**Matembe and others v Attorney-General**

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

**Date of judgment:** 2005

**Case Number:** 1/05

**Before:** Okello, Engwau, Kitumba, Byamugisha and Kavuma JJA

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*[1] Constitutional law – Doctrine of separation of powers – Power of Judiciary to inquire into the*

*actions of the Executive and the Legislature – Unconstitutionality of a Bill of Parliament.*

*[2] Temporary injunctions – Applicable principles in applications for temporary injunction.*

**JUDGMENT**

**Okello, Engwau, Kitumba, Byamugisha and Kavuma JJA:** The applicants, all members of the

Seventh Parliament, filed the instant application under the provisions of various rules as stated in the

body of the motion. They are seeking the following orders from this Court namely:

1. Parliament and its committees be temporarily restrained from further consideration of Constitutional

(Amendment) Bill number 2 of 2005 till the final determination of Constitutional Petition number 2 of

2005 by the Constitutional Court.

2. The costs of the application be provided for.

The grounds that form the basis of the application are:

1. The applicants have filed Constitutional Petition number 2 of 2005 challenging the constitutionality of

Constitution (Amendment) Bill number 2 of 2005 and rules 104 and 111 of the Rules of Procedure of

Parliament of Uganda and owing to the busy schedule of the court the petition has not been fixed for hearing.

2. Unless restrained by court, Parliament and its committees will proceed to consider and pass the bill and have it subjected to resolutions of district councils and to a referendum before the disposal of the applicants’ petition thereby rendering the relief sought nugatory.

3. I f the orders sought in this application are not granted the petition will be rendered nugatory and the petitioners will be deprived of their right to access courts of law and to a speedy and fair adjudication of their rights.

The grounds are supported by the affidavit of Honourable Ben Wacha, the second applicant. The respondent opposed the application with an affidavit sworn by Mike Chibita, Principal State Attorney, in the chambers of the respondent. When the matter came before us for final disposal, Mr *Walubiri*, learned Counsel for the applicants, submitted that the applicants have filed a petition that has not yet been fixed for hearing. In the petition, they allege in paragraph 4 thereof, that the act of the Minister of Justice and Constitutional Affairs tabling the Bill and Parliament discussing the same which Bill combines proposed amendments to Articles specified in Articles 259(2), 260(2), and 261, is inconsistent with and contravenes Articles 91, 258, 259, 260, 261 and 262 of the Constitution. Learned counsel contended that in terms of Article 137 of the Constitution, the applicants have raised a *prima facie* case that ought to be investigated by this Court. He pointed out that the applicants have alleged in paragraph 3 of the petition that rules 104 and 114 of the Parliament Rules of Procedure are inconsistent and contravene Articles 259(1), 260(1) 261(1) and therefore there is a *prima facie* case to be investigated by court. It was Mr *Walubiri*’s submission that the Bill in as far as it proposes to amend, in an omnibus manner, several Articles of the Constitution without specific two third votes in Parliament and where necessary in district councils or referenda in each specific Article and subjecting the entire Bill to an omnibus vote in district and referenda, the Bill contravenes and is inconsistent with Articles of the Constitution. In reply, Mr *Tibaruha*, the learned Solicitor General, stated that the petition is misconceived on the following grounds: 1. I t does not raise any legal issues for this Court to resolve. He contended that the petition is based on Article 137(3) of the Constitution but it does not specify whether it is clause (*a*) or (*b*) and therefore the Article is not applicable. It was his submission that the Article provided for the challenge for an Act of Parliament but does not provide for a challenge of a bill. He stated that a Bill, by definition, is a legislative proposal which is submitted by the Executive to Parliament for possible passage into an Act of Parliament. He contended that a bill can be amended or even rejected by Parliament and therefore the application to challenge the unconstitutionality of the Bill is premature and therefore the application is speculative. 2. R ules 104 and 114 of the Rules of Parliament are not unconstitutional. He referred to Article 94 of the Constitution that empowers Parliament to make its own rules. He claimed that the applicants are influential members of Parliament who should use their influence on the Rules Committee to change the rules. He contended that the rules are not unconstitutional and should be read together with other rules of Parliament. On the application itself, Mr *Tibaruha* submitted that it is unconstitutional in that it seeks to prohibit Parliament from carrying out its functions. He pointed out that under Article 79 Parliament is mandated to make laws for peace, order, development and good governance. He contended that the applicants should not be allowed to curtail the functions of Parliament which emanates from the Constitution. To do so would be against the letter and spirit of the Constitution. In his view, the order being sought would be contrary to the doctrine of separation of powers. He pointed out that the functions and roles of the three arms of government are spelt out. He relied on the decision of the Supreme Court in the case of *Attorney-General v Major General Tinyefuza* Constitutional appeal number 1 of 1997 and in particular the judgement of Kanyeihamba JSC at 14. He complained that the applicants are seeking to use the Judiciary to interfere with the work of the Legislature. On the principles applicable in applications of this nature, he submitted quite rightly, in our view, that they are settled. The court must be satisfied as follows: 1. T hat there is a *prima facie* case with a probability to succeed. 2. T he applicant might suffer irreparable injury if temporary relief is not granted. 3. I f court is in doubt, it will decide the case on a balance of convenience. He cited the case of *Giella v Cassam Brown and Co Ltd* [1973] EA 358 which was quoted with approval by this Court in *Uganda Law Society and another v Attorney-General***,** Constitutional application number 7 of 2003. He contended that the conditions are inclusive rather than alternative. He contended that the applicants must first demonstrate they have a *prima facie* case with a probability of success. Secondly, they must show that they would suffer irreparable damage if the order sought was not granted. It is only when the court is in doubt that it will decide the case on a balance of probability. He contended that the petition has no probability of success. He stated that the applicants’ view that a bill that combines amendments to Articles specified in Articles 259(2), 260(2) and 261(1) is unconstitutional is misconceived. According to him any bill to amend the Constitution must comply with Chapter 18, which provides two mandatory requirements which Parliament must comply with namely:

