Electoral Reform in Uganda

Emerging Jurisprudence on Structural Interdicts and Contempt of Court

Contributors

Benson Tusasirwe

Robert Kirunda

ELECTORAL REFORM IN UGANDA: EMERGING JURISPRUDENCE ON STRUCTURAL INTERDICTS AND CONTEMPT OF COURT

The 2019 Supreme Court Decision of

Prof. Frederick E. Ssempebwa & Ors* v. *Attorney General

Contributors

Benson Tusasirwe

Robert Kirunda

Foreword

Since 1996 Uganda has held six presidential elections after every five years. With the exception of 1996, each presidential election results have been challenged in the Supreme Court and the judges, though upholding the election results, have made several key recommendations for electoral reform in a bid to ensure free and fair elections. Election petition No. 1 of 2016 brought by Amama Mbabazi went a step ahead and consolidated previous recommendations for electoral reform and the Supreme Court stipulated a two-year within which the Attorney General was to report back to the court, measures taken to implement the said recommendations. However, the period lapsed before the Attorney General reported back to court and without any electoral reforms being tabled before Parliament.

To this end, Kituo Cha Katiba (KcK) together with two prominent law professors filed a public interest case before the Supreme Court of Uganda in 2019 to hold the Attorney General of Uganda in contempt of the court orders that centred on the electoral reforms in the 2016 Amama Mbabazi case. The public interest case of *Prof. Frederick. E. Ssempebwa, Prof. Frederick W. Jjuuko and Kituo Cha Katiba v. Attorney General*, the subject of this publication, is an initiative that falls within Kituo cha Katiba's strategic objective of "supporting the culture of promoting, respecting and defending democratic constitutional standards and practices in the Eastern African region" and sought to achieve the broader goal of promoting electoral reform and justice in Uganda.

The publication discusses elaborately the *Ssempebwa* case. In addition to the novelty of the issues raised in the case and the decision of the Supreme Court, the publication, the work of distinguished legal experts, contains methodical analyses of the legal, constitutional and political implications of the case. Underpinning the discourse is whether the Judiciary ably asserted its authority to compel the other arms of government to play their respective roles in implementing the Court's 2016 orders. Enriched with jurisprudence, it is our earnest belief that the publication offers useful information for further learning for various actors including judicial officers, and legal practitioners and scholars.

Christian Garuka
Chairperson
Kituo cha Katiba Board of Directors

Acknowledgements

Kituo cha Katiba extends special appreciation to Dr Benson Tusasirwe, Assistant Lecturer, Department of Public and Comparative Law at the School of Law at Makerere University and Mr Robert Kirunda, a lecturer at the Department of Law and Jurisprudence at Makerere University, for their ingenious analysis and authoring of the papers in this publication.

Our invaluable gratitude goes to Prof. Frederick Ssempebwa (S.C), Founding and Senior Partner at Katende, Ssempebwa & Co. Advocates, Kampala and Prof. Frederick Jjuuko, Dean, Faculty of Law, Uganda Martyrs University, Nkozi, for their exceptional technical guidance and input as well as untold dedication in this work.

Lastly, we are profoundly indebted to our partner, the Democratic Governance Facility, without whose support this important project would not have come to fruition.

CHAPTER ONE

The Journey thus Far on Electoral Justice and Reform on the Eve of the 2021 Elections

Background

The practice of holding regular elections in Uganda is provided for under Article 61 (2) of the 1995 Constitution and has been entrenched after a long period of disenfranchisement. As a result, the country has held presidential and parliamentary elections every after five years since 1996. Specifically, in all the presidential elections held in 1996, 2001, 2006, 2011 and 2016, President Museveni and his National Resistance Movement (NRM) party was declared winner with 76%, 69%, 59%, 68% and 60.75% of the total number of votes cast, respectively. Museveni's competitors have challenged the outcome of all the elections declared by the Electoral Commission and thrice went to court in 2001, 2006 and 2016[1].

The petitioner in *Col. (Rtd) Dr Kizza Besigye* v. *Yoweri Kaguta Museveni & Another*, Presidential Electoral Petition No. 1 of 2001 and *Col. (Rtd) Dr Besigye Kiiza* v. *The Electoral Commission and Yoweri Kaguta Museveni,* Presidential Electoral Petition No. 1 of 2006 was steadfast in his claim that the elections were not free and fair for non-compliance with the provisions and principles of the law. And although he disagreed with the decisions of the Supreme Court that dismissed his petitions on account of the electoral malpractices and administrative deficiencies of the Electoral Commission as highlighted in almost all of the above petitions,[2] he respected the court's decisions.

The contemporary practice is that political candidates of all shades, upon failure to settle the direct electoral political contestations, shift the burden to the courts of law for a final say although courts are traditionally hesitant to agree that they have a political role to play[3]. This is the litmus test for the viability and legitimacy of the Constitution and the commitment of Ugandans to democracy, constitutionalism and the rule of law.[4]

In addressing previous petitions, the learned Justices consistently stated that the legal regime is overdue for reform. Upon failure to act on the recommendations made in the rulings on 2001 and 2006 petitions filed by Kizza Besigye, the Supreme Court in the Mbabazi petition of 2016[5] ordered the Attorney General to ensure compliance and report to the court about the same in two years.

---

[1] Sekindi Fred, 'Presidential Election Disputes in Uganda: A Critical Analysis of the Supreme Court Decisions,' available at https://www.researchgate.net/publication/318218237_Presidential_election_disputes_in_Uganda_a_critical_analysis_of_the_Supreme_Court_decisions, pp. 163-164, at p.164. (accessed 20 December 2020)

[2] Sabiti Makara, 'Do party strategies matter in an Electoral Autocracy?' in J. Oloka-Onyango & Josephine Ahikire (eds), *Controlling Consent: Uganda's 2016 Elections*, 2017, Africa World Press, New Jersey, pp.141-144, at p.144.

[3] Benson Tusasirwe, *Implications of the Decision of the Supreme Court of Uganda in Prof. Frederick E. Ssempebwa and Prof. Frederick Jjuuko v. Attorney General for Constitutionalism and Democratization*, infra, p.8.

[4] Odoki J. Benjamin, *The Search for a National Consensus: The Making of the 1995 Uganda Constitution,* 2014, Fountain Publishers, Kampala, p.271.

[5] Presidential Election Petition No. 01 of 2016, [2016] UGSC 4 (26 August 2016)

Why the Amama Mbabazi Petition

On 20 February 2016, candidate Yoweri Kaguta Museveni, the incumbent leader, was declared winner and the duly elected President of the Republic of Uganda after the general presidential and parliamentary elections held on 18 February 2016. Upon this declaration, Hon. Amama Mbabazi, who had also been a presidential candidate, challenged the result of the election in the Supreme Court. Mbabazi, who garnered less than 2% of the total votes cast, sought a declaration that Yoweri Kaguta Museveni who had won by 60.75% of the total vote, had not been validly elected and sought an order for the election to be annulled.

Election petition No. 1 of 2016 brought by Amama Mbabazi presented a valuable opportunity for the country to evaluate and refine previous court orders and recommendations in light of new evidence.

During the preparations for court action, there was a palpable crisis of confidence and a growing perception within the public that the court case would meet the same fate as the previous petitions aforementioned[6].

Enter the Amicus Curie

In view of the public discontent among various stakeholders, namely citizens, public interested lawyers, political parties, civil society organizations, media, development partners, observer missions among other interested parties, two applications were brought before court prior to the hearing of the Mbabazi petition for leave to intervene as *amicus curiae*[7]in the petition.

The first application of *Professor Oloka Onyango & Ors* (MA No. 2 of 2016) was filed jointly by nine lecturers from Makerere University School of Law. The second one, *Foundation for Human Rights Initiative & Ors* (MA No. 3 of 2016), was brought by eight civil society organisations. Court allowed Miscellaneous Application No. 2 of 2016 and dismissed Miscellaneous Application No. 3 of 2016.

At the centre of the argument by the *amici* was the view that Uganda's electoral laws were deficient and that a free and fair election could not be premised on an inadequate electoral legal regime. The court agreed with the argument that the legal regime was overdue for improvement. The court also accepted the practical recommendations by *amicus curie* for electoral law reforms, which it believed would go a long way in the determination of electoral disputes before it in future, and aid court to exercise its residual power in emphasising structural interdicts or supervisory injunctions as a remedy in electoral disputes, which remedy is novel in Uganda's jurisprudence.

[6] Sekindi, (2017), op cit., p 171.

[7] The Oxford Dictionary of Law, (2006), 6th Edition, p.29. literally defines Amicus Curiae as a friend of the court. A non-party who gives evidence before the court so as to assist it with research, argument, or submissions. According to the Merriam-Webster, available at https://www.merriam-webster.com/dictionary/amicus%20curiae, amicus curiae is defined as 'one (such as a professional person or organization) that is not a party to a particular litigation but that is permitted by the court to advise it in respect to some matter of law that directly affects the case in question'.

Summary of the Recommendations from the Judgment

Since the Supreme Court had ineffectually made recommendations in the previous two presidential petitions of 2001 and 2006, on 31 March 2016 the court broke with the past and directed the Attorney General to oversee compliance with its decisions and orders. The recommendations were:

1. that the10-day period within which to file and determine a presidential petition be increased to at least 60 days under Article 104 (2) and (3) of the Constitution and Section 59 (2) and (3) of the Presidential Elections Act. This was to give the parties and the court sufficient time to prepare, present, hear and determine the petition, while at the same time being mindful of the time within which the new president must be sworn in.
2. that the rules of court be amended to provide for the use of oral evidence in addition to affidavit evidence, with leave of court. The reason was that affidavit evidence on its own may be unreliable as many witnesses tend to be partisan.
3. that a longer period than the overly restrictive 20 days provided for holding presidential elections where the same has been annulled under Article 104 (7) of the Constitution be provided for.
4. that there be enacted a law to regulate the use of technology in the conduct and management of elections. Court emphasized that it should be introduced well within time to enable the training of the officials and the sensitization of voters and other stakeholders.
5. that all presidential candidates be granted equal time and space on State-owned media to present their programmes to the people as provided for under Article 67 (3) of the Constitution and Section 24 (1) of the Presidential Elections Act 2005 (as amended). The law should also provide for sanctions against the violation of the constitutional duty.
6. that any election related law reform be undertaken within two years of the establishment of the new parliament in order to avoid last-minute hastily enacted legislation on elections.
7. that Section 64 (7), (8) and (9) of the Presidential Elections Act be amended to prohibit the giving of donations by all candidates including a president who is also a candidate, in order to create a level playing field for all.
8. that the law should make it explicit that public servants are prohibited from involvement in political campaigns.
9. that the law should be amended to make it permissible for the Attorney General to be made respondent in presidential elections petitions. This is in line with Article 119 of the Constitution, and rule 3, 5 and 20 (6) of the Presidential Election Rules.
10. that the Attorney General *must* follow up the recommendations made by the court with other organs of the state, namely Parliament and the Executive. The Attorney

> General to report to the court within two years from the date of this judgment the measures that have been taken to implement these recommendations. The court may thereafter make further orders and recommendations as it deems fit.

In recommendation No. 10 above, the Court appointed the learned Attorney General to oversee the implementation of its recommendations. Ironically, from the ruling of court on Friday 26 August 2016 till Monday 27 August 2018, after the stipulated two-year period within which the Attorney General was supposed to report back on progress of the implementation of the recommendations on electoral reform, no report had been made to the court!

The Intervention of Public-spirited Citizens

Uncertainty arose at the end of the two years stipulated by the Supreme Court as the period within which the electoral reforms were supposed to have been implemented expired without any electoral reforms tabled before Parliament. Clearly a follow-up was needed.

To this end, Kituo Cha Katiba (KcK) together with two prominent law professors filed an application before the Supreme Court of Uganda on 24 March 2019.[8] Through this legal action, the three parties sought to hold the Attorney General of Uganda in contempt both personally and officially for failing to honour the aforementioned Court orders that centred on electoral reform.

The matter was heard in April and May, 2020 and the Supreme Court delivered its ruling on 25 June 2020. Whereas the court did not find the Attorney General in contempt, it nevertheless issued new critical orders that aimed to transform the electoral democracy terrain in this country.

First, the court ordered that the Attorney General must in consultation with other organs of the State ensure that priority is given to the implementation of all the court's recommendations outlined in the Amama Mbabazi case of 2016 i.e., tabling the necessary electoral reforms in time. Second, it ruled that the proposed legislation aimed at operationalizing the court's recommendations of 2016 on electoral reform should be laid before Parliament within one month from the date of the ruling. Third, the Attorney General would report to the Court on the progress of the proposed legislation within three months from the date of the ruling (i.e., 25 June 2019). Fourth, the Attorney General would, in any case, make a final report on the progress of the proposed legislation within six months from the date of the ruling.

Has there been Compliance since the PIL Case? – Views of Legal Experts

Two legal experts' Dr Benson Tusasirwe and Robert Kirunda have respectfully critiqued the decision of court and their views form part of this publication. Their contention is that despite several reforms attempted in the fulfilment of the Civil Application No.5 of 2019 orders, a substantial electoral reform process has not actually taken place.

[8] *Prof. Frederick. Ssempebwa, Prof. Frederick W. Jjuuko and Kituo Cha Katiba* v. *Attorney General*, Civil Application No.05 of 2019

The Court's finding in the 2019 application mentioned above that the Attorney General had substantially complied with its orders, and that to the extent that he had not, the non-compliance did not amount to contempt of court, signalled a contradiction.

Dr Tusasirwe probes the legal and democratic implications of the decision, highlighting both the progress and retrogression that characterised this decision. He applauds certain aspects of the PIL case, namely (i) the ability of the petitioners to present the election petition and the same to be heard and conclusively decided by the Court; (ii) the Court once again directing the Attorney General to oversee the implementation of its orders; (iii) the Court's summoning of the Attorney General to show cause why he should not be cited for contempt of court for not implementing its decisions made more than two years earlier in acting upon the application by the distinguished learned petitioners and KcK, and (iv) the presence of an entire team of senior lawyers from the Attorney General's Chambers, led by the Deputy Attorney General, no less, and including the Solicitor General and several senior state attorneys, to represent government, which manifested the seriousness with which government took the above public interest litigation (PIL) Application and a positive indicator of due regard for respect for the state of constitutionalism and the rule of law in the country.

On the other hand, he argues that the court made the decision most reluctantly. To him, it was a disservice to the public for the Supreme Court to accept that three years after it ordered that a number of laws be substantially amended before the next round of elections, it was acceptable for the learned Attorney General to have done no more than come up with the Bills proposing minor changes in the electoral law, moreover hardly a year to the next elections.

On his part, Robert Kirunda opines that at the heart of the application was the centrality of what amounts to satisfactory compliance. This necessitated addressing two key aspects: first, that what the executive does in response to the orders of the court must conform to the substantial requirements of the court order; and second, that the manner in which the compliance is communicated (or "reported") to the court must engender transparency, participatory engagement and respect for the sanctity of the court and the rules it applies.

He extends a humble prayer to the Chief Justice to issue a Practice Directive prescribing the necessary rules or standards on the form the report ordered on the issuance of a structural interdict should take, and how the reporting should be done—two glaring loopholes in Uganda's legal discourse that need to be addressed with urgency by the Judiciary especially given the increasing adaptation to the issuing of structural interdicts, particularly by the High Court.

The legal experts cautioned that, as the country edged towards the 2020/2021 general elections processes, the old absurdities were bound to continue to plague the country since the Supreme Court is yet to fully assert its authority in the matter of electoral reform.

CHAPTER TWO

Implications of the Decision of the Supreme Court of Uganda in *Prof. Frederick E. Ssempebwa v. Attorney General* for Constitutionalism and Democratisation

[9*]Benson Tusasirwe

> *Hence the more important question to ask is not whether courts are engaged in politics. Rather, it is to ask: what kind of politics are courts engaged in?*
>
> [Joe Oloka-Onyango][10]

Background

Uganda held the fifth general elections under the 1995 Constitution on 18 January 2016. Yoweri Kaguta Museveni was declared the winner whereupon Amama Mbabazi, one of the unsuccessful candidates, petitioned the Supreme Court seeking to nullify the results of the election. The court dismissed the petition. However, in its detailed reasoning, the court expressed concern over certain legal and institutional aspects relating to the management of presidential and other elections. It accordingly made ten recommendations for reform, ordered that they be implemented well before the next cycle of general elections, and directed the Attorney General to oversee the implementation of the recommendations and report back to court within two years from the date of the ruling, that is, by 26 August 2018.

