

## **DEMOCRATIC GREEN PARTY OF RWANDA v. GOVERNMENT OF RWANDA**

[Rwanda SUPREME COURT – RS/SPEC/0002/15/CS (Rugege, P.J., Nyirinkwaya, Mukanyundo, Hatangimbabazi, Munyangeri, Hitiyaremye, Gakwaya, Karimunda and Nyirandabaruta, J.) September 09, 2015].

*Administrative procedure – Amicus curiae – Requirement for the admissibility of amicus curiae brief – Amicus Curiae is admissible when a person or an institution has sufficient expertise and also which bring the new fact in judgment that can be useful to the court in reaching a fundamental decision.*

*Law determining jurisdiction of the courts – The jurisdiction of the Supreme Court – Objection for lack of jurisdiction – Petition for the interpretation of the Constitution – Even if there is no Court with exclusive jurisdiction for abrogating or stopping the action which is contrary to the constitution the Courts have the obligation of deciding a case and they cannot deprive themselves from that obligation on any ground – Supreme Court has the jurisdiction for hearing the petitions relating to the interpretation of constitution – Law N° 21/2012 of 14/06/2012 relating to the Civil, Commercial, Labour and administrative procedure, article 6 – Organic Law N° 03/2012/OL of 13/06/2012 determining organization, functioning and jurisdiction of the Supreme Court, article 29 – Constitution of The Republic of Rwanda of 04 June 2003 as amended up to date, articles 93, 96, 145 and 200.*

**Facts:** A political party known as the Democratic Green Party of Rwanda represented by its leader sued the Government of Rwanda in the Supreme Court, requesting for an injunction on the people writing to the Parliament requesting it to amend article 101 of the Constitution so that the President of the Republic can run again for the presidency without any term limit. Centre for Human Rights Law Firm Ltd filed an amicus curiae brief and the Court first examined the request of Human Rights Law Firm.

The Government of Rwanda argues that the application for amicus curiae should not be admitted because there is no new information they are going to produce to the Court, and they cannot be amicus curiae because they are on the side of the Green Party, hence they cannot be amicus curiae when they are partial.

The Government of Rwanda also raised an objection of inadmissibility on the ground that Green Party does not demonstrate how its petition falls into the jurisdiction of the Supreme Court, that the jurisdiction of the Supreme Court is provided for by article 145 of the Constitution and also provided for by articles 28, 29(3<sup>o</sup>) and 30 of the Organic Law N° 03/2012/OL of 13/06/2012 determining organization, functioning and jurisdiction of the Supreme Court. It also stated that there is no elections held up to now for the plaintiff to base on article 29 mentioned above instead, the issue before the court is the interpretation of articles 101 and 193 of the Constitution and the court rules on existing issues instead of anticipating, therefore, what the court can examine in its jurisdiction is what should happen in case the referendum should be taking place. In its defence, Green Party argues that article 29 of the organic law of the Supreme Court provides that the Court has the jurisdiction to hear cases relating to elections and referendum and that the members of the parliament had begun the process of holding a referendum and in Rwanda there is no Constitutional Court but the Constitution provides that the president is the custodian of the constitution and when he violates it he is tried by the Supreme Court. A judge cannot refuse to decide cases on any

pretext even when the law is silent and that the seized court should be the one to refer the case to the court with the jurisdiction to hear the claim.

**Held:** 1. A person or an institution can be allowed to file an amicus curiae brief in case they have an expertise which can be of assistance to the court in order to make a well-founded decision. Since the information that the Centre for Human Rights Law Firm Ltd wants to present to the court is not different from those produced by Green Party and the Firm has no expertise nor has it carried further research on the claim of Green Party, it cannot be admitted as amicus curiae.

2. Given that the Supreme Court has the jurisdiction to hear petitions regarding the provisions of the law which are inconsistent with the Constitution and bearing in mind that, courts cannot deprive themselves of the obligation to decide cases on any basis, the Supreme Court is the court competent to hear the petition regarding the interpretation of the Constitution.

**The application for amicus curiae is rejected;  
The objection regarding the lack of jurisdiction is not valid;  
The Supreme Court has the jurisdiction to hear claims arising from the constitution and  
its interpretation;  
The court decides that the hearing will resume;  
Court fees are suspended.**

**Statutes and statutory instruments referred to:**

Constitution of The Republic of Rwanda of 04 June 2003 as amended up to date; articles 93, 96, 101, 193 and 200.

