights and Freedoms (Enforcement Procedure)

Rules, 1992.

The petition challenges the constitutionality of section 67(3) of the Parliamentary Elections Act of

2001.

Both petitioners were candidates who contested in the National Parliamentary Elections held on 26

June 2001, in their respective constituencies. Each lost the elections and decided to petition the High

Court, where both lost.

They filed separate electoral appeals to the Court of Appeal which were dismissed with costs. They wished to exhaust their options by appealing to the Supreme Court, the highest appellate court, but were barred by section 67(3) of the Parliamentary Elections Act 2001 which prescribes the appeal to the Court of Appeal to be final. They separately filed Constitutional Petitions, numbers 4 and 6 of 2002, under

Article 137 of the Constitution. These petitions were both dismissed on a technicality. On appeal to the

Supreme Court, the proceedings were remitted back to this Court for disposal on merit, hence this judgment.

At the commencement of the hearing, the two petitions were consolidated by court order, consequent upon which an amended petition was filed. It was supported by the petitioners’ affidavits, which were similar in content and substance.

The petitioners sought the following declarations, namely that:

(i) Section 67(3) of the Parliamentary Elections Act is inconsistent with Articles 140 and 86 of the

Constitution of Uganda, 1995 and therefore is null and void.

( ii) Section 67(3) of the Parliamentary Elections Act infringes on the petitioners’ rights under the

Constitution of the Republic of Uganda, 1995.

( ii) The court makes an order declaring the petitioner’s right of appeal to the Supreme Court.

The issues for determination by the court were:

1. Whether the petitioners do not have a right of appeal to the Supreme Court in Election Petitions.

2. Whether section 67(3) of the Parliamentary Elections Act 8 of 2001 is inconsistent with Articles 140,

86(1) and (2), and 2(2) of the Constitution.

3. whether the petitioners are entitled to the relief sought.

Mr *Akampumuza*, learned Counsel for the petitioners, submitted as follows:

“Article 140 read together with Articles 86(1)(*a*), 28(1) and 44(*c*) of the Constitution vest jurisdiction of appeals in the Supreme Court.

Article 86(1) vests the High Court with original jurisdiction to hear and determine Elections Petitions. Article

86(2) prescribes the right of appeal to the Court of Appeal and 86(3) stipulates Parliament’s power to make a law regarding petitions and who may petition.

Article 140(1) makes cross-reference to Article 86, which means that the two Articles were complementary. It is noteworthy that the marginal note to Article 140 refers to ‘Hearing of Election Cases’. Thus, Article 140 is complete by reference to Article 86. Similarly Article 86 is incomplete without reading it with Article 140.

Article 86 gives a right of appeal to the Court of Appeal but is silent in as far as the appeal to the Supreme Court is concerned. The silence is answered by Article 140 which by cross reference applies to Article 86 and clearly gives a right of appeal to the Supreme Court in election matters complained of by the petitioners. The marginal note to Article 140 clearly read together with the cross-reference to Article 86, brings out the intentions of the framers of the 1995 Constitution.

Ordinarily matters of the Constitution are specifically and expressly stated in the Constitution. If it intends that a matter is not appealable it states so eg Article 64(1), (3) and (4) with regard to appeals from Commissions where the finality is clearly brought out in Article 64(4).

Article 86(2) gives special right to an aggrieved person to appeal to the court but does not in any way preclude appeals beyond the Court of Appeal. Reading the Articles together it becomes clear that Article 140 provides an appeal to the Supreme Court. The court should apply the principle of harmonisation of the Articles and find that section 67(3) is inconsistent with Articles 140, 86(1) and (2) and (3); 44(c) and 28(1) and thus unconstitutional, as it amends the Constitution without going through the proper procedure.

Under Article 79(1) Parliament is mandated to make laws only subject to the Constitution. Under Article

86(3) Parliament is only mandated to make provisions or laws with respect to persons eligible to petition the

High Court and the manner in which to petition. Pray allow the petition.”

Submissions by Mr Alfred *Oryem*, learned State Attorney in reply:

“The petition lacks merit. The right of appeal is a creation of statute. There is no such thing as inherent appellate jurisdiction. *Attorney-General v Shah* [1971] EA 50.

The Supreme Court does only have inherent jurisdiction created under Article 104 of the Constitution to handle election petitions of the President. In ordinary election petitions, Article 86(2) creates the appellate jurisdiction of Court of Appeal while the High Court retains the original jurisdiction.

As regards Article 140 it is not concerned with appellate jurisdiction of the courts but with expeditious disposal of matters before court. Article 86 is conclusive regarding election petitions and the right of appeal in election matters.

The scheme of drafting of the Constitution supports that view.

Article 86 is in Chapter 6 under which various Articles concerning legislature are found. If there was the intention of second appeal to the Supreme Court such a right should have been created under Article 86.

In passing section 67(3) Parliament was exercising its powers under Article 86(3). The wording of section 67(3) does not add anything to Article 86(2). Section 67(3) is thus consistent with Article 86(2). Article 86 is conclusive on the issue of right of appeal. The right of appeal and jurisdiction cannot be inferred from Article 140.

The reference in Article 140 to Article 86(1) is superfluous and inadvertent, where the Constitution creates a right of appeal, it states so expressly like in Article 64.

When section 67(3) was enacted, the right of appeal was embodied in the Constitution. It already existed. It lay in the Supreme Court before the creation of the Court of Appeal which replaces the Supreme Court in electoral matters.

Section 67(3) was enacted under the mandate of Article 86(3). Article 86 is conclusive and need not be read with any other Article. Section 67(3) of the Act is in conformity with the Constitution and Article 86. It does not purport to amend any Article of the Constitution.

Pray find issue number 1 in the negative and also find that the petitioners are not entitled to any remedies.

Even if court found otherwise, it should exercise its powers not to grant declarations sought, as it would open up a floodgate for numerous application to file appeals out of time leading to chaos in Parliament.

The rationale behind stopping electoral proceedings at the Court of Appeal level is to ensure that electoral matters do come to a definite and speedy end so that members of Parliament can start serving the country.