Concerned that the Attorney General had not complied with the orders of the court, Prof. Frederick E. Ssempebwa, Prof. Frederick W. Jjuuko and Kituo cha Katiba (hereinafter, "the Applicants") filed Civil Application No.5 of 2019 in the Supreme Court, contending that the Attorney General's non-compliance amounted to contempt of court, and seeking appropriate remedies. On 25 June 2019, the Court rendered its ruling, wherein it found first, that the Attorney General had substantially complied with its orders and, second, that to the extent that he had not, the non-compliance did not amount to contempt of court. While not allowing the application, the court went ahead to make fresh directives and timelines for the implementation of its earlier recommendations.

This paper attempts to critique the decision of the Supreme Court in Civil Application No. 5 of 2019, and to discuss the implications of the decision for constitutionalism and the quest for democratization.

The Decision of the Court

The applicants' case was pretty straightforward. They pointed out that the directives of the court to the Attorney General were unequivocal: ensuring that the ten recommendations are implemented and reporting to court not later than two years from the date of the ruling.

---

[9] * LL. B (Hons) Mak, LL.M (Cantab), LLD Mak is an Assistant Lecturer at the Department of Public and Comparative Law, School of Law, Makerere University and Founder and Managing Partner, Tusasirwe & Co. Advocates.

[10] J. Oloka-Onyango; W*hen Courts do Politics: Public Interest Law and Litigation in East Africa*, 2017, Cambridge Scholars Publishing, p.3.

They contended that the bulk of the recommendations required enactment of laws, and that since no such laws had been enacted thus far, the Attorney General had disobeyed the orders of the court. And since no explanation/justification for the non-compliance had been proffered, the disobedience was wilful or *mala fide* and, therefore, amounted to contempt of court.

In answer, the Attorney General contended, and the court accepted, that the recommendations relating to enlargement of the time for filing and determining presidential election petitions and for holding fresh elections where a presidential election was nullified by court, had fortuitously been taken care of by the Constitution (Amendment) Act (No. 1 of 2018), an amendment effected by Parliament at the instance of a Private Member's Bill. On the rest of the recommendations which required amendment of existing electoral laws, the Attorney General put before court draft Bills which he said were going through the normal parliamentary cycle and were expected to be enacted into laws within several months. He conceded that the laws were taking longer than the two years prescribed by the court but explained that the process of consultation within the concerned government agencies had taken longer than anticipated.

The Court accepted the Attorney General's explanation and stated, at page 32 of the ruling:

> We find that the Attorney General has discharged the evidential burden of showing that he did not act wilfully or *mala fide* in disobedience of the court order.

The Problem with the Decision

With the greatest respect, it is submitted that in so generalizing the finding on this aspect, the Court did not follow the precedents that it had just accepted as capturing the correct position of the law on contempt of court, namely: *Pheko & Others v. Ekurhuleni Metropolitan Municipality* (No.2) [2015] ZACC10 and *Fakie v. CC11 Systems (Pty) Ltd* [2006] SCA54 (RSA). In the two cases, the Constitutional Court of South Africa and the Supreme Court of Appeal of South Africa respectively held that to find that there was civil contempt of court, it must be established that there was a court order; that the contemnor had notice of the order; that he disobeyed the order; and that the disobedience was wilful or *mala fide*. On page 23 of the ruling, the court adopted these ingredients, which are separate and distinct.

In the instant case, the existence of the orders and the Attorney General's notice thereof were not disputed. The Attorney General also conceded that apart from the two recommendations relating to time of filing and determining election petition and holding fresh elections (recommendations number 1 and 3) and the two relating to procedure for use of oral evidence and joinder of the Attorney General as a party to presidential election petitions (number 2 and 9), which were taken care of by the Constitution (Amendment) Act (No.1) of 2018 and the Presidential Election (Election Petitions) Rules respectively, the draft laws to take care of the remaining recommendations were still in form of Bills, yet the period prescribed by the court had already lapsed. In other words, the third ingredient of non-compliance with the orders of court had also been established at least in relation to six of the ten recommendations.

The inescapable conclusion one must arrive at is that the court was keen to avoid finding that the Attorney General had disobeyed (or had not complied with) its orders. To this end, the court lumped the last two ingredients together, and then only pronounced itself on the last one, that the Attorney General had not wilfully disobeyed its orders.

The effort to avoid finding that the Attorney General had fallen short resulted in a number of "stretched" findings. For example, on the fourth recommendation—the one requiring enactment of a law to regulate the use of technology in the conduct and management of elections, while it was admitted that the law had not yet been enacted, the court found that its recommendation was that the Attorney General should "follow up" the enactment of the law, and that once he showed that there were ongoing "consultations and engagements" with the various government departments for the purpose of enacting the law, then the Attorney General had duly "followed up" and thereby discharged his duty to oversee the implementation of the orders of the court. In other words, it did not matter that he had not caused the law to be enacted.

The same approach was adopted in respect of recommendations number 6, 7 and 8 in respect of which the court found that by participating in consultations leading to draft Bills, the Attorney General had "followed up" the implementation of the recommendations/ directives.

On the fifth recommendation requiring the enactment of a law providing sanctions against any state organ or officer who violated the constitutional duty to give all candidates in an election adequate time and space in State-owned media during campaigns, the court was faced with the reality that such a law was not yet in place, with the Attorney General promising to cause the same to be enacted within six months. The court made no finding on whether this was non-compliance, which it was. Instead, it only made the finding on the last ingredient stating: In the instant case, we do not find that the Attorney General deliberately disobeyed the court order.

It accepted the promise to comply within six months as "plausible". By this sleight of hand, the court strangely watered-down its own earlier recommendations, by finding that the Attorney General did need to have ensured that the laws the court directed to be enacted were in place by the lapse of the prescribed period. In effect, it allowed the Attorney General to make nonsense of its own orders by simply showing that he had complied with the orders by holding "consultations" with relevant government departments. The absurdity of this becomes manifest when one considers that at the time the court was pronouncing itself the time it had prescribed for the Attorney General to see to the implementation of its recommendations had lapsed nearly a year earlier, and all that the Attorney General showed were Bills hastily drafted just before the hearing.

The second leg of the orders to the Attorney General (besides overseeing the enactment of the laws) was that he should report to the court. In his response, the Attorney General claimed that he had "reported" by way of a letter dated 16 August 2018 to the Registrar of the court, which was exhibited. It was a reply to a letter of the Registrar of the court inquiring about the state of compliance.

The applicants contended that a proper report should have been presented in open court. The court rejected this, and held:

> We take judicial notice of the fact that communication with court is normally conducted through the office of the Registrar.

The court found reporting by way of a letter to explain the steps the Attorney General had taken as at 16 August 2018, to be sufficient compliance.

Again, this raises troubling issues. First, a letter to the Registrar, which was not even copied or disclosed to the parties to the petition that had given rise to the recommendations, looks like a terribly inadequate way to demonstrate compliance in a matter like the instant one. Second, when the letter was received, purportedly in August 2018, and was filed away and left unknown to anybody except possibly the Court Registrar, it served no practical use. Third, the letter did not even report compliance since as at 26 August 2018, even the bills had not been presented. At most, the letter only reported the initial steps being taken. Such a letter cannot, by any stretch, be called a report of compliance. Fourth, in the absence of a forum convened to discuss the report, how was the court to satisfy itself and all the other stakeholders, including the voting public as a whole, that steps were being taken to improve the legal and institutional framework for conducting elections, which the Supreme court had found wanting. Ultimately, the recommendations were not (or should not have been) just for the private benefit of the court, but for the general populace of Uganda.

The Attorney General, through the court ought to have been made to satisfy the public that the concerns, which had been expressed by the petitioner in Presidential Election Petition No.1 of 2016 as well as the *amicus curie* who appeared in the petition, and which the court had agreed with when it made the recommendations, had been addressed. Without the Attorney General accounting publicly as to what had been done to address the Court's recommendations, it could not be said that the concerns of the public had been assuaged.

Indeed, the Court seems to have been unmindful of how structural interdicts work. They are not a matter between the public officer and the court, but must involve all stakeholders in finding an acceptable solution to the problem at hand. So, on the matter of manner of reporting, again the decision of the court let the Attorney General off the hook lightly. Not surprisingly, while the court accepted that the Attorney General duly complied when he tendered his report in August 2018, the laws it had ordered to be enacted were only enacted in June 2020, and have to this day not been scrutinized by the court to pronounce itself as to whether they meet its aim of ensuring a more level playing field in time for the anticipated January 2021 general elections. To this end, the recommendations of the court have been made no sense of.

The application was in the main, disallowed. Although the Court found that it was "in the public interest that the recommendations of the court made are implemented", it nevertheless ordered that both parties bear their own costs of the application. Thus, although the applicants took a measure designed to benefit the national interest and not themselves, the

court did not find it necessary to require the costs of the action to be settled out of the public purse. It treated the applicants a little better than ordinary litigants in a civil claim. Such a decision tends to discourage well-meaning public interest litigation and is inconsistent with progressive practice. It also goes against the spirit of contempt proceedings which are about protecting the public interest in the administration of justice.[11]

The applicants were not individuals one could write off as busybodies, but two of the most respected law professors in the country and a leading regional non-profit organization with a sterling record in research, publication and advocacy in matters of constitutionalism. The court ought to have encouraged the participation of such personalities and entities in efforts to use the legal process to advance constitutionalism and democratic practice. It did not.

In the process, the court sent the wrong signals that it is alright to treat court directives lightly and, on the other hand, that whoever sets out to assist the court in ensuring that its decisions are respected does so at his or her own peril as to costs. It sent the wrong signals to the Attorney General that it is enough to comply with court orders only in formal terms rather than in substance. It is not surprising that the Attorney General and the government generally have not found it necessary to do anything beyond passing routine amendments to the electoral laws, while doing little to level the playing field for the protagonists in the electoral politics of the country.

To every Cloud, a Silver Lining

But credit must be given where it is due. The mere fact that it has been possible to present a presidential election petition and the same is heard and conclusively decided, not once or twice, but three times in a space of 15 years (in 2001, 2006 and 2016); the fact that in the 2016 petition, the Supreme Court not only made ten recommendations to the government, specified the time within which government had to comply, and directed the Attorney General to oversee their implementation; but also that years down the road, the court, on application by a couple of public spirited persons and a non-governmental organisation, the court summoned the Attorney General to show cause why he should not be cited for contempt of court for not implementing its decisions, are a step in the right direction. The very fact that an entire team of senior lawyers from the Attorney General's Chambers, led by the Deputy Attorney General, no less, and including the Solicitor General and several senior state attorneys, testifies to how seriously the government took the court's recommendations, and is a positive pointer to the state of constitutionalism and the rule of law in the country.

Furthermore, although to the chagrin of the applicants, the court found that the Attorney General had substantially complied with its orders, and that where he had not, had not deliberately defied the court and was therefore not in contempt of the court, it nevertheless went ahead to set new timelines for compliance, requiring the Attorney General to cause the completion of the process of passing the necessary laws and or amendments and report back to court. In so doing, the court asserted its authority, somewhat.

[11] The broad object of contempt of court proceedings was fully explained by the Supreme Court in a more recent decision; *In Re Ivan Samuel Ssebadduka*, decided on 25 November 2020.

These are important developments, considering that there was once a time when a court, taking such measures without fatal consequences, was unheard of as a few examples from Uganda's history will demonstrate: On 22 September 1972, Chief Justice Benedicto Kiwanuka was dragged out of his chambers at the High court in open daylight, publicly assaulted and bundled into a vehicle by government security officers and driven away never to be seen again. According to one account the then President, Idi Amin ordered his arrest and extra-judicial execution because he had issued a writ of *habeas corpus* for the release of one Daniel Stewart, a British businessman who Amin was keen to keep in unlawful detention.[12]

A few years later two Americans, Nicholas Stroh and Robert L. Siedle were abducted and could not be traced. An expatriate judge was appointed to lead a commission of inquiry into their disappearance. The commission came to the conclusion that they were murdered (actually literally slaughtered) by high-ranking officers of the military government. Well aware of the dire consequences of presenting a report containing such findings, the judge reportedly presented his report at Entebbe Airport before immediately catching a flight to flee the country for dear life.[13]

A.B.K Kasozi has put on record a telling litany of some of the things that happened to judicial officers in a space of a couple of years during the short-lived Obote II regime, thus:

> In 1982, Galdino Okello, a Chief Magistrate, was arrested and imprisoned without trial. An attempt was made on the life of Justice Sekandi. Mr. Justice Lubogo fled the country following a civil suit he decided against the vice president. Mr. Justice Ntabgoba went into exile after making decisions displeasing to the authorities. In May 1981 E. Kabazaire, a magistrate, was arrested in Mbarara and later taken to Nile Mansions to face the top officials. Another magistrate of Jinja was abducted from his house.[14]

Under such an environment, it would have been inconceivable to contemplate making a decision like directing the Executive to pass a plethora of laws and report back to court within a prescribed timeframe. That such a decision is now easily taken, says quite a lot. Indeed, that is possibly because of that very history that the court is hesitant to push its luck, by being overly assertive in the making of structural interdicts, especially in the area of civil-political rights, as in the instant case.

The decision was also important in terms of the law under which the application was brought, namely Article 128(3) of the Constitution of Uganda, which enjoins all organs and agencies of the State to accord the courts such assistance as may be required to ensure the effectiveness of the courts; National Objective number VIII, which requires the government to support the various organs with resources; and XXIX (a), (f) and (g), which enjoins the citizens to be patriotic, promote democracy and the rule of law, and to acquaint themselves

[12] Albert Bade, *Benedicto Kiwanuka: The Man and His Politics. Kampala, 1996,* Fountain Publishers, p. 156.
[13] Government of Uganda, 'Report of the Commission of Inquiry into Violations of Human Rights: Findings, Conclusions and Recommendations,' 1994, Entebbe: Government Printer (Chair: Arthur Oder). See also A. B. K. Kasozi; *The Social Origins of Violence in Uganda, 1964 – 1985,* (1999), Kampala: Fountain Publishers, p. 289.
[14] A. B. K. Kasozi, Ibid., p. 153 & 309 (fn. 18).

with the provisions of, uphold and defend the Constitution and the law. In bringing the application, the applicants were not only seeking to force the other arms of State to live up to their responsibilities towards the judicial arm, but they were also fulfilling their civic and patriotic duty to promote constitutionalism and the rule of law. Unfortunately, the Court was not as keen to laud and support their efforts.

All in all, therefore, the court's stated decision as well as what it did not do in advancing the cause of constitutionalism and democratisation, was disappointing.

Understanding the Reasons for the Decision

What then explains this decision, in particular, the failure of the Justices of the Supreme Court to come out more assertively to require the Attorney General and the government in general, to effect the court's recommendations? What explains the prospect of the court going out of its way to clear the Attorney General of all blame, notwithstanding the fact that he had failed to implement its recommendations within the prescribed two-year period?

The answer can be partly found in the two inter-connected realities: first, an excessive deference for antiquated doctrines such as separation of powers and the "political question" doctrine and, second, the court's alarm at and determination to push back against the increasing judicialisation of politics.

By the nature of their education and philosophical grounding, Ugandan judges, just like their brothers and sisters elsewhere in the Commonwealth, have been trained to accept that the three traditional arms of government should not interfere in one another's mandate.[15] That the judiciary should leave the questions of policy and origination of legislation to the executive, and limit itself to settling disputes by applying the law (initiated by the executive and enacted by the legislature) to the facts. Under this belief, the furthest the court can go is to suggest to the other arms that there is need for legal reforms, but to go into the details of what should be in the law and when the law should be made is considered as going too far.