Organic Law N° 03/2012/OL of 13/06/2012 determining organization, functioning and jurisdiction of the Supreme Court, articles 29 and 145.

Law N° 21/2012 of 14/06/2012 relating to the Civil, Commercial, Labour and administrative procedure, article 6.

The Constitution of Kenya, 2010, articles 22, 23 and 165.

The Constitution of the Republic of Uganda, 1995 with amendments through 2005, article 137.

The Constitution of the Republic of Mauritius; article 85.

The Constitution of the Republic of South Africa, 1996, article 167.

The Organic Law N° 03/2012/OL of 13/06/2012 determining organization, functioning and jurisdiction of the Supreme Court, articles 29 and 145.

**Cases referred to:**

MP v. Uwimana Nkusi et al., RPA 0061/11/CS, rendered by the Supreme Court on 05/04/2012.

Communications Commission Vs Royal Media Services [2014] KLR rendered by the Supreme Court of Kenya.

Marbury v. Madison, 5 U.S. 137 (1803) rendered by the Supreme Court of United States of America.

City of Boerne vs Flores, 117 S.Ct 2157 rendered by the Supreme Court of United State of America.

## **Judgment**

## I. BACKGROUND OF THE CASE

[1] The Democratic Green Party of Rwanda, [in this case to be referred to as the Green party, petitioned the Supreme Court on the ground that some of the citizens are writing to the parliament requesting for the amendment of article 101 of the Constitution so that the president of the Republic can stand again as a candidate to lead the country at any time without any term limit. The Green Party petitioned this Court requesting that article 101 of the Constitution should not be amended. The hearing was held on 07/07/2015, but it was postponed because Green Party did not have an advocate. The Green Party requested from the court for an additional period of six months to look for an advocate but the Court held that all that period was not necessary and it scheduled it on to 29/07/ 2015.

[2] On 23/07/2015 on behalf of The Green Party, Counsel Mukamusoni Antoinette transmitted an additional pleading. On 24/07/ 2015, The Center for Human Rights Law Firm Ltd made an application to court to allow it to participate in this case as *amicus curiae*, so that it can support the petition by The Green Party requesting the court to declare that the amendment of article 101 of the Constitution concerning the term limit of the president is unconstitutional.

[3] On 29/07/2015, the hearing was held in public, The Green Party represented by its president Dr Habineza Frank assisted by Counsel Mukamusoni Antoinette and the Attorney General was represented by the state attorneys Rubango Epimaque, Malala Aimable and Mbonera Théophile. The Court first examined the request for participating as *amicus curiae* by the Center for Human Rights Law Firm Ltd.

[4] In regards to the request for The Center for Human Rights Law Firm Ltd to participate in this case as *Amicus curiae*, the state attorneys objected to it on the ground that they have no new information to offer to the Court, and they are not friend of the court because they are on the side of the Green Party and they cannot be friends of the court when they are biased.

[5] After the examination of that request, the court was of the opinion that although *Amicus Curiae* is not provided for in the Rwanda Law but there is a precedent in the Judgment RPA 0061/11/CS; MP v. Uwimana Agnes and Mukakibibi Saidati rendered by this court, where the court held that, it is an advantage to allow a person or an organisation with specific skills or knowledge which are helpful to the Court to reach a well-founded decision, to participate as *Amicus Curiae*. The Court therefore held that The Centre for Human Rights Law Firm Ltd should not be allowed to participate as *Amicus Curiae* on the ground that, what it wants to offer to court is not different from the requests of Green Party only that it is presented in different words but does not possess special knowledge about the claim of The Green Party nor did it carry out any research on that issue. The request does not even carry anything new bought by the applicant for *Amicus Curiae* which can be useful in this case, thus the court should continue proceedings without *Amicus Curiae*.

[6] Before the case was heard on merit, the attorneys for the Government raised an objection of inadmissibility, claiming that the Green Party doesn't demonstrate the link between its petition and the jurisdiction of the Supreme Court and The Green Party argues that the jurisdiction of the Supreme Court is based on article 29(3<sup>o</sup>) of the Organic Law N<sup>o</sup> 03/2012/OL of 13/06/2012, determining organization, functioning and jurisdiction of the Supreme Court; which provides that the Supreme Court shall also have jurisdiction to hear election petitions relating to referendum, presidential and legislative elections.