Pray disallow the petition.”

Such were the submissions by both counsel.

Section 67 of the Parliamentary Elections Act reads:

“67 (1) A person aggrieved by the determination of High Court or hearing an election petition may appeal to the Court of Appeal against the decision.

( 2) The Court of Appeal shall proceed to hear and determine an appeal under this section expeditiously and may for that purpose, suspend any other matter pending before it.

The impugned subsection states:

(3) The decision of the Court of Appeal in an appeal under this section is final.”

Article 86 provides:

“86 (1) The High Court shall have jurisdiction to hear and determine any question whether:

(*a*) a person has been validly elected a member of Parliament or the seat of a member of Parliament has become vacant, or

(*b*) a person has been validly elected as Speaker or Deputy Speaker or having been so elected, has vacated that office.

( 2) A person aggrieved by the determination of High Court under this Article may appeal to the Court of Appeal.

( 3) P arliament shall, by law, make provision with respect to:

(*a*) the persons eligible to apply to the High Court for determination of any question under this Article; and

(*b*) the circumstances and manner in which and the conditions upon which any such application may be made.”

And Article 140 states:

“140 (1) Where any question is before the High Court for determination under clause (1) of Article 86 of this Constitution, the High Court shall proceed to hear and determine the question expeditiously and may, for that purpose, suspend any other matter pending before it.

( 2) The Article shall apply in a similar manner to the Court of Appeal and the Supreme Court when hearing and determining appeals on questions referred to in clause (1) of this Article.”

It is apparent that the entire Article 86 deals with the jurisdiction of the High Court and the procedure to dispose of election petitions and the right of an aggrieved party to appeal to the Court of Appeal.

Article 140(1) specifically refers to Article 86(1) which confers jurisdiction to the High Court in electoral matters and prescribes the procedure that such matters shall be expeditiously disposed of and shall take priority over everything else.

Article 140(2) also specifically states that the entire Article shall similarly apply to the Court of

Appeal and the Supreme Court when hearing and determining appeals on questions referred to in clause (1) of the same Article 140. This makes a cross-reference to Article 86(1) dealing with election petitions before the High Court.

In view of the foregoing I cannot agree, as suggested by Mr *Oryem*, that Article 140(2) is in reference to the jurisdiction of the Supreme Court when dealing with the Presidential election petitions under Article 104. This is because the opening language of Article 104 sufficiently indicates that the Article is self-sustaining. It sets its own time frame and makes specific cross-references where it is so desired for its completeness.

This Article reads:

“104 (1) subject to the provisions of this Article, any aggrieved condition may petition the Supreme

Court for an order that a candidate declared by the Electoral Commission elected as President was not validly elected.

(2) A petition under clause (1) of this Article shall be lodged in the Supreme Court registry within ten days after the declaration of the election results.

(3) The Supreme Court shall inquire into and determine the petition expeditiously and shall declare its finds not later than thirty days from the date the petition is filed.

(4) W here no petitions filed within the time prescribed under clause (2) of this Article, or where a petition having been filed, is dismissed by the Supreme Court, the candidate shall conclusively be taken to have been duly elected as President.

104 (8) Makes a cross-reference to Article 98(4) that the President shall not be liable to court proceedings while holding office.

104 (9) Parliament is to make laws for purposes of this Article including laws for grounds of annulment and rules of procedure.”

The above wording indicates that anything to do with the Presidential elections is exclusively dealt with under Article 104. It is important to note that clause 3 is similar to clause (1) of Article 140(1). There would therefore be no need for cross-reference in which case this can only support a finding that the reference to the Supreme Court in 140(2) can only be in respect to other election petitions emanating from the High Court and Court of Appeal, than the Presidential election petition.

The above finding is reinforced by the Judicature Act (Chapter 13) Uganda Laws, 2000 at 235 which is an act consolidating and revising the Judicature Act to take account of the provisions of the Constitution relating to the Judiciary. Its commencement date was May 1996, which is after the commencement date and promulgation of the 1995 Constitution on 8 October. It is significant that section 6 of the said Act, which deals with Appeals to the Supreme Court in civil matters reads:

“6(1) An appeal shall be as of right to the Supreme Court where the Court of Appeal confirms, varies or reverses a judgment or order, including an interlocutory order, given by the High Court in the exercise of its original jurisdiction and either confirmed, varied or reversed by the Court of Appeal.”

I cannot therefore escape from the conclusion that an appeal lies to this Supreme Court in this matter.

Furthermore, while it is correct that appellate jurisdiction springs form statute and that there is no inherent appellate jurisdiction – *Attorney-General v Shah* (4) [1971] EA 50, sight should not be lost of the fact that this statutory power emanates from the Constitution. It is my opinion that this principle presupposes a situation where there is no apparent conflict between any law and the Constitution. In *Shah*’s case (*supra*) the right of appeal had previously existed but had been repealed and not re-enacted.

There was thus, a vacuum but not a conflict with the Constitution as is the position with the case before us.

Reading all the relevant Articles together, 86, 132 and 140, I consider Article 132 to be dealing with general appellate jurisdiction of the Supreme Court, while Articles 86 and 140 specifically deal with electoral matters as evidenced by the marginal notes thereto. The marginal note to Article 86 reads.

“Determination of questions of membership” (of the Legislature), while the marginal note to Article 140 states “Hearing of election cases”.

Article 86(2) is noteworthy. It provides:

“(2) A person aggrieved by the determination of the High Court under the Article may appeal to the Court of Appeal, ” it does not go any further to state that the appeal shall be final. If it were the intention of the framers that the appeal should stop at that level, it should have stated so, in no uncertain terms.”

In this respect, Mr Alfred *Oryem*’s argument was that where the Constitution creates a right of appeal, it states so expressly like in Article 64. He remarkably stopped short of saying that where none is intended, it also says so as in Article 64(4) where it states:

“64(4) A decision of the High Court on an appeal under clause (1) or clause (3) of this Article shall be final”

In my view a provision like clause 4 of Article 64 would have been the likely sequel to Article 86(2). In its absence I am constrained to agree with Mr *Akampumuza* that Article 140(2) logically fills the vacuum and is clearly meant to confer jurisdiction to the Supreme Court to hear and determine appeals in electoral appeals from the Court of Appeal.