Making specific recommendations and prescribing a timeline for effecting them was possibly the furthest the court was prepared to go. When asked to take the next natural step of sanctioning those who did not comply, that looked like a journey too far. And so, when the applicants in Civil Application No. 5 of 2019 asked the court to do just that, the latter baulked. To their Lordships, that must have looked like an invasion into the territory of another arm of government. It simply went against the grain! It will conceivably take time for the idea to sink in that the requirement of Article 137 (4) (a) of the Constitution that the court in deciding constitutional matters should consider awarding reliefs. The same idea is underpinned by Article 2 (3) (a) of the International Covenant on Civil and Political Rights (ICCPR) and Article 8 of the Universal Declaration of Human Rights (UDHR), that requires that persons who come before courts of law are entitled to "effective remedies"

[15] For a discussion on the increasing irrelevance of concepts such as the rule of law and separation of powers, see Grace Patrick Tumwine–Mukubwa; 'Ruled from the grave: Challenging antiquated constitutional doctrines and values in Commonwealth Africa', in Joe Oloka-Onyango (ed) *Constitutionalism in Africa: Creating Opportunities, Facing Challenges,* 2001. Kampala: Fountain Publishers, pp. 287 – 307.

not just legal pronouncements. The above enjoins the modern court to be proactive in its decision-making, and that in constitutional and related litigation, make decisions which move society forward in terms of meaningful enjoyment of rights.

First enunciated by the United States (US) Supreme Court in the case of *Marbury v. Madison*,[16] and in the 1849 case of *Luther v. Borden*,[17] the political question doctrine is to the effect that a court will not consider certain questions because they involve the exercise of discretionary power of the executive or legislature. In other words, it means that certain decisions of the executive or parliament may not be subject to judicial review, that certain questions are beyond the inquiry of courts and should be left to be determined "politically" through the electoral process, policy formulation, through legislation or other "political" processes (including war).

Over the years, the doctrine has proved to be a convenient refuge, when courts feel uncomfortable making decisions, especially momentous ones that would set them on a collision course with other arms of the state.[18]

This tendency is an unwelcome one for a number of reasons. First, most recently enacted constitutions such as Uganda's, which lay down national objectives and directive principles of State policy, invoke sovereignty of the people; provide that limitations to the enjoyment of human rights are only permissible if they do not go beyond what is demonstrably justifiable in a free and democratic society; and demand, albeit implicitly, that the courts should not shy away from political questions. Second, what amounts to a political question is subjective and so vague that there is often no consensus on whether or not a given matter is political. To borrow from the case under review, for example, what is political about requiring that the State should provide for the use of technology in elections? Third, all interpretations of the Constitution potentially have political consequences[19]; and consequently, trying to interpret and give effect to the Constitution while avoiding political decisions is an exercise in futility.

It should be borne in mind that the courts' application of the political question doctrine is not always explicit. Oftentimes, courts apply the doctrine without saying so in so many words. For instance, in *Andrew L. Kayira & Another v. Edward Rugumayo & Another,*[20] the court declined to declare the removal of Lule unlawful and the incumbent government unconstitutional, explaining that the consequences of making such a decision "would be very grave indeed". Years down the road, in *Dr James Rwanyarare & Another v. Attorney General*[21] although Justice Kitumba in her lead judgment did not openly concede that her decision was informed by the political question doctrine, that reality was exposed by the judgement of Justice Berko who, at page 8, repeated the tired argument that the court

[16] Cr. 137 (1803)
[17] (1849) 7 How. 2
[18] For a discussion of the limits to the applicability of the doctrine in Uganda, see *CEHURD & Others* v. *Attorney General*, Constitutional Appeal No. 1 of 2013.
[19] Tumwine-Mukubwa, op. cit., pp. 298-99
[20] Constitutional Case No. 1 of 1979.
[21] Constitutional Petition No.4 of 2000.

could not declare the laws and State organs constituted and actions effected thereunder as nullities. He stated:

> Since the election, the present Parliament has enacted laws, debated and approved appropriation bills giving authority to the Government to spend monies for the running of the country, vetted and approved the appointment of officers including some Judges of this court. The petitioners are now asking the court to declare that the present Parliament was not elected in accordance with the provisions of the Constitution. In my view the consequences of issuing such a declaration are very serious indeed. I think that is a matter for the politicians to decide.

Public interest litigation, also known as strategic litigation, is one aspect of judicialisation of politics. Over the years, as the people grapple with an intransigent, insensitive and a generally unaccommodating State, they have lost faith in the capacity or willingness of most institutions of State to address their problems. They have thus increasingly sought to use the courts of law to demand and achieve things which they would ordinarily get from the State.

Judicialisation of politics tends to take various forms such as judicialisation of the electoral process, whereby most elections are contested in courts with the result that in effect the courts rather than the electorate end up choosing the political leaders; judicialisation of the legislative process, whereby those who fail to challenge and defeat legislation on the floor of parliament seek to do so through the courts; judicial review of administrative action which in effect asks the courts to make policy as well as administrative decisions; and public interest litigation by which the voiceless seek to use the courts of law to advance their causes.

Judicialisation of politics is inevitable, especially where there is a democratic deficit. In such a situation, for the courts to be overly reluctant to be seen to take political decisions, by trying to be politically neutral, is to take away the last refuge of the people, which according to Lord Atkin, is to be "more executive-minded than the executive."[22] The reality is that courts can never be politically neutral. To quote J.A.G. Griffith:

> Neither impartiality nor independence necessarily involves neutrality. Judges are part of the machinery of authority within the state and as such cannot avoid the making of political decisions. What is important is to know the basis on which the decisions are made.[23]

And as Prof. Joe Oloka-Onyango concluded, the important question to ask is not whether courts are engaged in politics, but rather what kind of politics.

[22] Lord Atkin in *Liversidge* v. *Anderson* (1942) AC 206.
[23] J.A.G. Griffith; *The Politics of the Judiciary*, 4th Edition. London: Fontana Press, 1991, p. 272.

Conclusion

It is evident that the real goal of the applicants was not so much to have the Attorney General penalized for disrespecting the court, but rather to back him into a corner so that he would have no alternative but to ensure that the recommendations of the court are put into effect in a meaningful way, in the interest of moving towards greater democratization. In the way it decided the application, the court did not enable the achievement of this goal.

All in all, it is difficult to make sense of the fact that the very court which, in Presidential Election Petition No.1 of 2016, set out to pave the path for greater democratization by prescribing the ten things the State was to do to ensure a more level playing field in presidential elections, was the same court which, in 2019 found it okay for the person it vested with the responsibility for putting its recommendations into effect to have only gone through the motions of implementing them in a formal rather than practical manner. It is difficult to come to terms with the fact that the court accepted that the learned Attorney General had "followed up" its directives when he held consultations with some departments of government. It was a disservice to the public for the court to accept that three years after it ordered that a number of laws be substantially amended well before the next round of elections; it was okay for the learned Attorney General to have done no more than coming up with Bills proposing minor changes in the electoral law, hardly a year to the next elections. The court having declined to put its institutional foot down to force the Attorney General to comply with its orders, it is not surprising that as the country heads into the January 2021 elections, only a handful of cosmetic amendments have been made to the electoral law, and every indication is that the shortcomings the Court found in the 2016 elections are certain to emerge in 2021, if they have not already done so.

CHAPTER THREE

Enabling (Non-) Compliance: Prof. Frederick E. Ssempebwa & 2 ors V. AG and the Quest for more Meaningful Engagement in Court Aided Electoral Reform

*Robert Kirunda**

Background

Amama Mbabazi v. Yoweri Museveni & the Electoral Commission (*Amama Mbabazi)* was the third presidential petition in Uganda's history.[24] In hearing the petition, the Supreme Court allowed nine law lecturers to join the proceedings as *amici curiae*. At the centre of the *amici*'s argument was the view that Uganda's electoral laws are mostly inadequate and that there cannot be a free and fair election premised on an inadequate electoral legal regime. The court had made recommendations in two presidential petitions, but they had not yielded many results.[25] In those previous petitions, the Supreme Court had made interventions along twelve broad themes: i) facilitation of the Electoral Commission;[26] ii) Nature of evidence;[27] iii) Time of filing and determining a petition;[28] iv) Time for holding re-election;[29] v) Timely enactment of election laws;[30] vi) Partiality of election officials;[31] vii) Deletion of voters from the register without due process;[32] viii) Failure or refusal by returning officers to avail reports on time;[33] ix) Contradictory and inadequate legal standards;[34] x) Level ground for candidates;[35] xi) Role of security forces;[36] and xii) The historical context of inadequate law.[37]

In *Amama Mbabazi,* the Supreme Court agreed with the argument that the legal regime was overdue for improvement. In its decision, the court made ten recommendations for legal reform. These related to i) the time for filing and determination of presidential petitions; ii) the nature of evidence; iii) the time for holding fresh elections; iv) the use of technology; v) unequal use of State-owned media; vi) the late enactment of relevant legislation; vii)

---

[24] * LL. B (Hons) Mak, LL.M UWC, Lecturer on law at Department of Law and Jurisprudence, Makerere University School of Law and Founding Partner at Kirunda & Wasige Advocates.
The first two were: *Kiiza Besigye v. Yoweri Museveni & The Electoral Commission, Presidential Petition No. 1 of 2001 (Besigye v. Museveni (No. 1))* and Kiiza Besigye *v.* Yoweri Museveni & The Electoral Commission, Presidential Petition No. 1 of 2006 (*Besigye v. Museveni (No. 2))*

[25] The details of the recommendations *in Kiiza Besigye* v. *Yoweri Museveni & The Electoral Commission, Presidential Petition No. 1 of 2001 (Besigye v. Museveni (No. 1))* and Kiiza Besigye v. Yoweri Museveni & The Electoral Commission, Presidential Petition No. 1 of 2006 (*Besigye* v. *Museveni (No. 2))* are ably summarized in the Amicus Brief filed by the Prof. Oloka-Onyango & 8 others in Supreme Court Civil Application No. 3 of 2016.

[26] *Besigye v. Museveni (No. 1),* Odoki CJ, at p. 41; Mulenga JSC, at p. 821; *Besigye v. Museveni (No. 2)* Odoki CJ at p. 152; Katurebe JSC at p. 402.

[27] *Besigye (No. 1)* Tsekooko JSC at pp. 513-514; Karokora JSC at p. 661; *Besigye (No. 2)* Oder at p. 206; Odoki CJ at p. 153.

[28] *Besigye v. Museveni (No. 2)* Odoki CJ at p. 153; Kanyeihamba JSC at p. 307; Katurebe JSC at p. 403; Tsekooko JSC at pp. 271 – 273.

[29] *Besigye v. Museveni (No. 2)* Katurebe JSC at pp. 403 – 404;

[30] *Besigye v. Museveni (No. 1)* Odoki CJ, p. 40; Besigye v. Museveni (No. 2) Katureebe JSC at p. 403

[31] *Besigye v. Museveni (No. 1)* Oder JSC at p. 430; *Besigye v. Museveni (No. 2)* Odoki CJ at p. 152; Kanyeihamba JSC at p. 324.

[32] *Besigye v. Museveni (No. 2)* Odoki CJ at pp. 152-153; Katurebe JSC at p. 352.

[33] *Besigye v. Museveni (No. 2)* Odoki CJ at p. 153; *Besigye v. Museveni (No. 2)* Katurebe JSC at p. 355.

[34] *Besigye v. Museveni (No. 2)* Odoki CJ, at p. 153; Kanyeihamba JSC at pp. 301 – 306.

[35] *Besigye v. Museveni (No. 1)* Odoki CJ at p. 40; *Besigye v. Museveni (No. 2)* Katurebe JSC at p. 403; Kanyeihamba JSC at p. 324

[36] *Besigye v. Museveni (No. 1)* Odoki CJ at p. 40; *Besigye v. Museveni (No. 2)* Odoki CJ at p. 152; Katurebe JSC at pp. 402 – 403; Kanyeihamba JSC at p. 324.

[37] *Besigye v. Museveni (No. 2)* Katurebe JSC at pp. 328 – 329; Kanyeihamba JSC at p. 324.

donations during the election period; viii) involvement of public officers in political campaigns; ix) the Attorney General's role in election petitions; and x) implementation of recommendations of the court.

Four of the ten recommendations made by the court in 2016 had been made in previous presidential petitions, as highlighted above. As a result of the *amicus* intervention by Prof. Oloka-Onyango and eight law dons at Makerere University School of Law, the court went further than it had done in 2001 and 2006. It made three Orders: i) it required the Attorney General to follow up with the other arms of government and ensure that its recommendations were implemented; ii) it required the Attorney General to report to the court within two years on the measures that would have been taken to implement the above recommendations, and iii) it reserved the discretion to make any further orders or recommendations it deemed necessary. The court went further than it had in the two previous presidential petitions in two ways. First, it tasked the Attorney General to ensure compliance with the three orders it had made. Second, it interdicted the Attorney General with a two-year period to execute its commands. However, the court did not direct on what form the report was to take, nor on how the reporting was to be done.

The Attorney General's conduct or lack thereof necessitated the filing of Supreme Court Civil Application 05 of 2019 (the Ssempebwa Application). This paper discusses the role of structural interdicts in advancing the quest for electoral reform in Uganda. In order to do so, the paper interrogates the nature of the structural interdict and what amounts to compliance therewith, as vital aspects to the ambition to improve electoral and democratic governance. The paper also examines the necessity and essence of satisfactory reporting in such cases.

Tracing Structural Interdicts in Law

The most comprehensive jurisprudence on structural interdicts exists in South Africa, which bases their foundation on Article 172(1)(b) of its Constitution.[38] Article 172(1)(b) of the Constitution of South Africa empowers the Constitutional Court to make any order that is just and equitable when deciding a constitutional matter within its power.[39] In Uganda, this principle is traceable in Article 137(4)(a) of the Constitution, which also allows the Constitutional Court, besides making a declaration on contravention of the Constitution, to grant an order for redress.[40] Section 33 of the Judicature Act also enjoins the courts in Uganda to make such orders and grant such remedies as will resolve the dispute or controversy between the parties as much as possible. Whereas Uganda's jurisprudence on the subject is not as developed, the courts have quickly embraced structural interdicts as a remedy to ensure social justice and foster legal and policy reform.[41]

[38] Cherese Thakur, "*Structural interdicts: An effective means of accountability?*", March 16, 2018, available at https://hsf.org.za/publications/hsf-briefs/structural-interdicts-an-effective-means-of-ensuring-political-accountability (accessed 27 November 2020)

[39] South Africa Constitution 1996, Chapter 8, Section 172(1)(b).

[40] Constitution of the Republic of Uganda 1995, Article 137(4)(a).

[41] Emmanuel Candia, '*The Effectiveness of Structural Interdicts in Uganda: An Assessment of Some Key Judicial Decisions*' p.1, available at https://www.academia.edu/38138360/The_Remedy_of_Structural_Interdicts_in_Uganda_docx (accessed 27 November, 2020)

The wealth of precedent and literature around structural interdicts is on the use of this remedy to enforce fulfilment of economic and social rights. However, this paper is concerned with the role played by structural interdicts in Uganda's quest for electoral reform. The attendant rights are of a civil and political nature. The paper particularly analyses what amounts to compliance by the Attorney General with the last recommendation issued by the Supreme Court in the Presidential Election Petition of 2016, directing that a report be submitted to the court on the status of implementation within two years. The paper answers two central questions: i) What is the role of the court in the issuance of structural interdicts in the context of civil and political rights enforcement? ii) What amounts to compliance with orders relating to structural interdicts and the exercise of judicial power?

The Nature, Role, Effect and Rationale of Structural Interdicts

A structural interdict is an order under which the court controls compliance with its orders or recommendations. Sometimes referred to as a supervisory interdict, a structural interdict is a useful tool to counter anticipated non-compliance with court orders, systemic inefficiency, negligence or reluctance.[42] Structural interdicts are based on the concept that courts retain residual jurisdiction over cases in which judgment has already been rendered with regard to the implementation of such judgment.[43] In essence, structural interdicts require the violator to rectify the breach of fundamental rights or the duty bearer to discharge their constitutional obligation under court supervision.[44]

Structural interdicts consist of five elements or processes.[45] First, the court issues a declaration identifying how the government has infringed rights; or otherwise, failed to comply with its constitutional obligations. Second, the court mandates government compliance with constitutional responsibilities. Third, the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. This report should explicate the government's action plan for remedying the challenged violations or complying with its obligations.[46] Fourth, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the constitutional infringement, and whether it brings the government into compliance with its constitutional obligations.[47] As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of government on the intricacies of implementation may be initiated.[48] Fifth, once the court approves the report presented, it issues a final order integrating the government plan and any court-ordered amendments. At the end of these steps, the government's failure to adhere to its plan (or any associated requirements) essentially amounts to contempt of court.[49]

[42] Christopher Mbazira, 'You are the "weakest link" in Realising Socio-economic Rights, Goodbye: Strategies for effective implementation of court orders in South Africa', 2008, Social-economic Rights Project, Research Series 17
[43] Ibid.
[44] Mitra Ebadolahi, *Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa, 2008, 83* New York University Law Review, at pp. 1565 & 1591
[45] Iain Currie & Johan de Waal, 'Remedies,' in Iain Currie & Johan de Waal (eds.) *The Bill of Rights Handbook* 2005, 5th ed., p. 217
[46] Richard Moultrie, "A Structural Interdict as the Appropriate Remedy for Constitutional Infringement" (unpublished manuscript, on file with the *New York University Law Review*, December 2006), pp. 7-8
[47] Mitra Ebadolahi, op cit., pp.1591-1592
[48] Ibid.
[49] Iain Currie & Johan de Waal, 'Remedies', op cit., p. 217

Structural interdicts may take different forms or models, depending on the specific order issued by the court.[50] Available models of this remedy include: the *bargaining model* where parties negotiate internally regarding the appropriate remedy; the *legislative/administrative hearing model*, which resembles a legislative committee process providing for public hearings and direct informal participation by interested parties who may not have been party to the original litigation; the *expert remedial formulation model* where experts are given the mandate to develop a remedial plan; the *report back to court model*, which requires the respondent to provide the court with a plan on how it intends to remedy the violation or comply with its constitutional obligation; and the *consensual remedial formulation model* where parties engage with each other by exchanging views and raising concerns as contribution to settling on a suitable remedy.[51] The input of other stakeholders may also form part of the process.

Structural interdicts serve various purposes depending on the demands in each case. Prof. Chris Mbazira observes that, unlike other forms of remedy such as damages, the purpose of structural interdicts is not deterrence or compensation.[52] Rather, it seeks to adjust future behaviour and is deliberately fashioned to achieve that objective. It creates an on-going regime of performance facilitated by the court's retention of jurisdiction, and sometimes by the court's active participation in the implementation of the decree.[53] The structural interdict is a response to the inadequacy of traditional remedies in responding to systemic violations of a complex organisational nature, or in this case systemic neglect of constitutional obligations. The traditional remedies like damages and declarations are insufficient to address such challenges at their root, or to address what has been termed as government recalcitrance or lackadaisical conduct.[54] As such, these interdicts also provide a tool through which the integrity of the judiciary can be preserved.[55]

It is because of these factors that the structural interdict has become a preferred remedy in 'institutional' suits that challenge large scale government deficiencies arising out of organisational, administrative, or legislative failure.[56] Such suits are necessary to deal with government actors that are simply opposed, intransigent or indifferent to established constitutional standards. In addition to *Amama Mbabazi,* five decisions have demonstrated the necessity of the use of interdicts to compel state compliance to legal and constitutional imperatives. In *Bahengana Damaro v. The Attorney General,*[57] the Constitutional Court of Uganda decried the impunity of the Uganda Police Force in wantonly violating the petitioner's rights and subjecting him to torture. The Court directed its Registrar to serve

[50] Strathmore Law Clinic, '*Structural Interdicts for Socio-economic Rights: What the Kenyan Jurisprudence Has Missed,*' (2019) *Strathmore Law Review,* pp.135, 140-142

[51] Ibid.

[52] Christopher Mbazira, '*From Ambivalence to Certainty: Norms and Principles for the Structural Interdict in Social-Economic Rights Litigation in South Africa,*' (2008), 24 South African Journal on Human Rights, pp. 1, 3-4

[53] Ibid, p. 4.

[54] For example, in the *Sibya* case where the court was concerned that the process of commuting death sentences following the *Makwanyane* case had taken too long. The government was ordered to take immediate steps to ensure that sentences of death imposed before 5th June 1995 are set aside and replaced with an appropriate alternative sentence. The government was also required to report to the court on not later than 15th August 2005 on all the steps taken to comply with the order above. See *Sibiya and Others v. DPP, Johannesburg High Courts and Others*, 2006 (2) BCLR 293 (CC).

[55] The authority and credibility of the judiciary would be significantly undermined if Court Orders were simply issued and then neglected by the party to whom such orders are directed, even where such party is another organ of the State or branch of government.

[56] Ibid.

[57] Constitutional Petition No. 53 of 2010. See also Emmanuel Candia, op cit., pp. 3-5

the decision upon the police leadership and required the matter be investigated and a report filed with the court within six months from the date of its decision. This was perhaps the first time the Constitutional Court issued a statutory interdict of any kind, let alone one touching on civil liberties, and exercised its residual jurisdiction. However, the Court did not follow up or take any further measures or actions to ensure that its interdict was complied with.

In *Center for Health, Human Rights and Development (CEHURD) and 2 Others v. Executive Director, Mulago Referral Hospital and Attorney General,*[58] the High Court interdicted the Uganda Police to investigate the disappearance of a baby from Mulago Hospital and file a report within six months. The court also interdicted Mulago Hospital to file reports on measures taken to account for all babies—dead or alive—every four months. These reports were to be filed for a total of two years. The interdict in this case was complied with but only because of the diligence of the team at CEHURD. There does not seem to have been much involvement of the court after it granted the order.[59]

Some success has been realized in advocating for socio-economic rights such as those relating to the nexus of life, livelihood and housing. In *James Muhindo and 3 Others v. The Attorney General*,[60] Musa Sekaana J. ordered the State to put in place comprehensive guidelines on land evictions within seven months, and went further to state that such guidelines should only be an interim measure towards the realisation of legislation in this regard. That legislation was later put in place vide the Constitutional (Land Evictions) (Practice Directions), 2021. But only one attempt has been made at using the structural interdict to advance the enforcement of civil and political rights, and to support the already existing demand and on-going advocacy for reforms in electoral laws and practices.

All the above decisions show a dire need for the courts to hold State agencies accountable for the enforcement of court orders. Where the courts take a passive role, as was the case in *Damaro,* the orders and interdicts will be ignored. *CEHURD* and *Muhindo* show that where the litigants are diligent, structural interdicts can in fact yield justice in questions that have remained unanswered. But such litigants need court's assistance and the court must take a more active role in not just requiring that their orders are followed to the letter, but that the agencies of government do so timeously and with collaboration of all stakeholders. Where this does not happen, the court fails in its duty to provide distributive justice and exposes itself to unavoidable criticism and possible wanton disobedience. This is the challenge that the Constitutional Court must meet in the way it deals with the compliance with its interdict in *Centre for Health Human Rights and Development & 3 Others v. The Attorney General*[61] discussed later in this paper. The situation is even more dire in cases involving civil and political rights, particularly those concerning presidential elections as the next sections show.

Using Structural Interdicts to Effect Electoral Reform in Uganda: Prof. F. E. Ssempebwa, Prof. Frederick Jjuuko & Kituo cha Katiba v. The Attorney General[62]

[58] Civil Suit 212 of 2013

[59] For a more detailed discussion on this case, see Emmanuel Candia, 'The Effectiveness of Structural Interdicts in Uganda: An Assessment of Some Key Judicial Decisions,' op cit., pp. 6-9

[60] *James Muhindo and 3 Others* v. *The Attorney General,* Misc. Cause 127 of 2016.

[61] Constitutional Petition 16 of 2011

[62] Supreme Court Civil Application 05 of 2019.

After the expiry of the timeframe stipulated in *Amama Mbabazi*, Professors Frederick Ssempebwa, Frederick Jjuuko and Kituo cha Katiba wrote to the Court, inquiring whether the Attorney General had complied with the court's orders and if so, for such report to be availed.[63] The Registrar responded by a letter dated 15 March 2019, to which he attached a copy of what he termed 'the Attorney General's compliance'**.** This was a letter written by the Attorney General to the President on 18 June 2018 'to advise him on the status of implementing the reforms arising out of the recommendations by the Court'**.**[64] This letter was in response to one authored by the President on 16 April 2018, about four months to the two-year deadline directing the Attorney General to liaise with the concerned State organs and ensure the implementation of the recommendations in the 2016 petition.[65] The letter reiterated the recommendations as issued by the Court, indicating compliance with only two of the ten reforms directed: extension of the time for filing and determination of a presidential election petition, and extension of the time for holding a fresh election from the date of annulment of a presidential election. The letter then pointed out the need for administrative and legal action in order for the rest of the recommendations to be implemented, and the institution of a multi-sectoral committee to that end.

Dissatisfied with this mode of 'compliance', Professors Fred Ssempebwa and Fred Jjuuko and Kituo cha Katiba proceeded to file an application in the Supreme Court for a declaration that the Attorney General was in contempt of Court Orders.[66] The applicants contended that there had been no implementation of the Court's orders issued in 2016 and that no reporting had been done as directed. They argued that as the orders had been given in open court, any reporting done should have followed the formal Court structure i.e., by the Attorney General moving the Court for a hearing with notice to all parties within the two years.[67]

In response, the Attorney General presented to court draft Bills that had not been debated or even sent to Parliament. The Bills had, in fact, been drafted *after* the application had been filed. The Attorney General pointed out that the Supreme Court did not, in issuing the orders, specify the modality of reporting back. Therefore, by letter to the Supreme Court Registrar dated 16 August 2018—ten days before the expiry of the two-year period given by court—the Attorney General had briefly laid out what measures had so far been taken towards implementing the orders of the Court. According to him, this amounted to sufficient compliance with the Court's directive, especially since correspondence to and from court is usually through letters to the Registrar of that court.[68]

[63] Prof. Frederick E. Ssempebwa, Prof. Frederick W. Jjuuko, and Kituo Cha Katiba, by letter dated 13 March 2019 addressed to the Registrar of the Supreme Court.

[64] The said letter was addressed solely to the President of the Republic of Uganda. However, the Rt. Hon. Speaker of Parliament, the Hon. Chief Justice, the Rt. Hon. Prime Minister, The Chairperson Electoral Commission, the Hon. Minister of Local Government and the Hon. Minister of Gender, Labor and Social Development were copied in to the letter, and the Attorney General indicated that he had instituted a multi-sectoral committee comprising officers from the different aforementioned offices for purposes of expediting the implementation of the Supreme Court recommendations. See Emmanuel Candia, op cit., pp. 11-12.

[65] Ibid.

[66] In the *Matter of an Application for a Declaration that the Attorney General is officially and personally in contempt of Court Orders, Prof. Frederick E. Ssempebwa SC & Ors. v. Attorney General, Civil Application No. 05 of 2019.*

[67] Ibid, p.9, Paragraph 6

[68] It is interesting to note that the Attorney General's in making its case hinted on the fact the Applicants had themselves adopted letter writing when requesting a record of the courts' proceedings and could not therefore question such mode of communication. See page 13 paragraph 11 of the ruling. In essence, the Attorney General likened compliance with a structural interdict to the procedural formality of requesting a record of proceedings from the court. The grave implications and realities of such interpretation are analyzed later in this paper.

The Court agreed with the Attorney General's argument on reporting. It took Judicial notice of the fact that communication with court is normally conducted through the office of the Court Registrar; and therefore, reporting to court by such letter did not amount to unreasonable conduct. Moreover, it did not matter that such letter was in fact written merely as a response to a letter from the Registrar reminding the Attorney General of his duty to court.[69] The fact that the Court in 2016 had not stated the reporting mode for the Attorney General meant that even such a letter could suffice. Further, the Supreme Court held that it was up to it, upon receiving the 'report', to have notified the other parties or even fixed the matter and called the parties for hearing if it deemed it proper to do.[70]

These particular findings of the Supreme Court in 2019 raise two concerns: first, the Court missed an opportunity to fill a gap that had been left by its 2016 decision in *Amama Mbabazi.* Having noted that it did not provide for a specific form of reporting, the Court should have pronounced itself on whether the subsequent reporting it provided for should be in open court as the applicants had prayed for, or any alternative form. Instead, the court seemed more concerned with not finding the Attorney General in contempt than in dealing with the contention on the form of reporting. Second, by not providing a specific form of reporting, the Court has, in effect, left itself open to routine applications by Ugandans interested in the rule of law. This may result in a multiplicity of proceedings or even embolden the Attorney General to resort to wanton disregard of the court's orders, since he is unlikely to face any more repercussions than subsequent orders to report again.

The Applicants had also sought a finding that the Attorney General had not complied with the orders of the court and was thus in contempt. They relied on decisions that set a four-part test for such a determination to be made.[71] An Applicant had to prove that: i) there was a court order; ii) the order was communicated to the respondent; iii) the order was disobeyed; and iv) the disobedience was wilful. Once, however, the first three elements are proved, the fourth is presumed. While the Court cited and agreed with the principles in these cases, it found that the Attorney General had not indeed fully complied with the orders in *Amama Mbabazi*, but that his noncompliance was not wilful. Consequently, the court gave the Attorney General further orders requiring that he liaises with other state agencies to ensure that the Court's orders in *Amama Mbabazi* are obeyed as a matter of priority; the attendant electoral legislation be tabled before Parliament in a month; the Attorney General reports to court on the progress within three months, but that in any event, the Attorney General should make a final report to the Court within six months from the date of the ruling.

The Court's determination of the Ssempebwa Application was flawed. Had the Attorney General complied with the Court's orders in 2016, this subsequent order to comply would have been unnecessary. The Court essentially, in issuing orders for subsequent compliance, demonstrated that the Attorney General had fallen below the standard required of him in 2016. The court avoided making a finding of contempt, and essentially undermined its own sanctity by failing to take stern action in the face of non-compliance. The Court, again, did not direct on the mode of reporting that the Attorney General should have followed.

[69] See *Prof. Frederick E. Ssempebwa SC & Ors.* v. *Attorney General*, op cit., p. 24, paragraph 24-26.
[70] Ibid., p. 24, paragraph 20.
[71] *Pheko & Ors v. Ekurhuleni Metropolitan Municipality,* (No. 2) [2015] ZACC 10; *Fakie v. CC11 Systems (Pty) Ltd,* [2006] SCA54 (RSA); *Lourens v. Premier of the Free State Province and Anor,* 95260 [2017] ZASCA 60; and *Meadow Glen Home Owners Association v. City of Tshwane Metropolitan Municipality,* 767/2013 [2014] ZASCA 209.

On 26 September 2019—three months after the ruling—the Attorney General wrote directly to the Registrar of the Supreme Court on the progress of the proposed legislation on electoral reforms. Attached to the letter were the five Electoral Law Reform Bills introduced by the Attorney General to Parliament in July 2019, which he indicated as being before the Sectoral Committee on Legal and Parliamentary Affairs for scrutiny.[72] The letter reads:

> By way of background, the Supreme Court in Presidential Petition No. 01 of 2016: Amama Mbabazi v. Yoweri Kaguta Museveni, Electoral Commission and the Attorney General made a total of ten (10) recommendations **on which I *now* report as follows**[73] (emphasis mine).

It then entails a breakdown of each recommendation as issued by the Court in 2016, immediately followed with an indication of what had been done towards its implementation.[74] The letter was copied to and served on, among others, Counsel for applicants in the 2019 application.

At the heart of this application was the centrality of what amounts to satisfactory compliance. This necessitates addressing two aspects: first, that which the executive does in response to the orders of the court must conform to the substantial requirements of the court order. In this case it did not. Second, the manner in which the compliance is communicated (or "reported") to the court must engender transparency, participatory engagement and respect for the sanctity of the court and the rules it applies.

In the way the Court heard and adjudicated the *Ssempebwa Application*, it missed the opportunity to emphasise the role of meaningful engagement of concerned citizens of Uganda in the quest for electoral reform, good governance and constitutionalism. It is noteworthy that although the application arose from *Amama Mbabazi* to which neither Prof. Ssempebwa and his colleagues were parties, the application was heard without hinderance on technical grounds of *locus standi*.

The Glaring Inadequacies

Strategies to achieve full compliance with court orders cannot be devised without identifying the challenges to be confronted. Away from the reluctance on the part of the State officials to observe the rule of law and respect court orders, a number of shortfalls in the mode and process of compliance prescribed by the court are noteworthy. These include the lack of clarity and transparency, and the absence of prescribed rules or standards.

The nature of the order issued by the court itself can result in its implementation or non-implementation. The *report back to court model* is praised for respecting the separation of

[72] The Presidential Elections (Amendment) Bill No. 17 of 2019; the Parliamentary Elections (Amendment) Bill No. 18 of 2019; the Electoral Commission (Amendment) Bill No. 19 of 2019; the Political Parties and Organizations (Amendment) Bill No. 20 of 2019; and the Local Governments (Amendment) Bill No. 21 of 2019.

[73] It must be remembered that both the court and the Attorney General in the 2019 Application pointed to the correspondence with the Registrar as sufficient compliance with the Court order to report on the implementation of the 2016 recommendations. It is therefore not clear why through this second letter, the Attorney General is declaring that he is doing the reporting then. This raises questions on when compliance with the 2016 Court orders was actually effected, and whether reporting done outside the prescribed time also amounts to sufficient compliance in Uganda's jurisprudence.

[74] The only 2016 recommendation left out in the letter is the last one on reporting by the Attorney General.

powers doctrine and hence shielding the court from allegations of usurping the functions reserved for other organs of State.[75] This may explain why the Supreme Court adopted the same model, despite the Attorney General's non-compliance.[76] However, even this model could have been adopted with more clarity, such as on the format of the report and the mode of its presentation. The Court needed not prescribe the content and the details of the report, as this could have been seen as usurpation. But a certain level of clarity was required in order for the remedy to be sufficient and to guide litigants' expectations. Compliance with court orders cannot be appropriately assessed if the mode of compliance is unclear or left unaddressed.

Furthermore, whatever model or means of redress is chosen, it should be subject to scrutiny by the court and the opposite party.[77] Public interest litigation, because of its widespread impact, calls for adequate representation of the different interests affected by the proceedings.[78] At the stage of relief in particular, if the decree is to be quasi negotiated and party participation is to be relied upon to ensure its viability, representation at the bargaining table provides importance not only to the affected interests, but also to the system itself.[79]

In this regard, another challenge identified in other jurisdictions and experienced in Uganda during the Ssempebwa application is the lack of transparency in the implementation of court orders. Litigants and other stakeholders involved in the court process are usually not informed about the steps the State is undertaking towards implementation.[80] This hinders both meaningful participation and the effective monitoring of progress. It excludes stakeholders whose contribution could be essential to implementation, such as civil society that could assist in clarifying the full import of the court order.[81]

Additionally, the principles of impartiality and judicial independence must be maintained even at this stage. The peculiar structure of structural interdicts places the court in an architectural relationship with the state bureaucracy.[82] However, the court is supposed to retain its neutral and supervisory role throughout the implementation and reporting phase, which is why it was problematic for the Attorney General to submit as his compliance of the court orders, a letter written to the President to advise him on the status of implementation, which the Registrar of the Court then forwards to interested parties.

On the absence of prescribed rules and standards, Prof. Mbazira points out that the principles established thus far only address one aspect of the structural interdict—the supervision process. Therefore, there is need for a comprehensive list of norms and principles that guide the determination of when the relief is appropriate.[83] However, beyond that, there is need for

[75] Mbazira, op cit.., note 51 at p.6.
[76] It is often argued that structural interdicts are not intended to substitute the judiciary for the administration. See D. M. Davis, '*Socio-economic Rights in South Africa: The Record of the Constitutional Court after Ten Years*', (2004) 5, *ESR Review,* pp. 3 & 6.
[77] Op cit., note 51.
[78] Abram Chayes, 'The Role of the Judge in Public Law Litigation', (1979) 89 Harvard Law Review, p. 1310
[79] Ibid.
[80] Op cit., note 41.
[81] Ibid.
[82] O. Fiss, 'Foreword: The Forms of Justice', (1979), 93 Harvard Law Review, pp. 1, 53
[83] Christopher Mbazira, 'From Ambivalence to Certainty: Norms and Principles for the Structural Interdict in Social-Economic Rights Litigation in South Africa', p.16

guidance in the area of compliance with structural interdicts i.e., what amounts to sufficient compliance to discharge the respondent of its duty and to keep dissatisfied litigants from going back to court.

As demonstrated above, the Supreme Court in 2019 noted that in 2016 it had not provided guidance on what form the report should take or how the reporting should be done. That loophole had resulted in dissatisfaction with both factors in terms of compliance, and led to the litigation in 2019. Despite acknowledging this, the Court in 2019 went on to issue further orders on reporting while maintaining the same silence on the form. As a result, the Attorney General again wrote a letter to the Registrar within three months, explaining the status of implementation, and no final report was availed within six months as directed in 2019. This begs the question on what purpose, if any, the issuance of these interdicts by the court eventually served.

To address this important challenge, it is proposed that the Chief Justice through the Rules Committee issues a Practice Directive that provides for the nature a report to the court on the issuance of a structural interdict should take. This Practice Directive need not be subjected to the long and laborious process of statutory enactment. It is achievable with relative expedience and will go a long way in ensuring that subsequent petitioners or applicants are not faced with the same frustration by the Attorney General, and that there is a clear way to ensure a transparent, accountable and participatory approach to court aided electoral reform in Uganda.

Implications for the Broader Journey towards Electoral Reform

The *Ssempebwa Application* was the first attempt in Uganda, and arguably in Africa, at the use of the structural interdict to enforce civil and political rights. The rights with which this application was concerned, particularly the right to vote and the rights to participate in democracy, choice of leadership and participatory governance are all enshrined in Uganda's Constitution.[84] Article 59 of the Constitution of the Republic of Uganda guarantees the right to vote. Enjoyment of this right is critical for the people of Ugandan to exercise their right to participate in democratic governance through the election of their leaders, as is espoused in Article 1 of the Constitution. But these two provisions are meaningless without the proper statutory framework that would breathe life into their enforcement and guarantee their enjoyment. This was the crux of the argument in the *Prof. Oloka-Onyango Amicus Application* and the *Ssempebwa Application* that followed up the enforcement of the attendant orders.

There are several civil and political rights in the Constitution. This Application is critical because it tested the court's resolve in dealing with the rights touching not just on State power, but also on the invincibility of presidential power and the power of incumbency in the fledgling democracy that Uganda is. The court's mundane approach to the question of contempt exposed it as not viewing itself as a co-equal arm of government and the only

[84] Article 59 on the right to vote enjoins the state to do everything possible to ensure that persons registered to vote enjoy their right to vote.

one that enjoys protection from interference.[85] Two factors underlie this view: first, the court should have found the Attorney General in contempt; second, the court did not make a final order in terms of the fifth step in the processes relating to structural interdicts as highlighted above. This exposed the court was as being too timid to confront the necessities that lay in electoral reform, perhaps because the reforms in pursuit of which this litigation arose related to the presidency.

As the highest court in the land, the Supreme Court essentially undermined the resolve of all the courts subordinate to it which must now follow its decision as binding precedent. Not only must they follow a decision that is patently at odds with the precedents it relied on, they will struggle to make any bolder findings against the Attorney General or any abuse of State power that relates to political, or other abuse of state power. The *Ssempebwa Application* was meant to vindicate the courts and the sanctity of their orders. One unintended consequence may actually be that the decision of the Supreme Court did just the opposite.

Worse still, the Supreme Court in the *Ssempebwa Application* undermined one of its most bold and forceful advances towards emasculating Uganda of the political question doctrine.[86] Ugandan jurisprudence and judicial independence had come a long way since *Uganda v. Commissioner of Prisons, Ex Parte Matovu,*[87] which is considered the decision that crystalized the political question doctrine in Uganda—the view that the courts must steer clear of questions that seem to be more politically motivated than legal in nature. In *CEHURD & 3 Ors v. The Attorney General,*[88] Justice Kisakye held:

> . . . the political question doctrine has limited application in Uganda's current Constitutional order and only extends to shield both the Executive arm of government as well as Parliament from judicial scrutiny where either institution is properly exercising its mandate, duly vested in it by the Constitution. It goes without saying that even in these circumstances, factual disputes will always come up where a private citizen challenges either the Executive or Parliament action or inaction and the resultant outcome of such actions and inaction in respect to either institution's implementation of its respective constitutional mandate and whether such action or inaction contravenes or is inconsistent with any provision of the Constitution. It is my considered view that it was for this very purpose that the Constitutional Court was established and given powers under Article 137(1) and (3) to consider these allegations and determine them one way or another.

This dictum was hailed as a bold expression and perhaps a deserved break from the "ghost" of *Ex Parte Matovu* that had dogged the Ugandan judiciary for a very long time. However, there remained a fear that the *CEHURD* decision only addressed the overt dimension of the political question doctrine. Unfortunately, the doctrine has a more subtle and covert

[85] Article 128 (1) of the Constitution of Uganda, 1995 guarantees the courts independence from interference by any other arm of government. None of the other two arms enjoys similar constitutional protection.
[86] J. Oloka-Onyango (2015), *Ghosts and the Law* (November 17, 2015), available at SSRN: http://dx.doi.org/10.2139/ssrn.2691895 or https://ssrn.com/abstract=2691895
[87] [1966] EA 514
[88] Constitutional Appeal 1 of 2013.

dimension, which consists of the courts of law being unduly submissive to and even fearful of the other arms of the State.[89] Summarizing his prophetic concern that courts in Uganda would manifest a subtle expression of the political question doctrine, Prof. Oloka-Onyango opined thus:

> Courts are reluctant interlopers on the presidential election dispute resolution scene; it takes them completely out of their comfort zones. The key point here is not so much that courts have avoided contentious election cases but that, in most cases where they have implemented the PQD, they have taken on the case and rendered a full decision on the matter but avoided upsetting the status quo.[90]

The decision in the *Ssempebwa Application* proved correct the ominous prediction that this subtle and covert dimension of the political question doctrine was yet to express itself.[91]

The Court would have done better engendering a more participatory and conversational role than an adversarial one. It should have compelled the Attorney General to explain non-compliance on the basis of each recommendation, and perhaps called in any arms of government that had not heeded its orders rather than let Counsel argue about compliance and give the Attorney General more time to resolve the non-compliance the Court had found. Inevitably, this would have laid a heavier burden on the State to ensure that it not only strictly met the dictates that the court had set forth, but also that it did so with the collective involvement of all stakeholders. This would not only have provided more and better guidance on meaningful engagement, but also meaningful compliance. Instead, the Court insisted on absolving itself of the responsibility of having received the Attorney General's report in full view and with the involvement of the parties to *Amama Mbabazi*, the *amici* whose application had somewhat advanced the journey to more meaningful reform, and the applicants in the *Ssempebwa Application*.

In the broader context, therefore, the *Ssempebwa Application* demonstrates the need for the courts to take on a wider role in handling cases in which the interests of citizens and the State may be at variance. The courts are not intended to only play an adjudicative role but also an administrative one. While playing the latter role, the courts play both a supervisory function and a facilitative one. These non-adjudicative roles do not supplant the judicial function and are only complimentary. They are also anticipated in the Constitution. Article 126 of the Constitution provides that judicial power is derived from the people and should be administered in accordance with the law and the norms and aspirations of the people. Article 126 (2) (d) then requires the courts to promote reconciliation. In so doing, the courts take on not just a judicial role but also an administrative one. This twin mandate was

[89] J. Oloka-Onyango, 'Political Question Doctrine in Uganda: An Analysis on the Technicalities on the realization of Freedoms of Expression Association, and Assembly in Uganda', 2017, Chapter Four Uganda, at p. 41. Two truly sad events occurred at the hearing of this Application: first, in the course of arguing the Application, counsel for the Applicants raised the question as to what the rest of the Bar were to do if the Attorney General could wantonly disregard the Orders of the Supreme Court. That question was never answered. Second, as the court was concluding its hearing, one of the Justices remarked, perhaps only half-jokingly, that they hoped they would not see the Applicants in court again over the same matter.

[90] J. Oloka-Onyango, *When Courts do Politics: Public Interest Law and Litigation in East Africa,* Cambridge Scholar, (2017) at p. 255

[91] Ibid.

expressed by the South African Supreme Court of Appeal in *Port Elizabeth Municipality v. Various Occupiers,*[92] where the court stated thus:

> . . . the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus, one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arm's-length combat by intransigent opponents.[93]

In the *Ssempebwa Application*, the Supreme Court made no efforts at all to engage with the parties on the key objectives that the applicants in the *Ssempebwa* and *Oloka* applications sought, or how those objectives could be realized in a practical and pragmatic manner. Yet the court must have been aware of the possibility, even the probability, that the Executive arm of government could be superficial in their compliance, if at all. In such circumstances, the courts would serve the cause of constitutionalism and the people of Uganda better by facilitating meaningful engagement.

Meaningful engagement provides the courts with an opportunity to strike a balance between the competing interests of the State and its citizens, without having to succumb to the fetters of the political question doctrine. Engagement has the potential to contribute towards the resolution of disputes and the increased understanding and sympathetic care, if both sides are willing to participate in the process.[94] Engagement is a two-way process in which the various parties to a constitutional disagreement would need to talk to each other.[95] There is no closed list of the objectives of engagement. The court would need to discern these from the grievances that the parties bring to it. Engagement has the potential to contribute towards the resolution of disputes and the increased understanding and sympathetic care, if both sides are willing to participate in the process.[96] Finally, it must be mentioned that secrecy is counter-productive to the process of engagement. The constitutional value of openness is inimical to secrecy.[97]

By legitimising reporting through a letter to the Registrar as was done in both the *Oloka* and *Ssempebwa Applications*, the court excluded other stakeholders from the reporting process and denied them the opportunity for engagement. The court took an adversarial and secretive approach to a matter in which the parties would have been better served by meaningfully engaging with each other. The court thus dismantled the public nature of civic engagement with the rights and duties in articles 1 and 59, and rendered the efforts of the spirited applicants subject to the private treatment of the pursuit of democratic reform, and

[92] *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC).
[93] Ibid.
[94] *Occupiers of 51 River Road Berea Township, and 197 Mainstreet, Johannesburg v. City of Johannesburg & 3 Ors, with Centre on Housing Rights and Evictions, and Community Law Centre as Amici CCT 24/7 [2008] ZACC, 1,* at para 15
[95] Ibid., at para 14
[96] Ibid., at para 20
[97] Ibid., at para 21

that in the context of a judiciary quite obviously subdued to the powers of the Executive arm and the presidency. The approach the court took, therefore, only resulted in superficial compliance, and leads to the conclusion that it was content with its being so undermined.

In the *Ssempebwa Application*, the Supreme Court mentioned that the objective of its orders in 2016 was to foster fair-play, democracy, law and order in the politics of Uganda.[98] It further explains that the two-year follow-up timeline was set in order for the recommended laws to be enacted or amended in time for all stakeholders to implement and comply with in subsequent elections.[99] However, it has already been observed that the manner in which the implementation of the court orders was conducted or 'conjured' was to answer to the political interest of the government and not the greater demand of the people.[100]

A unique bane and blessing arise from *CEHURD & 3 Ors v. The Attorney General.*[101] Having initially avoided hearing the matter on its merits, the Constitutional Court eventually did so, following the Supreme Court's decision discussed above. In rendering its judgment, the court granted an interdict in the following terms:

> The Attorney General is directed to submit a report at the end of the financial year 2020/2021 showing progress and implementation of the orders in (h) above.

The above interdict is a bane because it shows that despite the fact that structural interdicts were recognized in 2016 as a critical tool for the advancement of human rights and constitutionalism in Uganda, the lack of clarity on how best to harness this instrument abides. The Constitutional Court left itself open to the very vagaries that have been discussed in this paper.

It is a blessing because it leaves a window of opportunity for the Constitutional Court to tread the path that the Supreme Court should have trodden, as recommended in this paper, and perhaps to provide guidance to the High Court. It remains to be seen how the court will behave, once the timeline of its interdict lapses.

Conclusion and Recommendations

The Ssempebwa Application is a tacit recognition of the value of using structural interdicts in enforcing civil and political rights, but exposed the court to still be a captive of the subtle nature of the political question doctrine. The Supreme Court missed the opportunity to engender a participatory approach to negotiating political settlements. It should have engendered more meaningful engagement with these spirited individuals that had taken the initiative to vindicate its orders by ensuring that the Attorney General and the other arms of government complied. The exercise of residual jurisdiction in political cases is best served by ensuring that the matter before court is handled in a more participatory manner than an adversarial one. The Court seems to have considered the *Ssempebwa Application* as an adversarial one. It would have done better stepping out of its adjudicative role and embraced

[98] *Prof. Frederick E. Ssempebwa SC & Ors.* v. *Attorney General*, op cit., p. 33, paragraph 9-14
[99] Ibid.
[100] Emmanuel Candia, op cit, p. 14.
[101] Constitutional Petition 16 of 2011.

a more facilitatory one. In such a context, the court would be an authoritative arbiter ensuring that all concerned citizens are playing their part in holding the State accountable to obey court orders. This is what could have been achieved by the Court requiring the Attorney General to report back in open court.

This approach is important and can go a long way in ensuring that steps required for the achievement of meaningful electoral reform and justice are achieved in a less confrontational manner. Given Uganda's history, such an approach would have been desirable.[102] The opportunity has now presented itself in the *CEHURD & 3 Ors v. The Attorney General* case mentioned above.[103] It is recommended that the Constitutional Court seizes it and advances the jurisprudence on structural interdicts as a key tool to deepening constitutionalism, good governance and the rule of law in Uganda's jurisprudence.

According to the findings discussed in this paper, the court set a precedent that will complicate the judiciary's ability to hold the other arms of government accountable for non-compliance to orders, particularly in political cases. It is necessary, however, that a legislative intervention is made to provide clarity on what form a report issued in compliance with a structural interdict should take. This may be by way of Statutory Instrument or through a Practice Directive issued by the Chief Justice. Such a directive should include the requirement for such report to be detailed and accurate on the exact measures undertaken towards implementation, be read—and if need be, debated—in open court, and be served on all the parties interested in the proceedings that led up to the decision. This way, the court can play its facilitatory role and empower citizens to meaningfully engage in the process of law reform and good governance, to hold State actors accountable, and uphold the integrity of the court.

While politics is a field that courts tend to avoid through the political question doctrine, their role is inescapable.[104] Deciding presidential petitions places courts at the pinnacle of politics.[105] But they must see their role as broader than just applying the law to the facts of a particular dispute, or being "reluctant interlopers."[106] This is one of the lessons to be drawn from the litigation that arose from the *Amama Mbabazi* petition. The *Ssempebwa Application* gave the Supreme Court a rare and unique opportunity to facilitate the improvement of the electoral and democratic process in Uganda. As the discussion above shows, the Supreme Court of Uganda owed a duty to the applicants and to the rule of law in Uganda to defend the sanctity of its orders and to ensure that the efforts of spirited and proactive Ugandans are not subdued and frustrated by a submissive judiciary. The court failed in that duty.

[102] On the historical context to Uganda's political settlements, see Frederick Jjuuko & Sam Tindifa, *A People's Dialogue: Political Settlements in Uganda & The Quest for a National Conference, 2018,* Fountain Publishers, Kampala
[103] Constitutional Petition 16 of 2011.
[104] This is the entire thesis of Chapter Six of J. Oloka-Onyango's work on when courts decide presidential petitions in J. Oloka-Onyango, *When Courts do Politics,* op.cit., pp. 214 – 256. See particularly pp. 250 – 257.
[105] Ibid, at p. 257
[106] Op. cit note 89.

References

Chayes, A., (1979) 'The Role of the Judge in Public Law Litigation,' 89 Harvard Law Review at p. 1310

Amama Mbabazi v. *Yoweri Kaguta Museveni & Ors*., Presidential Election Petition No. 1 of 2016.

Thakur, C., (2018) "*Structural interdicts: An effective means of accountability?*". Available at

https://hsf.org.za/publications/hsf-briefs/structural-interdicts-an-effective-means-of-ensuring-political-accountability

Mbazira, C. (2008) 'From Ambivalence to Certainty: Norms and Principles for the Structural

Interdict in Social-Economic Rights Litigation in South Africa,' 24 *South African Journal on Human Rights* 1, at pp. 3,4,16

Mbazira, C., (2008) 'You are the "weakest link," in Realising Socio-economic Rights, Goodbye:

Strategies for effective implementation of court orders in South Africa,' *Social-economic Rights Project Research Series,* 1 – 54 at p. 17

Constitution of the Republic of Uganda 1995

Davis, D. M. (2004) *Socio-economic Rights in South Africa: The Record of the Constitutional Court after Ten Years*, 5 *ESR Review,* 3

Candia, E. (2020) *The Effectiveness of Structural Interdicts in Uganda: An Assessment of Some Key Judicial Decisions*, 1. available at https://www.academia.edu/3813860/The_Remedy_of_Structural_Interdicts_in_Uganda_docx

Jjuuko, F. & Tindifa, S. (2018) *A People's Dialogue: Political Settlements in Uganda & The Quest for a National Conference,* 2018, Kampala, Fountain Publishers, ISBN 978-9970-617-91-3

Currie, I. & Waal d. J. (2005) 'Remedies,' in Iain Currie & Johan de Waal (eds.), *The Bill of Rights Handbook,* 5th ed, Juta Legal and Academic Publishers, 978-0-7021-5923-7

In the Matter of an Application for a Declaration that the Attorney General is officially and personally in Contempt of Court Orders, *Prof. Frederick E. Ssempebwa SC & Ors*. v. *Attorney General*, Civil Application No. 05 of 2019.

J. Oloka-Onyango (2015) *Ghosts and the Law*. Available at

SSRN: http://dx.doi.org/10.2139/ssrn.2691895 or

https://ssrn.com/abstract=2691895

J. Oloka-Onyango, (2017) *Political Question Doctrine in Uganda: An Analysis on the Technicalities on the realization of Freedoms of Expression association, and Assembly in Uganda Chapter Four*, Available at Political-Question-Doctrine-in-Uganda-Issue-Paper.pdf (chapterfouruganda.org)

J. Oloka-Onyango (2017), *When Courts do Politics: Public Interest Law and Litigation in East Africa,* Cambridge Scholar. Cambridge.

Ebadolahi, M. (2008) 'Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa,' 83 *New York University Law Review* 1565 at pp. 1591, 1592

Fiss, O. (1979) 'Foreword: The Forms of Justice,' 93 *Harvard Law Review 1* at p. 53

Moultrie, R. (2006) "*A Structural Interdict as the Appropriate Remedy for Constitutional Infringement,*" (unpublished manuscript, on file with the *New York University Law Review*.

Sibiya and Others v. DPP, Johannesburg High Courts and Others, 2006 (2) BCLR 293 (CC) South Africa Constitution 1996

Strathmore Law Clinic (2019) 'Structural Interdicts for Socio-economic Rights: What the Kenyan Jurisprudence Has Missed,' *Strathmore Law Review,* 135, pp. 140-142

APPENDIX

FULL JUDGEMENT OF PROF. SSEMPEBWA & ORS V. AG

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 05 OF 2019
(ARISING OUT OF PRESIDENTIAL ELECTION PETITION NO.1 OF 2016)

CORAM: ARACH-AMOKO, MWANGUSYA, OPIO-AWERI, MWONDHA, MUGAMBA, BUTEERA, JSC
NSHIMYE, AG. JSC

IN THE MATTER OF AN APPLICATION FOR A DECLARATION THAT THE ATTORNEY GENERAL IS OFFICIALLY AND PERSONALLY IN CONTEMPT OF COURT ORDERS

AND

IN THE MATTER OF PRESIDENTIAL ELECTION PETITION NO. I OF 2016
AMAMA MBABAZI VS YOWERI KAGUTA MUSEVENI & OTHERS

1. **PROF. FREDERICK E. SSEMPEBWA, SC**
2. **PROF. FREDERICK W. JJUKO** **APPLICANTS**
3. **KITUO CHA KATIBA**

VERSUS

ATTORNEY GENERAL **RESPONDENT**

THE RULING OF COURT

Introduction

This is an application by Notice of Motion brought under Article 128(3) of the Constitution of the Republic of Uganda (as amended), Objective No. VIII and XXIX (a), (f) and (g) of the National Objectives and Directive Principles of State Policy, section 98 of the Civil Procedure Act, Rule 2(2), 42(1) and 43 of the Judicature (Supreme Court) Rules.

The application was supported by the accompanying affidavits of Prof. Frederick Ssempebwa, SC, Prof. Frederick W. Jjuko and Edith Kibalama and an affidavit in response by Professor Frederick. E. Ssempebwa.

The grounds for the application according to the Notice of Motion are the following:

1. **That in Presidential Election Petition No.1 of 2016 court made orders on electoral reforms to be implemented by other organs of State, namely Parliament and the Executive, and directed the respondent to follow up the implementation.**

2. **That court set a two-year timeframe from the date of the aforementioned Judgment within which the respondent was to report to this court the measures taken to implement the orders.**

3. **That ever since the date of judgment the said orders have not been implemented, and the respondent has not reported back to this Honourable Court.**

4. **That the respondent has acted in contempt of the said court orders.**

The application is opposed by the respondent. The Attorney General, Honourable William Byaruhanga, filed an affidavit in reply and a supplementary affidavit.

Background

General elections were held in this Country on 18th February 2016 with eight presidential candidates. The Electoral Commission declared Y. K. Museveni as the successful candidate on the 20th February 2016. One of the candidates, Amama Mbabazi, was dissatisfied with the results.

He petitioned this court vide Presidential Election Petition No. 01 of 2016 for nullification of the election results based on various grounds and complaints.

The Court heard the petition and delivered its Judgment with detailed reasons on 26th day of August 2016.

In its Judgment, the Court pointed out a number of areas of concern. It noted that in the previous two Presidential Petitions, the Court had made important observations with

regard to the need for reform in the area of election s generally and Presidential elections in particular, which have remained unanswered by the Executive and the Legislature.

The Court identified the following ten key areas in which it made recommendations for reform:

1. **"The Time for filing and determination of the petition**
   In the course of hearing this petition, the issue of the inadequacy of the time provided in Article 104(2) and (3) of the Constitution for filing and determining of presidential election petitions came up. The same issue was also pointed out by this Court in the two previous presidential elections petitions and to gather evidence and the 30 days within which the Court must analyze the evidence and make a decision as provided under Article 104(2) and (3) of the Constitution and section 59 (2) and (3) of the PEA is inadequate. We recommend that the period be reviewed and necessary amendments be made to the law to increase it to at least 60 days to give the parties and the court **sufficient time to prepare, present, hear and determine the petition, while at the same time being mindful of the time within which the new** president **must be sworn in.**

2. **The nature of evidence:**
   Whilst the use of affidavit evidence in presidential election petitions is necessary due to the limited time within which the petition must be determined, it nevertheless has serious drawbacks mainly because the veracity of affidavit evidence cannot be tested through examination by the court or cross-examination by the other party. Affidavit evidence on its own may be unreliable as many witnesses tend to be partisan. We recommend that the rules be amended to provide for the use of oral evidence in addition to affidavit evidence, with leave of court.

3. **The time for holding fresh elections:**
   Article 104(7) provides that where a presidential election is annulled, a fresh election must be held within 20 days. We believe this is unrealistic, given the problems that have come to light in the course of hearing all the three petitions that this court has dealt with to-date. In all these petitions, the Commission has been found wanting in some areas. Importation of election materials has sometimes been a problem. Securing funds has also often provided challenges. Therefore, to require the Commission to hold a free and fair election within 20 days after another has been nullified is being overly optimistic. A longer and more realistic timeframe should be put in place.

4. **<u>The use of technology:</u>**
   While the introduction of technology in the election process should be encouraged, we nevertheless recommend that a Jaw to regulate the use of technology in the conduct and management of elections should be enacted. It should be introduced well within time to train the officials and sensitize voters and other stakeholders.

5. **Unequal use of State-owned media:**
Both the Constitution in Article 67(3) and the PEA in section 24 (1), provide that all presidential candidates shall be given equal time and space on State-owned media to present their programmes to the people. We found that UBC had failed in this duty. We recommend that the electoral law should be amended to provide for sanctions against any State organ or officer who violates this Constitutional duty.

6. **The late enactment of relevant legislation:**
We observed that the ECA and the PEA were amended as late as November, 2015. Indeed, the Chairman of the Commission gave the late amendment of the law as the reason for extending the nomination date. We recommend that any election related law reform be undertaken within two years of the establishment of the new Parliament in order to avoid lastminute hastily enacted legislation on elections.

7. **Donations during election period:**
Section 64 of the PEA deals with bribery. We note that Section 64 (7) forbids candidates or their agents from carrying out fundraising or giving donations during the period of campaigns. Under Section 64 (8), it is an offence to violate Section 64 (7). However, we note that under Section 64 (9) a candidate may solicit for funds to organize for elections during the campaign period. Furthermore, a President may in the ordinary course of his/her duties give donations even during the campaign period. This section in the law should be amended to prohibit the giving of donations by all candidates including a President who is also a candidate, in order to create a level playing field for all.

8. **Involvement of public officers in political campaigns:**
The law should make it explicit that public servants are prohibited from involvement in political campaigns.

9. **The role of the Attorney General in election petitions:**
The Attorney General is the principal legal advisor of Government as per Article 119 of the Constitution. Rule 5 of the PEA Rules also requires the Attorney General to be served with the petition. We found that several complaints were raised against some public officers and security personnel during the election process. However, the definition of "respondent" in Rule 3 of the PEA Rules as it currently is, does not include the Attorney General as a possible respondent. Further, Rule 20(6) of the PEA Rules provides that even when a Petitioner wants to withdraw a petition, the Attorney General can object to the withdrawal. The law should be amended to make it permissible for the Attorney General to be made respondent where necessary.

10. **Implementation of recommendations by the Supreme Court**
We note that most of the recommendations for reform made by this court in the previous presidential election petitions have remained largely unimplemented. It

may well be that no authority was identified to follow up their implementation. We have nevertheless observed in this petition that the Rules require that the Attorney General be served with all the documents in the petition. We have further noted that the Attorney General may object to withdrawal of proceedings. Therefore, the Attorney General is the authority that must be served with the recommendations of this Court for necessary follow up."

The Court proceeded to order as follows: -

"1) The Attorney General must follow up the recommendations made by this court with the other organs of State, namely Parliament and the Executive.

2) The Attorney General shall report to the court within two years from the date of this Judgment the measures that have been taken to implement these recommendations.

3) The court may thereafter make further orders and recommendations as it deems fit."

Representation

The Attorney General was represented by Hon. Mwesigwa Rukutana - Deputy Attorney General, assisted by Mr. Francis Atoke - Solicitor General, Ms Christine Kaahwa - Ag. Commissioner Civil Litigation, Mr. Martin Mwambusya - Commissioner Civil Litigation, Mr. George Karemera - Principal State Attorney, Mr. Richard Adrole - Senior State Attorney and Ms. Jackline Amusugut - State Attorney.

The applicants were represented by Mr. Ladislous Rwakafuuzi, Mr. Benson Tusasirwe, Mr. Robert Kirunda and Mr. Luyimbazi Nalukola.

Professor Frederick W. Jjuko, the 2nd applicant and Ms Edith Kibalama, the 3rd applicant were present in court.

Submission by the Applicants

Counsel for the applicants submitted that there were five issues for the court to adjudicate upon, namely:

1) Whether there were orders made by the Supreme Court.
2) Whether the orders were brought to the attention of the respondent
3) Whether the respondent disobeyed the orders of this Court.
4) If so, whether that disobedience was wilful or *mala fide*
5) What remedies are available to the applicants.

The respondent conceded to the first and second issues in that this court made the orders and in the respondent's presence in court. The first and second issues are thus answered in the affirmative.

Issue No. 3. Whether the respondent disobeyed the orders of this court

Counsel relied on the affidavits of Professors Ssempebwa, Jjuko, and m/s Kibalama and submitted that the respondent was required to report to the court within 2 years the manner and the extent to which he had taken action to ensure that the orders of this court had been complied with. It was the applicants' contention that no such reporting was done and that the respondent did not implement the court orders.

Counsel submitted that the orders were given in open court and any reporting should have been done following the formal court structure, by the Attorney General moving court for a hearing with notice to all parties within the 2 years. The appellants contended that the Attorney General failed to do that but that instead the Attorney General wrote a letter to the Registrar of the Court. Counsel noted that the letter was a response to the Registrar's letter reminding the Attorney General of his duty to court. Counsel asserted that the letter to the Registrar was not adequate as a report to court.

Counsel submitted further that the respondent had failed to implement any of the recommendations and court orders. Counsel went further to illustrate to court how there was no implementation of all the orders of court as follows:

Recommendation No. 4

Counsel submitted that the Supreme Court recommended that a law to regulate the use of technology in the conduct and management of elections should be enacted in time to allow the training of officials and sensitization of voters and other stakeholders. He noted that the above had not been done. He added that the Attorney General was out of time since no such law had yet been enacted.

Recommendation No. 5

The Court required the Attorney General to amend the electoral laws to provide for sanctions against any State organ or officer who violates the constitutional duty to give all candidates equal time in the media. According to Counsel, the Attorney General only wrote a directive to the Uganda Communications Commission to comply with the existing law, which was a different thing from the court's recommendation. This according to Counsel, was in total disregard of the court's recommendation.

Recommendation No. 2 and 9

Recommendation 2 related to the nature of evidence in Presidential Petitions while recommendation No.9 related to the role of the Attorney General in the adjudication of the petitions. According to Counsel, the Attorney General wrote a letter forwarding the draft rules to the Chief Justice on the 8th April 2019 and filed that letter in court on 12th April 2019, which was 16 days after the filing of this application. The Attorney General has

since forwarded to court the regulations signed by the Chief Justice on 25th April, 2019. According to Counsel, the Attorney General was only prompted by this application which indicates that the Attorney General is intransigent and disrespects the court. He would not have done anything if this application had not been filed. The Attorney General should therefore be held as being in contempt of the court.

Recommendation No. 6, 7 and 8

Counsel dealt with the three recommendations jointly.

Recommendation 6 related to early enactment of elections related law within 2 years to avoid last- minute hastily enacted legislation on elections. Recommendation 7 related to donations during the election period. Recommendation 8 related to involvement of public officers in political campaigns.

Counsel submitted that the requirement was for the laws to be enacted within 2 years of the establishment of the new Parliament but they were not enacted by the time this application was filed. The Attorney General only filed draft Bills in court on the morning of the hearing of the application. Counsel submitted that the Attorney General was already non-compliant and court should make that finding.

Recommendations No.1 and 3.

The two recommendations relate to the time of filing Presidential Petitions and the holding of elections.

Counsel submitted that the Attorney General is required under Article 128(3) of the Constitution to aid the courts in ensuring their effectiveness. This court has observed in 3 Presidential Election Petitions that there was need to amend the law in respect of time for filing Presidential Elections Petitions and the holding of fresh Presidential elections. The Attorney General was ordered in Presidential Election Petition No. I of 2016 to follow up on amendment of the law. According to Counsel, the Attorney General did not comply. The law has been amended by Constitutional Amendment No. I of 2018 at a private member's initiative. Counsel submitted that the Attorney General wilfully delegated his responsibility to amend the law on a matter that touches the very legitimacy of the Government to a private citizen. Counsel contended that this negates his duty to court and the Attorney General should be held in contempt for failure to implement the court orders.

Issue No. 4: Whether the disobedience was wilful and *mala fide*

Counsel submitted that the Attorney General is obliged by Article 128(3) of the Constitution as officer of Government to aid the courts in ensuring their effectiveness. This court has on three occasions when it gave Judgments in election petitions stated that there are challenges around the time of filing Presidential petitions and the holding of fresh elections and there is need for legal reform. The Attorney General was ordered in election petition No. 01 of 2016 to follow up the reforms recommended by court with other government agencies, but

he deliberately relegated this important duty to a private member of parliament. According to Counsel, this was wilful delegation of the Attorney General's responsibility to amend the laws on a matter that touches on the very legitimacy of government to a private citizen. Counsel contended that this was wilful noncompliance on the part of the Attorney General. Learned counsel submitted further that the wilfulness is presumed because the Attorney General knew of the court orders but did not comply. That it was the Attorney General with the burden to adduce evidence and show that his non-compliance was not wilful.

Issue No. 5: Remedies

Counsel submitted that it had been illustrated by the applicants to this court that the respondent who was a party to the proceedings and was therefore fully aware of the court orders deliberately failed to comply with the court orders. He prayed that the court grants to the applicants all their prayers.

The applicants had sought to move court for the following orders:

(a) A declaration that the respondent is acting in contempt of court by neglecting, refusing and or failing to implement the orders of this honourable court contained in the Judgment of the court made on *26*th day of August 2016 in Presidential Election Petition No.1 of 2016, requiring him to follow up with the other organs of State, namely Parliament and the Executive, the Electoral Reform Orders made by this Court, and to report to this court within two years from the date of the judgment the measures taken to implement the orders.

(b) A declaration that the sitting Attorney General is personally in contempt of the court orders, and should be sanctioned accordingly.

(c) A declaration that as an advocate who has failed to implement the decision of this honourable court the sitting Attorney General is not fit to occupy the office of the Attorney General.

(d) An order that the respondent henceforth implements the orders as directed by this honourable court.

(e) Appropriate measures be put in place to compel the respondent to comply with (d) above, including an order that the executive shall not present any other legislative business until the orders aforesaid shall have been fully complied with.

(f) An order that the costs of this application be met by the respondent.

According to Counsel, the applicants had demonstrated to court that the respondent did not comply with the Court orders in the following ways:

(1) failure to cause the necessary reforms to be effected in time; and

(2) failure to report to this Court the content of the reforms.

Counsel submitted that the Attorney General has by supplementary affidavit brought to court amendment Bills but these are dated 25th April 2019 which is a date after the 2 years set by Court and the Bills are not laws up to now. Counsel stated that the orders have not been implemented by the Attorney General and that the Attorney General did not cause the necessary reforms, let alone report in two years as ordered. Counsel was emphatic that the Bills that the respondent has filed are belated and have come after prompting by this application. The Attorney General had not given any excuse in his pleadings for non-compliance and therefore the contempt was proved.

Counsel submitted that this court should declare that having failed to implement the orders of this court the person currently occupying the office of the Attorney General is in contempt personally and is therefore not a fit and proper person to be the Attorney General and that accordingly he should cease to hold that office.

Counsel called upon this court to order that henceforth the respondent should implement the orders as directed by this court.

Counsel submitted further that in respect of the Bills that the Attorney General has now presented in court, a shorter new timeline should be given within which the Bills should be passed to become laws. Counsel proposed that the court orders that Government should not present any other business to Parliament until the Bills on elections are dealt with and the reforms made. He concluded that the Bills should be given priority over other Parliamentary business and proposed that a new date be given by court for the respondent to report to court.

Costs

Counsel for the applicants prayed for costs. Counsel submitted that it was not correct to hold that costs should not be paid in cases of public interest. According to Counsel, when citizens take up cases in public interest litigation, they do research and it costs money. He reasoned that the applicants should therefore be paid costs when they are successful.

Counsel contended that, where on the other hand court finds the public interest litigants in such cases not successful, no costs should be awarded unless the case taken up was frivolous, reckless and baseless. Counsel added that applicants who take up such cases in good faith should not be punished with costs.

Submissions by the Deputy Attorney General who Represented the Respondent

The Deputy Attorney General relied on the Attorney General's affidavit in reply and his supplementary affidavit and submitted that the Attorney General was ordered by court to follow up on the implementation of the court's recommendations with other State organs like Parliament and the Executive. He went on to state that the Attorney General has duly and in a timely manner followed up on the implementation of the court's recommendations with the relevant authorities.

He stated further that the Attorney General had reported back to court 10 days before the expiry of the two-year period given by court.

The Deputy Attorney General contended that when court gave the orders it did not specify the modality of reporting back. He stated that the Attorney General reported back by a letter to the Registrar because it is trite knowledge that correspondence to and from court is usually through the Registrar of the Court. He submitted that it was the communication mode the applicants had themselves adopted when they wanted a record of the court's proceedings. He said that the applicants would therefore be stopped from questioning communication to court through the Registrar. It was contended for the respondent that the Attorney General followed up the court's recommendations with other organs of State and that by the time the Registrar of the court wrote a reminder to the Attorney General, the Attorney General was ready to make his report. It was further contended by the Deputy Attorney General that the Attorney General made his report by a reply to the Registrar's letter and the report was made within the period of 2 years set by court.

The Deputy Attorney General made a response in respect of each of the ten recommendations as follows:

Recommendation No. 1

The Deputy Attorney General submitted that the 1st recommendation regarding time for filing and determining Presidential Election Petitions was addressed by Section 4 of the Constitution (Amendment) Act, No.1 of 2018. This section extended the time for lodging a Presidential Election Petition from 10 days to 15 days and the time for the Supreme Court to determine the petition and declare its findings and reasons was increased from 30 days to 45 days. This is now reflected in the Constitution (Amendment) Act,2018, Article I04(3).

The Deputy Attorney General submitted that a Private Member of Parliament initiated the Bill when the Attorney General was still consulting and following up on the recommendations of court with other State organs. He went on to say that when the private member brought his Bill to Parliament, the Attorney General worked with the private member as provided for by the Constitution and the Rules of Parliament. He submitted that the bill was passed by Parliament with inputs from the Executive and the private member, and that in the process the Attorney General fulfilled recommendation No.1 of this court since he followed up with the Executive and Parliament in the enactment process of the resulting law.

Recommendation No. 2 and 9

The two recommendations are in regard to the nature of evidence in a Presidential Election Petition and the role of the Attorney General. According to the Deputy Attorney General, the Attorney General and the Chief Justice had consultations. The Attorney General, after the consultations, drafted amendments to the Rules of Procedure and forwarded them to the Chief Justice on 16th August 2018 for consent and signing. On 25th April 2019, the Attorney General received a signed copy of the Presidential (Elections Petition) (Amendment) Rules from the Chief Justice and the same has been transmitted for publication as a Statutory Instrument.

According to the Deputy Attorney General, the recommendations No. 2 and 9 have been complied with as the Attorney General followed up with the Chief Justice on the enactment of the rules as ordered by court.

Recommendation No. 3

According to the Deputy Attorney General, the third recommendation of this court regarding time for holding fresh election has been implemented by Section 4 of the Constitution (Amendment) Act No.1 of 2018. The time for holding a fresh election from the date of annulment under Article 104(6) has been increased from twenty days (20) to sixty (60) days.

Recommendation 4

The Deputy Attorney General submitted that this recommendation on the use of technology in the election process will be addressed by the enactment of the Presidential Election (Amendment) Bill 2019, the Parliamentary Election (Amendment) Bill 2019, and the Electoral Commission Amendment Bill 2019 for which Bills the Attorney General has prepared a waiver in accordance with paragraph 2(b) of Section (q-b) of the Uganda Public Service Standing Orders duly authorizing the drafting of the Electoral laws without prior reference to cabinet for approval in order to ensure the timely enactment of Electoral laws. According to the respondent this was after consultations and follow up with the relevant institutions of Government. Parliament will soon debate and pass the Laws. The respondent, it was submitted was only ordered to follow on the recommendations of court and he did that, resulting in the draft Bills.

Recommendation No. 5

The Deputy Attorney General submitted for the respondent that the law requiring all candidates to be given equal campaign time by the state media was in place but regretted some incidental non-compliance. He hastened to add that the Attorney General had already communicated to the Minister of ICT and National Guidance to inform all the Uganda Broadcasting Council staff to comply with the law. Court directed the Deputy Attorney to read Recommendation No. 5 in open court which he did. It is then that he realized that the recommendation was for enactment of a law providing for sanctions in case of default. The Deputy Attorney General then undertook to ensure that sanctions are provided for in the proposed Electoral laws against any State organ that fails to comply with the Constitutional duty of providing equal time and space on State owned media for presidential candidates.

Recommendation No. 6

The Deputy Attorney General submitted that enactment of Laws and formulation of Bills is a business that requires a lot of consultations and that requires ample time. He submitted that since this court's judgment was delivered, consultations have been going on. These are now concluded and draft Bills have been produced. Because of the urgency of the matter, the Attorney General has sought leave to table the Bills without going through Cabinet and the Bills will be in Parliament within a month, and the Attorney General would be able

to report back to court within 4 months but in any case, the Bills would be enacted and become Laws within 6 months.

The Attorney General undertook to process the amendments in consultation with relevant government agencies and to appeal to other organs of State to make the enactment of the laws a matter of priority.

It was submitted that the Attorney General had demonstrated that he did not act in contempt of Court either as an individual or as an institution. The Court's recommendations were followed up although there were delays in the process. There was no wilful refusal to comply with the orders of Court. He prayed for the application to be dismissed with costs.

Consideration and Resolution by Court

We have had sufficient time to peruse and carefully consider all the pleadings and authorities supplied by Counsel for the parties together with other materials that court found relevant. We have also carefully studied the submissions of all counsel and we have given all the above due consideration in the resolution of this application.

Contempt of court is in two categories. There is a criminal offence known as contempt of Court. Criminal contempt is defined by Black's Law Dictionary 10th edition at page 385 as **"An act that obstructs justice or attacks the integrity of the court the criminal contempt proceedings are punitive in nature."**

The offence is recognized by **Article 28(12)** of the Constitution, which states:
"Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law."

This offence has its origins in Common Law and according to Lord Denning, in **Re Bramblevales Ltd. [1969]** 3 **All. E. R 1062,** for one to be convicted of contempt of Court the case has to be proved beyond reasonable doubt just like in other criminal offences.

The application before us is not in respect of a criminal case. It is a civil application for civil contempt. Civil contempt is defined by Black's Law Dictionary 10th edition on page 385 as follows:

> **"The failure to obey a court order that was issued for another party's benefit. A civil contempt proceeding is coercive or remedial in nature. The usual sanction is to confine the contemnor until he complies with the court order** (p.385)**."**

The Constitutional Court of South Africa had occasion to define contempt of Court and state the object of both criminal and civil contempt of Court in the case of **Pheko and Others v. Ekurhuleni Metropolitan Municipality (No.2) [2015] ZACC10** as follows:

> **"[28] Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity. This includes acts of contumacy in both senses: wilful disobedience**

and resistance to lawful court orders. This case deals with the latter, a failure or refusal to comply with an order of court. Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.

[29] The court's treatment of contempt has been developed over the years. Under the common law, there are different classifications of contempt: civil and criminal, *in facie curiae* (before a court) or *ex facie curiae* (outside of a court). The forms of contempt that concern us here, namely those occurring outside of the court, could be brought before court in proceedings initiated by parties, public prosecutors or the court acting of its own accord *(mero motu)*.
[30] The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings *mero motu*.

[31] Coercive contempt orders call for compliance with the original order that has been breached as well as the terms of the subsequent contempt order. A contemnor may avoid the imposition of a **sentence** by **complying with the coercive order. By contrast, punitive orders aim to punish the contemnor by imposing a sentence which is unavoidable. At its origin the crime being denounced is the crime of disrespecting the court, and ultimately the rule of law."**

We accept the Court's definition and explanation of the objective in the above authorities.

We find it appropriate to further clarify the purpose of civil contempt since it is the main issue of this application. The Constitution in **Article 126(1)** states:

"Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people."

It is of great importance that when courts give orders in exercise of their judicial power, the orders are respected, implemented and take effect. Nobody should interfere with court orders and State agencies are obliged to assist the courts to ensure that they are effective.

This is stated in **Article 128(2)** of the Constitution:

"No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions."

The Constitution goes further in **Article 128(3)** and states:

> **"All organs and agencies of the state shall accord to the courts such assistance as may be required to the effectiveness of the courts."**

The Constitution has vested judicial power in the courts. The public expects court orders to be obeyed. Court orders should never be given in vain. Civil contempt of court serves the purpose of empowering courts to enforce court orders and punish those that wilfully and unlawfully disobey court orders.

The procedure for civil contempt of court serves the objective of ensuring compliance with court orders as was extensively stated by the Supreme Court of Appeal of South Africa in the persuasive authority of **Fakie v. CCl1 Systems (pty) Ltd [2006] SCA54 (RSA)** when the Court held:

> **"(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.**
> **(b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.**
> **(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.**
> **(d) But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.**
> **(e) A declaratory and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."**

Applying the principles discussed above to the facts of this case, we have to establish that the following have been proved:

(1) That an order was issued by court.
(2) That the order was served or brought to the notice of the alleged contemnor (the respondent).
(3) That there was non-compliance with the order by the respondent.
(4) That the non-compliance was wilful or *mala fide*.

The first and the second elements were conceded to by the respondent and we therefore find that they have been proved.

The next question is whether there was non-compliance with the orders by the respondent. This Court gave the following two orders:

> **"(1) The Attorney General must follow up the recommendations made by this court with the other organs of State, namely Parliament and the Executive.**

(2) The Attorney General shall report to the court within 2 years from the date of this Judgment the measures that have been taken to implement these recommendations."

Both parties submitted on recommendation No. 2 first and that is the order we shall adopt in discussing the issues.

Court order No. 2

It was contended by Counsel for the appellants that reporting to court would only be proper if the respondent moved court for an open court hearing with notice to the parties for the report to be made in open court, and that given that this did not happen, there was non-compliance with the court orders.

The Deputy Attorney General for the respondent, on the other hand, in response asserted that by his letter to the Supreme Court Registrar dated 16th August 2016, the Attorney General reported to court on the measures that had been taken to implement the recommendations and that as such there was compliance with the court orders.

We take judicial notice of the fact that communication with court is normally conducted through the office of the Court Registrar.

When the court gave its orders, it did not state the reporting mode for the respondent. We do not find therefore that reporting to court by letter to the Registrar of the Court was unreasonable conduct since court users normally communicate with this court through its Court Registrar.

The court after receiving the report could have notified the other parties or even fixed and called the parties for hearing if it deemed that to be the proper thing to do. The Attorney General attached his report to the letter of 16th August 2018.

We note that the fact that the letter was in reply to a letter from the Registrar does not change the fact that a report was made to the court. Consequently, we answer the issue of the respondent reporting to court in the affirmative.

Court Order No.1

The first order was for the Attorney General to follow up the recommendations with other organs of State, namely Parliament and the Executive. Did the Attorney General comply with this court order by following up the recommendations with other organs of the State, namely the executive and Parliament?

The contention of the applicants is that there was no follow up by the Attorney General. The respondent disputed the allegation and explained activities that the respondent had taken as follow-up of the recommendations of this Court with the other organs of the State, namely, the Executive and Parliament.

Recommendations No. 1 and 3

Recommendations No.1 related to the time of filing and determination of petitions while recommendation No.3 related to the holding of fresh elections.

The applicants contended that the Attorney General wilfully delegated the responsibility of amending the law on these matters to a private member. Constitutional (Amendment) Act, 2018 which the Attorney General submitted had implemented the two recommendations was initiated by a Private Member and not the Attorney General or Government and that its enactment cannot therefore be taken to have been followed up by the Attorney General.

We have read Constitution (Amendment) Act No.1 of 2018. The relevant provisions are Section 4 and Section 6 of the Act. Section 4 of the Act extends the time for lodging a Presidential Election Petition from 10 days to 15 days after the declaration of the election results. The time for the Supreme Court to inquire into and determine the petition and declare its findings and reasons was increased by **Article 104(3)** from thirty days to forty-five days from the date of filing of the petition.

The Deputy Attorney General explained that whilst he was still following up this court recommendation for amendment of the law, the private member initiated the amendment. He submitted that this is permitted under the Constitution, the law and Rules of Parliament. He added that the Attorney General worked with the private member and Parliament to get the amendment passed into law. This was not contested by the appellants whose only complaint was that this was delegation of the Attorney General's responsibility and thus not a follow up of the court's recommendations. We find that the two recommendations of this court were implemented. It would not have been necessary or even fruitful for the Attorney General to obstri.1ct the private member's initiative when the same objective would still be achieved by law initiated by a private member. It is worth noting that when the law is passed, it does not indicate whether it was initiated by a private member of parliament or by government. We accept the Attorney General's explanation that he followed up with the Executive and Parliament for the amendment to be passed. We hold that the Attorney General complied with recommendation No.1 and 2.

Recommendation Nos.2 and 9

Recommendation 2 was for the Rules of Procedure to be amended to provide for use of oral evidence in addition to affidavit evidence with the leave of court. Recommendation 9 was for the law to be amended to make it permissible for the Attorney General to be made a respondent where necessary.

The Attorney General after their consultations wrote to the Chief Justice on 8th April 2019 and submitted a draft Presidential Election (Election Petition Rules 2001 by the Chief Justice) for the Chief Justice to consider and, if he found appropriate return for publication in the Gazette. The Chief Justice signed the Rules on 25th April 2019 and returned the draft Rules to the Attorney General for publication.

It is our finding that the Attorney General followed up recommendations No.2 and No.9. There was compliance with the court order.

Recommendation No. 4

The recommendation was that a law to regulate the use of technology in the conduct and management of elections be enacted well within time to allow for training of officials and sensitization of voters and other stakeholders.

The applicants contend that no law has been enacted in time as recommended and therefore the respondent was in contempt. The Attorney General in response stated in his affidavit that engagements have been ongoing between his office, the Electoral Commission and other stakeholders to enact the law as recommended. He specifically stated in paragraph 4 of his supplementary affidavit that he has authorized the drafting of the requisite electoral laws without prior reference to Cabinet for approval to hasten the process of enactment of the laws.

The recommended law on the issue has not yet been enacted up today. A draft Bill is now in place. The court order was for the Attorney General to follow up, and his explanation is that he did follow up with other State agencies and organs although he does not have the final product yet. We do not find that the Attorney General disobeyed the orders of this court and did not following up on the Court's recommendations with other State organs and agencies.

Recommendation No. 5

The court's recommendation was for the electoral law to be amended to provide for sanctions against any State organ or officer who violates the constitutional duty to give equal time and space on State-owned media and programmes.

This law has not been enacted and the applicants assert that the respondent was non-compliant on the recommendation. The respondent conceded that although there was in place a law (Section 24(1) of the Presidential Elections Act and Article 67 of the Constitution) providing for equal coverage, there was no law yet providing for sanctions in case of default. The Deputy Attorney General stated that the electoral draft laws will be amended within the next six months to provide for sanctions but admitted that that had not yet been done.

Civil contempt is constituted by conduct or statements that display disrespect or wilful disobedience or resistance to a court order. The breach will have been committed deliberately and *mala fide*.

In the instant case we do not find that the Attorney General deliberately disobeyed the court order. We consider his undertaking to include the recommendation of this Court for sanctions in the pending Bills plausible and do not find reason to reject it. We would therefore not hold the Attorney General in contempt in respect of this recommendation.

Recommendations 6, 7 and 8.

Recommendation No. 6 was for election related law reforms to be undertaken within 2 years of establishment of the new Parliament.

In Recommendation No. 7, the court recommended that the law be amended to prohibit the giving of donations by all presidential candidates including the sitting president in order to create a level playing field for all.

Recommendation No.8 was for a law to explicitly prohibit public servants from involvement in political campaigns.

The appellants' contention was that the Attorney General was in contempt in respect of all the 3 recommendations since the recommended amendments were not effected within 2 years as recommended by court. They argued that the Attorney General's filing of draft Bills does not cure the defect of failure to act within 2 years.

The Attorney General in response concedes to the failure to bring the amendments within the period of two years. He submitted that enactment of Bills is a process that requires consultations which require ample time. He contended that the Attorney General used the time between the Judgment date and the period this application was being heard to complete the processes of consultation.

He submitted that the bills were already in place. The Deputy Attorney General undertook that the bills will be tabled in Parliament and should be passed within 4 months but certainly not beyond 6 months.

We note that the Bills are now in place after the necessary consultations. We, therefore, find that the Attorney General did follow up on the courts' recommendations as ordered by court.

Issue No. 4. Whether the non-compliance was wilful and *mala fide*.
This element must be proved to establish civil contempt of Court. The test for proof of this element was stated in **Fakie case (supra)**

> **[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide.' A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could be evidence of lack of good faith).**
>
> **[10] These requirements - that the refusal to obey should be both wilful and** mala **fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt—accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.**

Applying the principles stated in the **Fakie case** (supra) the Supreme Court of South Africa in **Lourens v. Premier of the Free State Province and Another 95260 [2017] ZASCA 60** held

> **"[12] It is now settled that an applicant must prove the requisites of contempt (the order, service or notice, non-compliance, wilfulness and mala fides) beyond reasonable doubt. But once these requisites have been proved, the respondent bears an evidential burden of showing that non-compliance was not wilful and mala fide. Disobedience of a civil order will constitute contempt only if the breach of the order was committed deliberately and mala fide. Unreasonable non-compliance, provided that it is a bona fide does not constitute contempt. And where, as in this case, an applicant approaches a court on notice of motion, a dispute of fact as to whether non-compliance was wilful and mala fide falls to be determined on the respondent's version; unless the court considers that the respondent's allegations do not raise a real, genuine or bona fide dispute of fact, or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers."**

Needless to say, we find both the **Fakie** (supra) case and the case of **Lourens** (supra) persuasive.

In the instant application the Attorney General was given orders to follow up the recommendations of this court with other organs of the State.

We have already made a finding that Section 4 of the Constitution (Amendment) Act No. l of 2018 implemented the Recommendations No.1 and 3 of this court.

We have also made the finding that the Attorney General followed up the Court's two recommendations with other organs of the State in the enactment of the Law that had been initiated by a private member.

In respect of court's recommendation No. 2 and 9, the Chief Justice signed and returned draft Rules to the Attorney General for gazetting.

We hold that the two recommendations have been implemented after the Attorney General's follow up with the Chief Justice on the two recommendations.

Recommendations No.4, 5, 6, 7 and 8 are all in respect of the Attorney General following up the court's recommendations for enactment of Laws with the Executive and Parliament.

The Attorney General after consultations prepared the following draft laws:
(l) The Presidential Elections (Amendment) Bill, 2019,
(2) The Parliamentary Elections (Amendment) Bill, 2019,
(3) The Electoral Commission (Amendment) Bill, 2019,
(4) The Local Government (Amendment) Bill, 2019.

The proposed amendment Bills, according to the affidavit of the Attorney General, will be debated by Parliament and it was his undertaking that they would become laws within 4 months. The laws once enacted will implement the recommendations of this court.

The Attorney General conceded that the process of enacting the laws took longer than the two years' timeline set by court. He explained that the consultations commenced immediately after the Judgment but had only recently been concluded. The Attorney General undertook to appeal to the Executive and Parliament to give priority to enactment of the laws.

The Court's order was for the Attorney General to follow up with other organs of State and thus get the enactment of the laws effected. The respondent asserted that he followed up the recommendations of court as ordered but that there were delays caused by consultations.

His explanations on the delayed legislations are not far-fetched in light of the explanation given. Indeed, the explanation shows steps that were taken to effect the court orders, albeit slow.

We find that the Attorney General has discharged the evidential burden of showing that he did not act wilfully or mala fide in disobedience of the court order.

We have already held that the report that was made to the Court Registrar was a proper report to court on the measures undertaken to implement the court's recommendations.

We do not find that the respondent acted in contempt of this court.

This court made orders in Presidential Election Petition No.1 of 2016 for the Attorney General to follow up on its 10 recommendations for the purpose of ensuring that the recommendations are implemented and the recommended amendments to the election laws are enacted in a reasonable time of 2 years.

The objective of the court's orders was to foster fair play, democracy, law and order in the politics of this country.

The court set a timeline for the follow up because the enacted laws should be passed and effected in time for all stakeholders to implement and comply with the laws in subsequent elections.

We find that the Attorney General has made efforts to follow up the recommendations but is as yet to achieve the desired objective of the court. He was not expected to be the sole participant as an institution of government in getting the laws enacted. The court recommendations could only be implemented in time if and when all organs of the State played their various roles in the process of enacting the recommended laws.

It is in that vein that we urge the Attorney General to impress it upon all the relevant organs and agencies of the State to take the court's recommendations seriously. There is need also for all organs and agencies of the State to understand the importance of respect for the rule of law and the orders given by courts.

It is in that light that the Attorney General and all other State agencies and organs should appreciate the gravity of civil contempt of court which is available principally for enforcement of Court orders.

We cite the Supreme Court of Appeal of South Africa in **Meadow Glen Home Owners Association vs. City of Tshwane Metropolitan Municipality (767/2013 [2014] ZASCA 209** to illustrate the point. The Court held:

> "**Contempt of court is not an issue *inter-partes;* it is an issue between the court and the party who has not complied with a mandatory order of court." *[Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education Gauteng 2002 (1) SA 660 at*** elaborating **this, Plasket J. pointed out in the Victoria Rate payers case [(511/03) [2003] ZAECHC 19 (11 April 2003)] that contempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the legal arm of government: There is thus a public interest element in every contempt committal. He went on to explain that when viewed in the constitutional contest**
>
> **'it is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the Superior Courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system... That, in turn, means that the Court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.'**

We are persuaded by the dicta in the case above.

When this court delivered its Judgment, it stated that it may make further orders and recommendations as it deems it. We now find it appropriate to make further orders for the purpose of ensuring compliance with this court's recommendations. We do this confident that the implementation of the orders we are now making will not require other civil contempt of court proceedings.

We make the following orders:

(1) The Attorney General must in consultation with other organs of State, the Executive and the Legislature, ensure that priority is given to the implementation of all the court's recommendations.

(2) The proposed Legislation for implementation of the court's recommendations should be laid before Parliament within one month from the date of this ruling.

(3) The Attorney General shall report to this court on the progress of the proposed Legislation within three months from the date of this ruling.

(4) The Attorney General shall in any case make a final report on the progress of the proposed Legislation within six months from the date of this ruling.

In regard to costs, we find that the applicants were acting in public interest when they brought this application. It is in public interest that the recommendations of this court and the orders the court made are implemented. It is clear to us that that was the interest of the applicants when they brought up this application.

It is trite that generally costs follow the event and the successful pa1ty is awarded costs. It is also trite, however, that courts have a wide discretion in the award of costs but the discretion must be exercised judiciously.

Given the circumstances of this petition we order each party to bear their own costs.

The publication is an elaborate analysis of the public interest case of *Prof. Frederick. E. Ssempebwa, Prof. Frederick W. Jjuuko and Kituo Cha Katiba v. Attorney General*, Supreme Court, Civil Application No.05 of 2019 that sought to hold the Attorney General of Uganda in contempt of the 2016 orders of the Supreme Court of Uganda on recommendations for electoral reform in Election Petition No. 1 of 2016 of *Amama Mbabazi v. Yoweri Museveni & the Electoral Commission*.

The work of two leading legal minds, the publication encapsulates holistic analyses of the legal, constitutional and political implications of the *Ssempebwa* case. It among others, exposes the stance of Uganda's highest court on the principle of contempt of court and the novel issue of structural interdicts in electoral reform matters. More fundamentally, the publication in essence examines the ability and willingness of the Supreme Court to ensure that the Executive implements its orders, which ultimately puts to the test the principles of the independence of the judiciary and separation of powers. Appended is the full judgement of the case for the benefit of readers keen on detail. Enriched with jurisprudence, the publication is useful for further learning for various actors including judicial officers, and legal practitioners and scholars.

ISBN: 978-9970-617-96-8

ISBN 978-9970-617-96-8
9 789970 617968