## II. ANALYSIS OF THE LEGAL ISSUES

### ➤ **Whether the Supreme Court has no jurisdiction over the interpretation of the Constitutional provisions.**

[7] State attorney Mbonera Théophile, argues that the jurisdiction of the Supreme Court is provided for in article 145 of the Constitution and also articles 28, 29 and 30 of the Organic Law N° 03/2012/OL of 13/06/2012; determining the organization, functioning and jurisdiction of the Supreme Court. He further argues that The Green Party doesn't demonstrate how the claim is connected with the Court's jurisdiction as it is provided for by the law.

[8] He explains that article 29(3) of the Organic Law N° 03/2012/OL of 13/06/2012 determining organization, functioning and jurisdiction of the Supreme Court relates to the elections and prior to the hearing of this case, there were activities relating to referendum carried out, what was done by the parliament was a research aimed at determining whether that referendum can be held.

[9] He goes on to adduce that the issue before the Supreme Court is the interpretation of article 101 of the Constitution and nothing was agreed upon concerning the elections and the referendum on the third term of the president which is yet to be held, hence this claim does not fall into the jurisdiction of the Supreme Court .

[10] In his conclusion, he argues that it is true the Supreme Court has the obligation to safeguard the constitution as provided for by the law which includes abrogating the unconstitutional laws which come into force, but he goes on to say that the issue before the court is different, it's the jurisdiction to interpret the Constitution.

[11] State attorney Malala Aimable argues that article 29 of the Organic Law of the Supreme Court on which the petitioners base their petition is not at all related to the jurisdiction of the Supreme Court to hear this case, because it provides that the elections should have been held. He argued that parliament's acceptance of the citizen's request is not elections, thus if there was no elections, the Supreme Court could not have the jurisdiction to try this case.

[12] In his conclusion, State attorney Malala states that Green Party wants to demonstrate that there is a lacuna in the Law, whereas the law maker provided for everything. If Green Party seeks for authentic interpretation of the Constitution, the request should be presented to the parliament which also in return seeks the opinion of the Supreme Court.

[13] State attorney Rubango Epimaque argues that when you read article 29 of the Constitution there is nowhere stated that the Supreme Court was endowed with the jurisdiction to try these cases. The court examines existing issues, not the issues that will occur in future. He continues to argue that the court can only examine what was done during the referendum and if the Green Party is seeking the opinion of the Court, then it should have done it in the procedure provided for by article 96 of the Constitution and therefore, the Supreme Court should hold that the issue should be exhausted in other procedures.

[14] In his conclusion, Counsel Rubango states that the interpretation of the law is done by two different organs, authentic interpretation of the Constitution is done by the Parliament as per article 96 of the Constitution, therefore it is not in the jurisdiction of the Supreme Court,

unless it is the interpretation of the laws but the authentic interpretation is done by the Parliament.

[15] The president of the Green Party Dr Habineza Frank argues that article 29 of the Organic Law N<sup>o</sup> 03/2012/OL of 13/06/2012 determining organization, functioning and jurisdiction of the Supreme Court provides that the Supreme Court has the jurisdiction to hear cases emanating from elections and referendum and the members of parliament have already begun the process of the referendum, and apart from the members of the parliament, there are some ministers in the cabinet and some parties in the forum who have begun to sensitize the population about it and the government did not halt it. It is understood therefore that it is the Government of Rwanda which should be sued. He continues to argue that when you contemplate on what is being discussed on the radio and the television, you come to the conclusion that the purpose is to amend the constitution and it has already been confirmed given what various leaders claim, therefore the Supreme Court should take a decision on it.

[16] Habineza concludes that the arguments of the Attorney General that The Green Party should have resorted to the Parliament is not true, because there is no way they should have resorted to it when 99% of the members support for the amendment of the Constitution yet the Green Party also wrote to the parliament but never had the response. The only means available for The Green Party was to petition the Supreme Court.

[17] Mukamusoni Antoinette the counsel for Green Party states that the objection raised by the Attorney General that in Rwanda there is no Constitutional Court, has no merit, given and pursuant to article 98 of the Constitution because that provision state that it is the president who is the custodian of the Constitution and if he violates it, he is tried by the Supreme Court.