1. There must be a Bill for an Act of Parliament the sole purpose of which is to amend the Constitution by way of addition, variation or repeal any of the provision of the Constitution.

2. The Act must be passed in accordance with the procedure laid down in Chapter 18. Mr *Tibaruha* contended that there is nothing in the Constitution which prohibits a Bill for an Act of Parliament seeking to amend the Constitution from containing amendments to Articles, referred in Articles 259, 260 and 261. He stated that the challenge to the Bill is misconceived because the different Articles will be handled individually as provided for in the Referendum and Other Provisions Act (1 of 2005). He pointed out that the rules of Parliament with regard to amendment of the Constitution would become important in the Committee of the whole House when considering each clause where simple majority would be used. On the balance of convenience, he submitted that the importance of the Bill to the whole country couldn’t be overemphasised. He invited us to take judicial notice of the constitutional review exercise that had begun and that the Bill is a culmination of that exercise. The applicants should not be allowed to inconvenience the whole country by stopping Parliament from considering the Bill. He also stated that no injunction can issue against Government. He relied on the decision of *Attorney-General v Silver Springs Hotel and others* Civil application number 1 of 1989 (UR). On discretion, Mr *Tibaruha* submitted that this is not the type of case where discretion should be exercised in favour of the applicants. Parliament should not be interfered with. He invited us to dismiss the application with costs. Exercising his right of reply, Mr *Walubiri* stated that the decision of *Silver Springs Hotel*’s case (*supra*) was rejected by this Court in *Dr James Rwanyarare and Others v Attorney-General,* Constitutional application number 6 of 2002 because it was decided under a different constitutional dispensation. He stated that the circumstances of this case are closer to the *Rwanyarare* application(*ibid*) than the *Uganda Law Society and another v Attorney-General* (*supra*). It was his contention that the framers of the Constitution were very clear as to how the Constitution is to be amended and that there was a purpose (*sic*). Commenting on the Referendum Act, counsel pointed out that the question to be answered in the schedule to the Act is not to ratify the Articles but the Bill itself. Before considering the merits or demerits of the application, we would like to comment on the submissions of Mr *Tibaruha* which was that the doctrine of separation of powers does not allow us to issue an injunction or any other restraining order against the Government and the Legislature. We think the observations made by Kanyeihamba JSC in the *Tinyefuza* case (*supra*) at 12 are very instructive. He said: “The rule appears to be that the courts have no jurisdiction over matters which are within the constitutional and legal powers of the Legislature and the Executive. Even in cases, where courts feel obliged to intervene and review the legislative measures of the Legislature or administrative decisions of the Executive when challenged on the grounds that the rights of individuals and freedoms of individuals are clearly threatened, they do so sparingly and with the greatest of reluctance.” The above observations were based on two cases, namely *Marbury v Madison* 1 Cr 137(180) that was cited with approval in *Uganda v Commissioner of Prisons* ex parte *Matovu* [1966] EA 514, to the effect that courts should resist the temptation of inquiring into how the Executive or the Legislature perform their duties in matters where they have a discretion. In the same judgement at 14 the learned Judge said: “The Constitution provides that the constitutional platform is to be shared between the three institutional organs of Government whose functions and powers I have already described (*supra*). The Uganda Constitution recognises these organs as the Parliament, the Executive and the Judiciary. It was not by accident either that it created and described and empowered them in that order of enumeration. Each of them has its field of operation with different characteristics and exclusivity and meant to exercise its powers independently. The doctrine of separation of powers demands and ought to require that *unless there is the clearest of cases* calling for intervention for purposes of determining the constitutionality and legality of action or the protection of the liberty of the individual which is presently denied or imminently threatened, the courts must refrain from entering the arena not assigned to them either by the Constitution or laws of Uganda.” (Emphasis mine.) This rule like any other rule is not absolute. The Constitutional Court was established as the guardian of the rights and freedoms of the individual against oppressive and unjust laws and acts. It must remain vigilant in upholding the provisions of the Constitution. Therefore if an allegation is made against the Executive or the Legislature about the unconstitutionality of their actions or omissions, this Court is seized with jurisdiction to intervene. In the matter now before us, it is being alleged in the petition that the act of the Minister of Justice and Constitutional Affairs in tabling an omnibus Bill before Parliament that combines proposed