In constitutional interpretation it is trite that constitutional rights conferred without express limitation are not to be whittled down by reading implicit restrictions into them. It will be sacrilege, therefore, to put a restriction on the petitioners’ right of access to the highest appellate court in the land when this right is clearly guaranteed under Articles 132 and 140(2).

Section 67(3) of the Parliamentary Election Act which declares electoral appeals to the Court of Appeal to be final was made under Article 86(3). Under Articles 79 and 2(2) Parliament is only empowered to enact laws subject to the Constitution and not otherwise, bearing in mind the supremacy of the Constitution over any other law to the contrary. Section 67(3) of the Act is thus clearly inconsistent with Articles 86(1) and (2), 140 and 2(2) of the Constitution.

I, thus, agree with the findings of Twinomujuni JA and would answer issue number 1 in the affirmative and declare that the petitioners do have a right of appeal to the Supreme Court in election petitions.

I would also answer issues number 2 and 3 in the affirmative.

Regarding the respondent’s fear of the repercussions of this judgment that it would open a floodgate of applications to file petitions out of time, I do not think these fears are well grounded considering the fact that this judgment might not be the end of this judicial process yet. Article 132(3) avails a party aggrieved by this Court’s decision, a further right of appeal to the Supreme Court.

However, be that as it may, since my Lords Engwau, Byamugisha and Kavuma JJA are all of the contrary view that the petition lacks merit, it is thus so dismissed by the majority of 3 to 2 with costs to the respondent.

**Engwau JA:** I had the benefit of reading, in draft, the judgment prepared by Byamugisha JA and I entirely agree with it. I would like, however, to comment on the following matters for emphasis only.

The petitioners, Baku Raphael Obudra and Obiga Kania, filed separate petitions seeking declarations under Article 137 of the 1995 Constitution. Their petitions were subsequently consolidated for the following declarations:

1. That section 67(3) of the Parliamentary Elections Act of 2001 is inconsistent with Articles 140 and 86 of the Constitution and therefore null and void.

2. That the said section infringes on the petitioner’s rights under the Constitution.

3. That an order declaring the petitioner’s right of appeal to the Supreme Court be made.

4. That the petitioners be awarded costs.

The brief background to the consolidated petitions is that on 26 June 2001, Parliamentary Elections were held throughout the country. The petitioners, (hereinafter referred to as first and second petitioners respectively) contested in two separate constituencies and each one lost. Being dissatisfied with the results, both of them filed separate petitions in the High Court at Gulu. On 23 January 2002, Kania J dismissed the petition of the first petitioner. The following day, 24 January 2002 Aweri Opio J also dismissed the petition of the second petitioner. Both of them appealed separately to the Court of Appeal, which also dismissed their appeals with costs. They then filed separate petitions to the Constitutional

Court which consolidated them but dismissed the claim on a technical ground. As a result, they appealed to the Supreme Court which allowed their appeal and ordered the Constitutional Court to hear their petitions on merit. Each petitioner swore an affidavit in support of his petition. The respondent filed an answer supported by an affidavit of Ms Clare Olaki, a state attorney, in the chambers of the respondent.

At the hearing of the petition, the following issues were framed:

1. Whether section 67(3) of the Parliamentary Elections Act, 2001 is inconsistent with Articles 140,

86(1) and (2) and 2(2) of the Constitution.

2. Whether the petitioners are entitled to the relief sought.

Section 67(3) of the Parliamentary Elections Act (herein referred to as the Act) states:

“67(3) The decision of the Court of Appeal in an appeal under this section is final.”

Article 86(1) and (2) of the Constitution reads:

“86 (1) The High Court shall have jurisdiction to hear and determine any question whether:

(*a*) a person has been validly elected a member of Parliament or the seat of a member of Parliament has become vacant; or

(*b*) a person has been validly elected as Speaker or Deputy Speaker or having been so elected, has vacated that office.

( 2) a person aggrieved by the determination of the High Court under this Article may appeal to the

Court of Appeal.

( 3) . . .

Article 140 of the Constitution states:

“140 (1) Where any question is before the High Court for determination under clause (1) of Article 86 of this Constitution, the High Court shall proceed to hear and determine the question expeditiously and may, for that purpose, suspend any other matter pending before it.

( 2) This Article shall apply in a similar manner to the Court of Appeal and the Supreme Courtwhen hearing and determining appeals on questions referred to in clause (1) of this Article.”

On the other hand, Article 2(2) of the Constitution provides:

“2(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or customs shall, to the extent of the inconsistency, be void.”

Mr Henry *Rwaganika* and Mr James *Akampumuza* represented the petitioners while Mr Okello *Oryem*,

state attorney, was for the respondent.

On the framed issues, Mr *Akampumuza*, learned Counsel for the petitioners, submitted that when

Article 140 is read together with Article 86, the Constitution vests an appellate jurisdiction in election petitions from the Court of Appeal to the Supreme Court. Learned counsel pointed out that Article 140 makes a cross reference to Article 86, in that the latter is incomplete unless read together with the former

Article. Article 86, according to counsel, gives a right of appeal to the Court of Appeal in election petitions but it is silent about appeals to the Supreme Court. In counsel’s view, that silence is resolved by

Article 140.

It was, therefore, the petitioner’s case that an attempt by section 67(3) of the Act to try to limit the right of appeal from the Court of Appeal to the Supreme Court, Parliament has amended Articles 86 and 140 of the Constitution without following the correct procedure envisaged in the Constitution. In counsel’s view, section 67(3) of the Act is inconsistent with Articles 140, 86(1) and (2) and 2(2) of the Constitution and therefore null and void.

Mr Alfred Okello *Oryem*, learned State Attorney for the respondent, did not agree. The respondent’s case, according to him, is that section 67(3) of the Act is not inconsistent with Articles 140 and 86 or any Articles of the Constitution. He contended that the impugned section of the Act does not infringe a right of appeal in election matters because no such rights exist in our Constitution. In his view, the right of appeal is a creation of a statute and there is no such inherent appellate jurisdiction in Uganda. In support of that proposition, he relied on the case of *Attorney-General v Shah* [1971] EA 50.

Learned State Attorney pointed out that the Court of Appeal has appellate jurisdiction created by

Article 86(2) of the Constitution. It is the High Court which has original jurisdiction under Article 86(1).

In his view, the provisions of Article 140 are concerned not with appellate jurisdictions of the courts but expeditious disposal of election matters before the courts.

Mr Okello *Oryem* further submitted that Article 86 is conclusive on the issue of jurisdictions of the courts and the rights of appeal on election matters. Article 86(1) confers jurisdiction to the High Court on election of members of Parliament, Speakers and Deputy Speakers. Article 86(2) creates the right of appeal on the decision of the High Court on election matters. It was his contention, therefore, that since it is this Article 86 which is concerned with the hearing and determining of election petitions, if there was an intention of a second appeal to the Supreme Court, such a right would have been created under that

Article. Since such a right was not created, he submitted that no second appeal was ever intended to the

Supreme Court.

Learned State Attorney further pointed out that in clause (3) of Article 86, Parliament was vested with the power to enact a law, setting the procedure and circumstances under which election appeals should be made. In enacting section 67(3) of the Act, Parliament was exercising its powers under clause (3) of

Article 86. The section, in his view, was consistent with the Constitution in that it was conclusive on the jurisdiction of courts and the right of appeal in election petitions. The cross-reference in Article 140 to

Article 86, according to him, was simply superfluous and inadvertent by the framers of Constitution.

In conclusion, Mr Okello *Oryem* submitted that section 67(3) of the Act does not purport to amend any Article of the Constitution, and it is, therefore, not null and void. In that respect it is not inconsistent with Articles 140 and 86 or any Article of the Constitution. In his view, the petitioners are, therefore, not entitled to any remedy but instead their petition should be dismissed with costs to the respondent.

It is trite law that jurisdiction is created by a statute. In the case of *Attorney-General v Shah* (*supra*) it was stated thus:

“It has long been established and we think there is ample authority for saying that appellate jurisdiction springs only from statute. There is no such thing as inherent appellate jurisdiction.”

In the case of the Supreme Court, its appellate jurisdiction is created, according to my observation, by

Article 132 of the Constitution, sections 4 and 7 of the Judicature Act:

Article 132 reads:

“132 (1) The Supreme Court shall be the final Court of Appeal.

(2) A n appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law.

(3) . . .

( 4) . . .”

On the other hand, section 4 of the Judicature Act states:

“4. An appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as are prescribed

By the Constitution, this Act or any other law.”

Section 7(1) provides:

“7(1) An appeal shall lie as of right to the Supreme Court where the Court of Appeal confirms, varies or reverses a judgment or order including interlocutory order given by the High Court in the exercise of its original jurisdiction and either confirmed, varied or reversed by the Court of Appeal.”

My understanding of the above provisions is that the Supreme Court is empowered to entertain appeals from the Court of Appeal as the Constitution, the Judicature Act or any other law may prescribe. That being the case, the law governing election petitions is in Article 86 of the Constitution, Parliament in exercise of the powers vested in it enacted section 67(3) of the Parliamentary Election Act. In that section, the decision of the Court of Appeal in election petition appeals is final. It was submitted, however, that by cross-reference in Article 140 to Article 86, the Constitution vests appellate jurisdiction to the Supreme Court in election petitions. It was further submitted that section 67(3) of the Act attempts to amend Articles 140 and 86 without following the right procedure laid in the Constitution.

My answer to the preceding submissions is that Article 140 of the Constitution empowers the Supreme Court and the Court of Appeal to hear and determine any appeal referred to them expeditiously.

The cross-reference in Article 140 to Article 86 does not confer appellate jurisdiction, in my view, to the

Supreme Court in election petitions. If that was the intention of the framers of the Constitution, they would have stated so explicitly. In my view, the omission was deliberate. The Court of Appeal was intended to be the last and final court of appeal in election petitions. Therefore, section 67(3) of the Act is not inconsistent with Articles 140, 86(1) and (2) and 2(2) of the Constitution.

In result, I would dismiss the petition in the terms proposed by Byamugisha JA.

**Byamugisha JA:** The petitioners in their amended separate petitions filed on 24 November 2004, are seeking declarations under the provisions of Article 137 of the Constitution. They are asking this Court to make the following declarations and orders as contained in paragraphs 3 of Baku’s and Kania’s amended petitions respectively.

1. That section 67(3) of the Parliamentary Elections Act (hereinafter called the Act) is inconsistent with

Articles 140 and 86 of the Constitution and therefore null and void.

2. The section infringes on the petitioners, rights under the Constitution.

3. Make an order declaring the petitioner’s right of appeal to the Supreme Court.

4. Costs of the petition be awarded to them.

The facts that led to the institution of the petitions are not in dispute. The petitioners were candidates who contested in the Parliamentary Elections that were held throughout the country on 26 June 2001.

They were unsuccessful. Being dissatisfied with the outcome of those elections, they filed separate election petitions in the High Court Registry at Gulu High Court Circuit. On 23 January 2002, the High

Court (Kania J) dismissed the petition of Baku Raphael Obdura and the following day, the same court

(Aweri Opio J) dismissed the petition of Obiga Kania.

Consequently, they both filed appeals to the Court of Appeal that were dismissed with costs. It is the dismissal of those appeals that gave rise to the instant petitions. Each petitioner deponed an affidavit in support of the contents of the petition.

The respondent filed an answer opposing the petitions. It was supported by an affidavit sworn by

Clare Olaki, a state attorney, in the respondent’s chambers. In the answer and the affidavit, it was averred that the allegations contained in paragraphs 1 and 2 of the petition were false. It was further averred that the provision of section 67(3) of the Act is in no way inconsistent with Article 140 or any other Article of the Constitution. The petitions were consolidated for purposes of the trial.

At the commencement of the trial, the following issues were framed for our determination, namely:

1. Whether section 67(3) of the Parliamentary Elections Act is inconsistent with Articles 140, 86(1) and

(2), and 2(2) of the Constitution;

2. Whether the petitioners are entitled to the relief sought.

In submitting on the first issue Mr *Akampumuza*, learned Counsel for the petitioners, stated that Article

140 of the Constitution has to be read together with Articles 86(1)(*a*) and 44(*c*) in order to understand that the Constitution vests jurisdiction of appeals in election matters in the Supreme Court. He claimed that Article 140 makes direct connection to Article 86 by cross-reference and that the latter Article is incomplete without reading it with the former. It was the petitioners’ case that Article 86 gives the right of appeal to the Court of Appeal but it is silent in as far as appeals to the Supreme Court are concerned and the silence is answered according to the learned Counsel by Article 140.

It was his contention that Article 86(2) gives a special right to an aggrieved person to appeal to the

Court of Appeal but it does not preclude any appeals beyond that court. He pointed out that the marginal note to Article 140 shows that it is a special and specific provision dealing with hearing of election petitions prescribing whole range of standards of how election matters should be handled from the High

Court to the Supreme Court. He further pointed out, the Constitution by cross-reference subjects Article

140 to Article 86 and this clearly brings out the intention of the framers of the Constitution. Learned counsel also submitted that in trying to limit the right of appeal to the Supreme Court, Parliament tried to amend Articles 86 and 140 of the Constitution. It was his contention that the end result is that such law would be inconsistent with the Constitution and this renders section 67(3) of the Act inconsistent with the Constitution and therefore null and void. He invited us to hold so.

Mr Okello *Oryem*, learned State Attorney who represented the respondent, did not agree with the above submissions. He submitted that the impugned section was not inconsistent with the Articles mentioned in the petition as alleged. He stated that the section does not infringe the rights of the petitioners to appeal to the Supreme Court because no such right exists in the first place. He pointed out that the right of appeal is created by statute and that there is no such a thing as an inherent right of appeal in Uganda. He cited to us the case of *Attorney General v Shah* (4) [1971] EA 50 for that contention. It was his submission that Article 140 was not concerned with appellate jurisdiction of the courts mentioned therein but with expeditious disposal of election petitions. According to him, the Article does not create or confer any original or appellate jurisdiction. He did not agree that Article 86 is inconclusive on matters of jurisdiction, as Mr *Akampumuza* had submitted. He further submitted that Article 86(3) had conferred powers on Parliament to enact the Act, including the impugned section, and its enactment did not purport to amend the Constitution. According to him, the section is not inconsistent with any Article in the Constitution but was in conformity with it. He invited us to dismiss the petition and declare that the impugned section is not inconsistent with any Article in the Constitution.

I think the law has long been established that jurisdiction is a creature of statute. The word itself is not defined in the Constitution. But in simple language, it means the power of a court or a judge to hear and entertain an action, petition or other proceedings. In the case of *Attorney-General v Shah* (*supra*) the brief facts were that the High Court made orders of *mandamus* against two officers of Government under section 34 of the 1967 Judicature Act. Sub-section (3) of that section contained the following words “subject to any right of appeal, the order shall be final”. The Attorney-General filed an appeal against the orders of *mandamus* basing himself on that subsection. The respondent objected to the appeal on the ground that the Court of Appeal had no jurisdiction to hear the appeal. In upholding the objection, Spry

AP (as he then was) in the lead judgment with which other members of the court agreed, said:

“It has long been established and we think, there is ample authority for saying that appellate jurisdiction springs only from statute. There is no such thing as inherent appellate jurisdiction.”

The appellate jurisdiction of the Supreme Court is created by Article 132(2) of the Constitution and section 4 of the Judicature Act. Article 132(2) states as follows:

“An appeal shall lie to the Supreme Court from decisions of the Court of Appeal as may be prescribed by law.”

Section 4 provides as follows:

“An appeal shall lie to the Supreme Court from decisions of the Court of Appeal as are prescribed by the

Constitution, this Act or any other law.”

A proper reading of the above provisions indicate to me that the Supreme Court can only entertain appeals from the Court of Appeal as the Constitution, the Judicature Act or any other law may prescribe.

In the case of election matters, the law applicable is Article 86 of the Constitution under Chapter 6. The

Article states as follows:

“(1) The High Court shall have jurisdiction to hear and determine any question whether:

( *a*) A person had been validly elected a member of Parliament or the seat of a member of

Parliament had become vacant; or

( *b*) A person had been validly elected Speaker or Deputy speaker or having been so elected, has vacated that office.

(2) A person aggrieved by the determination of the High Court under this Article may appeal to the Court of Appeal.

(3) Parliament shall by law make provision with respect to:

( *a*) the persons eligible to apply to the High Court for determination of any question under this

Article; and

( *b*) the circumstances and manner in which and conditions upon which any such application may be made.”

Parliament in exercise of the powers conferred by the sub-Article enacted the Parliamentary Elections

Act (8 of 2001). For purposes of the matters now before us, section 67 concern appeals from the decisions of the High Court in the exercise of its original jurisdiction to the Court of Appeal. It states:

“(1) A person aggrieved by the determination of the High Court on hearing an election petition may appeal to the Court of Appeal against the decision.

(2) The Court of Appeal shall proceed to hear and determine an appeal under this section expeditiously and, may for that purpose, suspend any other matter pending before it.

(3) The decision of the Court of Appeal in an appeal under this section is final.”

Article 140 which is the subject of contention states as follows:

“(1) Where any question is before the High Court for determination under clause (1) of Article 86 of this Constitution, the High Court shall proceed to hear and determine the question expeditiously and may, for that purpose suspend any other matter pending before it.

(2) This Article shall apply in a similar manner to the Court of Appeal and the Supreme Court when hearing and determining appeals on questions referred to in Article (1) of this Article.”

My understanding of this Article is that it enjoins the courts mentioned therein to determine questions referred to them under Article 86 expeditiously. The Article sets standards to be followed, it does not confer jurisdiction to any of the courts mentioned therein. On the other hand, Article 86 confers jurisdiction to the High Court and the Court of Appeal. It does not confer any jurisdiction on the

Supreme Court to hear and determine appeals from the Court of Appeal in the exercise of its appellate jurisdiction.

On the authority of *Attorney-General v Shah* (*supra*) jurisdiction being a creature of statute and the

Constitution being the statute that confers jurisdiction it cannot be said, in my view, that jurisdiction can be inferred by cross-reference. If the framers of the Constitution had wanted election matters to proceed to the highest appellate court in the land they would have stated so in no uncertain terms under Article

86. The omission to mention the Supreme Court in Article 86, as one of the appellate courts was, in my view, deliberate. I think they intended the Court of Appeal to be the last and final court of appeal in election matters.

I am not persuaded by the submissions of learned Counsel for the petitioners that Article 86 is incomplete. I do not consider that the words of Article 140(2) on their proper interpretation can be said to confer a right of appeal or jurisdiction on the Supreme Court to hear and determine such appeals. The learned Counsel had no comments to make about the decision of *Attorney-General v Shah* (*supra*) which

I consider to be good law. It is therefore my considered opinion that section 67(3) is not inconsistent with

Articles 86 and 140 of the Constitution. I would decline to grant the declarations sought and dismiss the petitions with costs to the respondent.

**Kavuma JA:** I have had the benefit of reading, in draft, the judgment of Lady Justice CK Byamugisha

JA and I agree with it.

I only wish to emphasise that it is the law, in my view, that appellate jurisdiction in Uganda is conferred by specific provision of law. There is no such a thing as appellate jurisdiction by inference. In matters of elections of members of Parliament, such appellate jurisdiction is provided for, and in my view conclusively, under Article 86(2) of the Constitution where a person aggrieved by the determination of the High Court under that Article, may appeal to the

Court of Appeal. If the framers of the Constitution had intended that election matters covered under

Article 86 of the Constitution could be the subject of a second appeal to the Supreme Court that should have been specifically stated under that Article.

The constituent assembly, in my view, must have intended that matters concerning disputes of election of members of Parliament should be expeditiously and conclusively settled at the Court of

Appeal level so that successful parties can settle down and serve their electorate and the nation as members of Parliament without the uncertainty that would surround their status pending finalisation of the usually lengthy, expensive and strenuous election litigation. The scheme of drafting the Constitution which places Article 86 in chapter 6 of the Constitution under which various Articles concerning the

Legislature are found further fortifies me in this view. Article 140 of the Constitution is, in my opinion, about hearing of election cases expeditiously. It is not, to my mind, about conferring appellate jurisdiction to any court in matters of elections of members of Parliament. Any reference to Article 86 clause (1) in Article 140(2) must be inadvertent and superfluous.

In the circumstances, I agree with Honourable Lady Justice CK Byamugisha that the petition should be dismissed in the terms proposed by her Ladyship.

**Twinomujuni JA (Dissenting):** These two consolidated constitutional petitions were filed by the petitioners seeking declarations to the effect that:

(i) Section 67(3) of the Parliamentary Elections Act, 2001 is inconsistent with Articles 140 and 86 of the

Constitution of the Republic of Uganda and therefore null and void.

(ii) Section 67(3) of the Parliamentary Act, 2001 infringes on the petitioners’ rights under the Constitution of Uganda.

The brief background to the petition are as follows:

In June 2001, the two petitioners contested Parliamentary elections in two separate constituencies and each lost in his constituency. They separately filed election petitions in the High Court of Uganda and lost. They separately appealed to the Court of Appeal Uganda and lost. Since section 67(3) of the

Parliamentary Elections Act, 2001 appeared to bar their intentions to appeal to the Supreme Court, they filed a constitutional petition in this Court challenging its constitutionality. They lost the petition on a technical objection that it did not disclose a cause of action. They successfully appealed to the Supreme

Court which held that the petition disclosed a cause of action and ordered this Court to hear it on merits, hence these proceedings.

The petition is supported by the affidavits sworn by the petitioners. The respondent filed an answer which is also supported by an affidavit of Ms Clare Olaki, a state attorney in the respondent’s chambers.

There are no disputed facts in this petition. This Court’s decision must turn on a constitutional interpretation of section 67(3) of the Parliamentary Elections Act, 2001 (herein referred to as the Act) and Articles 140 and 86 of the Constitution of Uganda, 1995 (herein referred to as the Constitution).

Section 67 of the Act states:

“67 (1) A person aggrieved by the determination of the High Court on hearing an election petition may appeal to the Court of Appeal against the decision.

(2) The Court of Appeal shall proceed to hear and determine an appeal under this section expeditiously and may, for that purpose, suspend any other matter pending before it.

(3) The decision of the Court of Appeal in an appeal under this section is final.”

On the other hand, Article 86 of the Constitution provides:

“86 (1) The High Court shall have jurisdiction to hear and determine any question whether:

(*a*) A person has been validly elected a Member of Parliament or the seat of a member of

Parliament has become vacant; or

(*b*) A person has been validly elected as Speaker or Deputy Speaker or having been so elected, has vacated that office.

(2) A person aggrieved by the determination of the High Court under this Article may appeal to the

Court of Appeal.

(3) Parliament shall, by law make provision with respect to:

(*a*) The persons eligible to apply to the High Court for determination of any question under this Article; and

(*b*) The circumstances and manner in which and the conditions upon which any such application may be made.”

Article 140 provides:

“140 (1) Where any question is before the High Court for determination under clause (1) of Article 86 of this Constitution, the High Court shall proceed to hear and determine the question expeditiously and may, for that purpose, suspend any other matter pending before it.

(2) This Article shall apply in a similar manner to the Court of Appeal and the Supreme Court when hearing and determining appeals on questions referred to in clause (1) of this Article.”

At the trial of this petition, the petitioners were represented by Mr Henry Rwaganika and Mr James

*Akampumuza* and the respondent was represented by Mr Alfred Okello *Oryem*, a state attorney in the respondent’s chambers.

Mr James *Akampumuza*, learned Counsel for the petitioners, argued the petition on their behalf. The gist of his submissions is that Article 86 read together with Article 140 confer a right of appeal in election petitions from the Court of Appeal to the Supreme Court. He pointed out that 140(1) makes a cross reference to Article 86 and states that appeals in the Supreme Court and the Court of Appeal must be handled expeditiously, as in the High Court and for that purpose may suspend any other pending matters before them. In his view, Article 86 is not complete unless it is read together with Article 140.

He submitted that since the Constitution, in these two Articles, gives a right of appeal from the Court of Appeal to the Supreme Court, an attempt by section 67(3) to limit that constitutional right cannot stand and is unconstitutional and null and void by virtue of Article 2(2) of the Constitution. In his view, if the framers of the Constitution had intended to limit the right of appeal to the Supreme Court, they would have expressly stated so in Article 86 as they did in Article 64(4) in respect of appeals from the decisions of the Electoral Commission and Electoral Tribunals appointed under Article 64(3) of the Constitution.

He urged us to follow the well-established principle of constitutional interpretation to the effect that a

Constitution must be read and interpreted as a whole.

Mr *Akampumuza*’s second and probably alternative argument was that in trying to limit the right of appeal to the Supreme Court in election petitions by section 67(3) of the Act, Parliament tried to amend Articles 86 and 140 of the Constitution without following the procedure laid down in the Constitution. In his view, the resultant law would be inconsistent with the Constitution to the extent of the inconsistency and that would render section 67(3) null and void. He invited us to so hold.

In reply, Mr Alfred Okello *Oryem* submitted that section 67(3) was not inconsistent with Articles 86 and 140 and does not infringe the petitioners’ right to appeal to the Supreme Court because such a right does not exist in our Constitution. He pointed out that a right of appeal is a creature of statute and there is no inherent appellate jurisdiction in Uganda. He referred to the case of *Attorney-General v Shah* (4) [1971] EA 50. He submitted that Article 140 of the Constitution was not concerned with appellate jurisdiction but was only concerned with expeditious disposal of election petitions. It does not create or confer any original or appellate jurisdiction on any court. In his view, Article 86 was conclusive on the jurisdiction of courts and the right of appeal in election petitions. On the subject, Article 86 had not been read with Article 140 or any other Article, as it is complete and conclusive. The cross-reference in Article 140 to Article 86 was merely superfluous and inadvertent and was never intended by the framers of the Constitution. In his view, if they had intended to confer a right of appeal to the Supreme Court, they would have specifically stated so in Article 86 of the Constitution. He submitted further that, under

Article 86(3), Parliament had the mandate to enact the Act including section 67(3) thereof and it did not purport to amend Articles 86 or 140 of the Constitution. In his view, that section is not inconsistent but is in conformity with the Constitution. His prayer is that we declare that section 67(3) of the Act is not inconsistent with any Article of the Constitution.

The main question for resolution in this petition is whether section 67(3) of the Act is inconsistent with Articles 140 and 86 of the Constitution. In order to resolve this question, we must answer two related questions:

(i) Does Articles 86 and 140 of the Constitution confer appellate jurisdiction on the Supreme Court of

Uganda in election petitions?

(ii) If so, what is the legal status of section 67(3) of the Act?

In order to answer the first question posed above, it is necessary to closely examine the provisions of

Articles 86 and 140 of the Constitution. Article 86 (*supra*) confers jurisdiction on the High Court to hear and determine any question as to whether:

(*a*) A person has been validly elected a Member of Parliament or a seat of a member has become vacant; or

(*b*) A person has been validly elected a Speaker or Deputy Speaker or having been so elected, has vacated that office.

Clause (2) of that Article provides that any person aggrieved by the decision of the High Court can appeal to the Court of Appeal. Clause (3) states that Parliament shall, by law, make provisions with respect to:

(*a*) Persons eligible to apply to the High Court for determination of any question under this Article; and

(*b*) Circumstances and manner in which and the conditions upon which any such application may be made.

This Article does not answer the question as to whether an appeal lies to the Supreme Court or not from the decisions of the Court of Appeal.

It does not provide that the appeal to the Court of Appeal is final.

It does not confer power on any authority to determine this issue at all.

It was argued that Article 86(3) confers power upon Parliament to determine that matter. With respect, clause (3) does no such a thing. It only gives Parliament power to make provisions as to who is eligible to petition the High Court and in what circumstance, manner and on what condition. In my judgment, this does not include power to confer original or appellate jurisdiction on any court in election petitions.

Therefore, section 67(3) of the Act could not have been enacted under the authority of Article 86(3) of the Constitution. So we must now go to Article 140 of the Constitution and find out why it was necessary to make a cross reference in there to Article 86(1) of the Constitution. I propose for ease of reference to reproduce here below the provisions of Article 140 of the Constitution.

“140 (1) Where any question is before the High Court for determination under clause (1) of Article 86 of this Constitution, the High Court shall proceed to hear and determine the question expeditiously and may, for that purpose, suspend any other matter pending before it.

( 2) This Article shall apply in a similar manner to the Court of Appeal and the Supreme Court when hearing and determining appeals on questions referred to it in clause (1) of this Article.”

The draftsperson of the Constitution and the Constituent Assembly were aware that Article 86 had left the issue of appellate jurisdiction unresolved. The Article was not conclusive on that matter. The Article had not authorised any other authority to resolve it. Afterall, that Article dealt with resolution of disputes arising from election of members of Parliament and the Speaker. It was never intended to resolve or confer appellate jurisdiction on the Supreme Court. It was deemed it would be better dealt with under the provisions falling under the Judiciary Chapter, such as Article 140 of the Constitution, that is why the

Article makes a cross reference to Article 86(1). A close reading of Article 140(2) shows clearly that the

Court of Appeal and the Supreme Court were enjoined to hear and determine election petitions as expeditiously as the High Court was required to do under Article 140(1) of the Constitution. This clause (2) answered the question which was left hanging by Article 86 of the Constitution. By reading the two

Articles together, the logical and inescapable conclusion is that the Constitution of Uganda settled once and for all the question of appellate jurisdiction in election petitions.

I am fortified in this belief by the provisions of Article 132 of the Constitution and section 7 of the

Judicature Act.

Article 132 provides:

“132 (1) The Supreme Court shall be the final Court of Appeal.

(2) An appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law.”

The expression “by law”, of course, includes the Constitution itself. Articles 86 and 140 prescribed the appellate jurisdiction of the Supreme Court in election petitions. In order to put the matter beyond any doubt, section 7 of the Judicature Act, 1996 provides:

“Section 7: Appeals to the Supreme Court in Civil Matters:

(1) An appeal shall lie as of right to the Supreme Court where the Court of Appeal confirms, varies or reverses a judgment or order including interlocutory order given by the High Court in the exercise of its original jurisdiction and either confirmed, varied or reversed by the Court of Appeal.”

In my judgment, this provision means that once the Court of Appeal disposes of an appeal from the exercise of the original jurisdiction of the High Court, an appeal, as of right, lies to the Supreme Court.

The Judicature Act of 1996 was enacted long before section 67(3) of the Act was enacted. If Parliament genuinely thought that the Constitution had not resolved the issue of appeals in election petitions to the

Supreme Court, it would have provided in section 67(3) as follows:

“Notwithstanding the provision of section 7 of the Judicature Act 1996, the decision to the Court of Appeal under this section is final.”

However, that was not necessary because, in enacting section 67(3) of the Act, Parliament was trying to resolve a matter on which the Constitution had already clearly pronounced itself in Articles 140 and 86.

My answer to the first question posed above, is that Articles 86 and 140 of the Constitution conferred appellate jurisdiction in election petitions on the Supreme Court of Uganda.

I have not been able to discover why Parliament would have wanted to deny election petitioners a right to seek a remedy in the final court of appeal in this land. The significance of having a fair hearing in election petitions cannot be overemphasised. The resolution of electoral disputes not only affects the perception of the population on the independence of the Judiciary but also on the fairness of the electoral process in this country. If a man or a woman is disputing the decision of the Court of Appeal in an election petition, why should he or she be denied the right to test its validity in the highest and final court of appeal in the land, namely the Supreme Court?

It was submitted that Parliament intended that disputes arising from the electoral process should be resolved as quickly as possible, so that the elected candidates are able to assume office quickly to serve their people. With respect, I do not agree with that argument. The Constituent Assembly, in its wisdom, foresaw the problem that could arise as a result of delays in the disposal of election petitions. That is why it enacted Article 140 of the Constitution which commands the High Court, the Court of Appeal and the

Supreme Court to deal with election petitions expeditiously and for that purpose, to put aside all other matters before them. It was not by mere accident that Article 140(2) specifically mentions the Supreme

Court.

I am aware, of course, that in Constitutional appeal number 1 of 2003, *Baku Raphael Obudra and Obiga Kania v The Attorney-General* one of the learned Justices of the Supreme Court decided this same question in the negative, but since his was a minority holding, I believe I am at liberty to hold a contraryview.

The second question, which was posed above, was that if this Court held that Articles 86 and 140 conferred appellate jurisdiction on the Supreme Court in election petitions, what would be the status of section 67(3) of the Act? I have answered the first question in the positive. In my judgment, it follows that section 67(3) is inconsistent with the named Articles of the Constitution. I would have no hesitation in declaring that the clause is null and void as commanded by Article 2(2) of the Constitution.

The second issue for determination in this petition is whether the petitioners are entitled to the declarations sought in petition. The petition sought declarations that section 67(3) of the Act is null and void and that the section infringes on the Constitutional rights of the petitioners to appeal to the Supreme

Court. It also sought an order for costs of the petition with certificate for two counsel. Learned counsel for the petitioners submitted that if the first issue was decided in their favour, then they should be granted all the declarations sought.

Mr Alfred Okello *Oryem* opposed the request. He submitted further that even if this Court found section 67(3) to be inconsistent with the Constitution, it should nevertheless decline to grant the declarations sought because of two reasons:

(*a*) Rule 4 of the Supreme Court Rules and those of this Court allow the courts to extend time within which to appeal to the Supreme Court. If the declarations sought are granted, then these courts will be flooded with applications to extend time to appeal to the Supreme Court by all those who lost their appeal in this Court arising from the general elections of 2001.

(*b*) The nature of election petitions is such that it affects the right of representation. A lot of time should not be spent on endless litigation. The litigation should be brought to an end at some point without delay so that elected leaders can serve their people. I understood Mr Okello *Oryem* to mean that even if we hold in favour of the petitioners, we should not allow them to appeal to the Supreme Court at this point in time. He relied on the case of *PK Ssemogerere and Another v The Attorney-General*, Constitutional appeal number 3 of 2004, in which the Supreme Court held that even if a court nullifies an act of Parliament, it can still decline to declare that acts performed under the authority of the nullified law are valid. On this authority, we informed Mr Okello *Oryem* that this case is not yet finalised, as reasons for the judgment have not yet been given and that it could not be relied on as authority yet.

In conclusion, Mr *Oryem*’s prayer was that all the relief sought should not be granted including the costs of this petition.

In my judgment, I think the fears being raised by learned Counsel for the respondent that granting relief sought would open flood gates for already closed litigation, are not justified at all. In my view, section 67(3) of the Act is not null and void *ab initio*. This means that until its nullification, it was good law. Therefore, all petitions which were finalised before its nullification are binding and those who accepted the final decision of the Court of Appeal are bound and their petitions came to a close. I do not think these can be resurrected. However, the petitioners who did not accept that the Court of Appeal was the final court of appeal in election petitions are entitled to benefit from this judgment, if they so wish.

They are entitled to appeal to the Supreme Court against the dismissal of their appeals in this Court from the decisions of their respective petitions in the High Court.

I would therefore, allow this petition and grant the reliefs sought including the costs of the petition with a certificate for two counsel.

For the petitioners:

*Mr Akampumuza*

For the respondent:

*Mr Alfred Oryem*, State Attorney