[18] She continues to argue that article 6 of the Organic Law N<sup>o</sup> 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure provides that the Judges cannot refuse to decide a case on any pretext, even if the law is silent on the matter, obscure or insufficient. She affirms that the petition of The Green Party falls within the jurisdiction of the Supreme Court and if it finds that it does not have jurisdiction over it, it should indicate the court empowered with the jurisdiction.

[19] Mukamusoni further argues that the argument of the State Attorneys that the Supreme Court does not have jurisdiction, is not true because the seized court should be the one to indicate the court with the jurisdiction to hear the petition of The Green Party and good enough they have begun the proceedings after the Parliament have begun the process of amending the Constitution, and the Supreme Court as the advisor of the Government under article 96 of the Constitution should give an opinion to halt those activities.

[20] She continue arguing that if the president of the Republic is the guardian of the Constitution and he is tried by the Supreme Court, then when he violates the Constitution, it is understood that when it's going to be amended, the Supreme Court is the one to be seized. She further argues that as explained in their petition, there is no constitutional court, therefore when it is violated; the claim is put before the Supreme Court.

## **VIEW OF THE COURT**

[21] Article 29(3<sup>o</sup>) of the Organic Law N<sup>o</sup> 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court provides that the Supreme

Court has jurisdiction to hear cases relating to elections and referendum. The petition of the Green Party requesting the court to rule that article 101 and 193 of the Constitution do not give anyone the right to amend the limits of the presidential term, has no relation to claims of elections or referendum, hence the court cannot rely on article 29(3<sup>o</sup>) mentioned in this article to determine that it has jurisdiction to hear this petition.

[22] Article 29(1<sup>o</sup>) of the Organic Law N<sup>o</sup> 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, states that the Supreme Court has the jurisdiction of trying the President of the Republic on charges of treason or grave and deliberate violation of the Constitution. As stated above the petition in this case is to declare that articles 101 and 193 of the Constitution do not permit the amendment of the term limits of the president of the Republic. The case brought by the Green Party before court is different from the one which would be brought before the court accusing the President of violating the Constitution. The Court cannot rely on article 29(1) mentioned in this paragraph to determine that it has jurisdiction over the case brought before it by the Green Party.

[23] The defence for the Government states that the Supreme Court does not have powers to interpret the Constitution but that power is vested in the Parliament whereby it is provided in article 96 of the Constitution that the authentic interpretation of Laws shall be done by both Chambers of Parliament acting jointly after the Supreme Court has given an opinion on the matter; each Chamber shall decide on the basis of the majority referred to in article 93 of this Constitution [...].”

[24] Paragraph 3 and 4 of article 93 of the Constitution provides that “[...] ordinary laws shall be passed by an absolute majority of members of each Chamber present...”. The laws mentioned in article 93 are ordinary laws and organic laws. Those laws stated in article 93 are the ones which the Parliament has the powers on which to give authentic interpretation, therefore argument of the state that parliament is the body with authority to give authentic interpretation to laws has merit on organic and ordinary laws. Relating to the Constitution, there is no organ which was given the power to interpret its provisions.

[25] The Court’s opinion is that the issue in this case is not to determine whether the Parliament has the power to provide authentic interpretation of the provisions of the Constitution but to determine whether the Supreme Court has jurisdiction to hear cases relating to the interpretation of the Constitution which do not request for the repeal of a law or a provision of the law that is contrary to the constitution.

[26] It is apparent that there is no court which was empowered with the jurisdiction directly or indirectly on the case requesting to prohibit or halt any activity alleged to be unconstitutional. Although that is the case, the courts have the obligation to decide cases and cannot deprive themselves of that obligation on any ground. The principle is that the court cannot refuse to decide a case on the pretext that the law is silent on the issue on which it has been seized. This is emphasized by article 6 paragraph 3 of the Law N<sup>o</sup> 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, which states that “[.....]. Judges cannot refuse to decide a case on any pretext, even if the law is silent on the matter, obscure or insufficient. ...”. The courts are the ones with the obligation to decide the cases, what remains is to determine the Court with the jurisdiction to hear the case requesting for the invalidation or halt an activity which is unconstitutional as claimed by Green Party.

[27] Article 145(3<sup>o</sup>) of the Constitution and article 29(2<sup>o</sup>) of the Organic Law N<sup>o</sup> 03/2012/OL of 13/06/2012 determining organization, functioning and jurisdiction of the Supreme Court, empowers the Supreme Court with jurisdiction over claims relating to international treaties, organic laws, ordinary laws and decrees which are unconstitutional. The Constitution provides that any law which is contrary to it is invalid and it gives jurisdiction to the Supreme Court to take a decision on the claims regarding laws which are contrary to it. In those cases the law or the provisions requested to be repealed are interpreted by the court comparing them with the provisions of the Constitution.

[28] Neither the Constitution nor the Organic Law of the Supreme Court provide for the Court or any other organ with the jurisdiction over the claims which request for the invalidation of an activity which is unconstitutional referred to in article 200.

[29] In countries like Kenya and Uganda which are also located in the East African region where Rwanda is located, the higher courts are the ones with the jurisdiction to hear the claims relating to the constitutional provisions and their interpretation. In the Constitution of Kenya such jurisdiction is provided for by articles 22, 23 and 165 d<sup>1</sup> and for Uganda, it is provided for in article 137<sup>2</sup>.

[30] In South Africa, the Constitutional Court has jurisdiction over all claims regarding the constitution and its interpretation. [167] (3) The Constitutional Court - (a) is the highest court of the Republic; and (b) May decide - (i) Constitutional matters; and (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court, and (c) makes the final decision whether a matter is within its jurisdiction [...] 7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution”.

[31] Also in Mauritius, article 85 of the Constitution bestows on the Supreme Court the jurisdiction over the issues regarding to the interpretation of the Constitution. That article provides that “[.....] Where any question as to the interpretation of this Constitution arises in any court of law established for Mauritius (other than the Court of Appeal, the Supreme Court or a court martial) and the court is of opinion that the question involves a substantial question of law, the court shall refer the question to the Supreme Court”.

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<sup>1</sup> Article 23 (1) The High Court has jurisdiction in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights [.....], article (165)(3) d. of the Constitution ..... “the High Court shall have jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of: (i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution”.

What is provided for in these articles was emphasized in the case of Communications Commission Vs Royal Media Services [2014] e KLR at para 359&360 (Supreme Court of Kenya).

<sup>2</sup> Article 137 Questions as to the interpretation of the constitution

(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.

(2) When sitting as a Constitutional Court, the Court of Appeal shall consist of a bench of five members of that Court.

(3) A person who alleges that-

(a) an Act of Parliament or any other law or anything or done under the authority of any law; or

(b) any act or omission by any person or authority is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.

[32] Courts in some countries have adjudicated cases relating to the constitution although there was no law which precisely gives them the jurisdiction over the constitutional matters. This happened in the United States of America in some cases, the famous one being that of *Marbury v. Madison*<sup>3</sup> in 1803, and in other cases that followed. In the case of *City Boerne vs Flores*, the Supreme Court of United State of America held that their parliament has the competence to enforce the Constitution through voting the laws but it doesn't have the competence to take a decision on the violation of the constitution, that competence is bestowed to the courts<sup>4</sup>.

[33] In general, in other countries claims relating to the constitution are heard by the Supreme Court or constitutional courts depending on the country. These courts are the ones with the jurisdiction over constitutional matters.

[34] Pursuant to the explanations in the previous paragraphs, the Court finds that since the Supreme Court has the jurisdiction to rule over the claims relating to the unconstitutional laws, and since there is no court nor another organ given the jurisdiction to hear constitutional matters or to interpret the provisions of the constitution, the supreme Court has the jurisdiction to hear the claims relating to the interpretation of the Constitution.

### **III. DECISION OF THE COURT**

[35] The Supreme Court admits the objection of the lack of jurisdiction raised by the Government of Rwanda but upon its examination, the Court finds it without merit.

[36] The Supreme Court decides that it has the jurisdiction to hear claims arising from the Constitution and its interpretation.

[37] The Court decides that the hearing of the case on the merits will resume on 23/09/2015.

[38] The Court suspends the Court fees.

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<sup>3</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>4</sup> *City of Boerne vs Flores*, 117 S.Ct 2157 at 2172.