amendments to Articles specified in Articles 259(2), 260(2) and 261 breaches the Constitution, are not matters that fall in the province of political discretion. It is a constitutional matter touching on the supremacy of the Constitution, as stated in Article 2(1). It (the Constitution) has a binding force on all authorities and persons in Uganda. We agree that Article 79 spells out the functions of Parliament. It subjects the Legislature to the provisions of Constitution. Parliament is charged with the duty of protecting it. The Article states as follows: “(1) Subject to the provisions of this Constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda. (2) Except as provided in this Constitution, no person or body other than Parliament shall have power to make provisions having the force of law in Uganda except under authority conferred by an Act of Parliament. (3) Parliament shall protect this Constitution and promote the democratic governance of Uganda.” Turning to the merits of the application, we agree with the principles that govern applications of this nature as stated in the authorities cited by both counsel. We shall use the principles to determine whether they apply to the facts of the matter now before us. The first principle is whether a *prima facie* case with a probability of success has been made out. The petition alleges in paragraph 2 as follows: “The act of the Attorney-General and Minister of Justice and Constitutional Affairs tabling before Parliament, and Parliament debating, the Constitutional (Amendment) Bill number 2 of 2005 which combines proposed amendments to Articles specified in Articles 259(2), 260(2), and 261 is inconsistent with and contravenes Articles 92, 258, 259, 260, 261 and 262 of the Constitution in as much as: (*a*) The proposed amendments to some of the Articles referred to in Articles 260 and 261 will be unduly subjected to the procedure in Article 259 of the Constitution. (*b*) The proposed amendments to some of the Articles referred to in Article 259(2) of the Constitution will be unduly subjected to Article 260 of the Constitution. (*c*) The proposed amendments to some of the Articles referred to in Article 261 of the Constitution will unduly be subjected to Article 262 of the Constitution.” Paragraph 3 of the petition alleges that: “Rules 104 and 111 of the Rules of Procedure of the Parliament of Uganda are inconsistent with and contravene Articles 259(1)(*a*), 260(1)(*a*) and 261 of the Constitution in as much as: (*a*) the votes of members of Parliament on the second and third reading of the Bill under the said rules are omnibus covering the entire Bill and not individual clauses seeking to amend specific Articles in the Constitution (*sic*). (*b*) The votes of members of Parliament on individual clauses of the Bill under the said rules are by simple majority and not two thirds majority.” The above averments were verified by the affidavit of Honourable Ben Wacha in which he deponed *inter alia* that the Bill seeks to amend, repeal or otherwise affect 114 Articles or schedules of the Constitution. He also avers that there are three procedures of amending the Constitution that are categorised differently. We think that the contention of the applicants or petitioners in their petition that the act of the Minister in tabling an omnibus Bill for eventual enactment into an Act of Parliament will breach the Constitution, raises a *prima facie* case with a probability of success. It raises serious questions to be investigated by this Court. For that reason we would have exercised our discretion to grant the orders being sought. However, the affidavit sworn in support of the application contains the following matters: In paragraph 4 the deponent states as follows: “That I am aware as a member of Parliament, that the Legal and Parliamentary Affairs Committee will soon table its report to Parliament upon which the Bill will proceed to the second and third readings, and if passed, be referred to the district councils for their resolutions and referred to a referendum.” In paragraph 5 he states that: “That if further consideration of the Bill proceeds and it is passed into law and implemented before the said petition is heard and disposed of, the relief sought in the petition will be rendered nugatory and the petitioners’ rights to access court and to be accorded a fair hearing and effective redress will be irretrievably lost.” It is clear from the above paragraphs that currently the factual situation on the ground is as follows: (*a*) The Bill was tabled before Parliament on 15 February 2005. Thereafter, it was committed to the Legal and Parliamentary Committee for consideration. (*b*) The Committee has not yet submitted its report to Parliament for consideration and debate. Until the report is tabled and considered by Parliament it is difficult to say that Parliament has accepted the Bill and in the format it was presented in by the Minister. Since Parliament has a duty to act within the Constitution when carrying out its legislative functions, it is too early to tell whether it will breach the Constitution at this stage. It is, therefore, in our view, premature to gauge a breach of the Constitution on the part of Parliament. In result we decline to grant the order being sought and dismiss the application. Costs of the application will abide the outcome of the petition.

For the appellant:

*Mr Walubiri*

For the respondent: