THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS CAUSE No. 0100 OF 2004

ADVOCATES COALITION FOR DEVELOPMENT AND ENVIRONMENT::APPLICANTS

VERSUS

ATTORNEY GENERAL:: RESPONDENT

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

RULING:

This action was brought under public interest litigation. The first applicant is a non-Government organization duly registered and incorporated as a company limited by guarantee under the Laws of Uganda. It is involved in Public Policy Research and Advocacy work, which among others involves promoting the rule of law, protecting the environment and among others, involves promoting the environment and defending the public interest in the management, conservation and preservation of Uganda's natural resources.

The second applicant is an adult Ugandan formerly Secretary of Butamira Forest Environmental Pressure Group comprising a total membership of 1510 individuals.

The action was taken against the first respondent in his representative capacity under the Government Proceedings Act while the second respondent was sued as the Principal Government agent charged with the management of the environment and mandated to coordinate, monitor and supervise all activities in the field of the environment.

The application was brought by notice of motion under Article 41 (1) and 50 (1) and (2) of the constitution of the Republic of Uganda; Rule 3 (1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules S.l No. 26 of 1992; order 2 rule 7 and order 48 rules 1 and 3 of the Civil Procedure Rules. The application is seeking for orders and declaration that:

(1) The granting of a permit to Kakira Sugar Works Ltd by the first respondent contravenes Article 39 and 237 of the Constitution of the Republic of Uganda and Section 43 of the Land Act and was made ultra vires and as such is null and void.

(2) The granting of the forest permit to Kakira Sugar Works Ltd by first respondent amount to the defacto degazetting its statutory obligations when it permitted Kakira

Sugar Works Ltd to occupy a forest reserve and change the land use without carrying out a full Environmental Impact Assessment Study.

(3) The defacto degazetting Butamira Forest reserve is in violation of the applicants' rights to a clean and healthy environment and protection of the country's natural resources.

(4)The failure to submit a project brief is a violation of the Applicants' Constitutional and Statutory rights covered under Article 39 and 245 of the Constitution; Section 3 and 19 of Cap 153; and Regulations 5, 6 and 12 of SI No.8/1998.

(5) The respondents failed to discharge their Statutory and constitutional environmental due diligence, fiduciary and preservatory duty to the applicants as laid out in Article 20. (2), 39, 237 (2) (b) and 245 of the Constitution. Sections 6, 19,20 and 45 cap 153; Section 45 (1) and (4) of the Land Act; as well as Regulations 6, 7, 8, 9, 12, 13, 14, 15, 16, 17,18,19,20,21,22,24,25,26, of S.l No. 8/1998.

(6) A land use permit does not have/or cannot have the effect of changing the land use/regime of an area protected under Article 237 (2) (b) of the Constitution read together with Articles 39 and 245 of the Constitution; Section 45 (1) and (6) of the Land Act; and section 45 (1) (2, a), (3) and (5) of Cap. 153.

(7) An order directing the first respondent to revoke the permit and requiring second respondent to restore or take such measures as required of them under Ugandan Law to restore the environment and preserve the ecological integrity of Butamira Forest Reserve.

(8) An environmental restoration order to be issued against the respondents directing them to restore the forest vegetation destroyed in Butamira Forest Reserve as a result of their issuing a land use permit in total disregard of the law.

(9) The respondents' actions are in violation of the doctrine of Public Trust
as enshrined under the National objectives and directive principles of intergenerational equity as enshrined in the convention on Biological Diversity, 1992 and the Rio Declaration, 1992 which Uganda has either ratified and signed or subscribed to.

(10) No order be made as to costs.

The general grounds for the application are:

4 (a) That Government issued Kakira Sugar Works Ltd with a 50 year sugar cane growing permit in respect of Butamira Forest Reserve in contravention of the constitution and the law.

(b) That the said defacto degazetting of Butamira Forest Reserve was affected amidst protest from the local communities who depended on the reserve for their livelihood through agro- forestry, and as such a full Environmental Impact Assessment ought to

have been conducted by the second respondent.

(c) That no project brief, Environmental Impact Assessment and environmental impact statement were submitted and or carried out by Kakira Sugar Works Ltd nor required of it by the first and second respondents; and neither were the local community's views and or concerns sought or addressed on the project before award of the land use license/permit.

(d) That the said award of land use license/permit violates the applicants' and other Ugandan citizens' rights to a clean and healthy environment, as well as, protection of the country's natural resources.

(e) That unless this application is granted the applicants and other citizens of Uganda will suffer irreparable damage and loss resulting from the violation of their right to a clean and healthy environment as well as the failure to protect their natural resources.

The application was supported by affidavit of Godber Tumushabe the first applicants' executive Director and that of Sharif Budhugo, the second applicant. A brief background facts giving rise to this application would be of great propriety. The Butamira Forest Reserve was established by the then Busoga Kingdom Government in 1929. It measured approximately 5.4 square miles. It was gazetted as a local Forest Reserve under the management of the Kingdom Government. In 1939 the Forest Reserve was leased to Kakira Sugar Works for a period of 32 years for the purpose of producing of firewood for the sugar company. Although the Sugar Works had the lease of the forest they were denied the right to change the use of the land from forest to plantation. However all through the 1950s and beyond Kakira Sugar Works made several attempts to acquire the Reserve for sugar cane growing. A case in point was in 1954. Then in 1956 Kakira made another attempt to acquire part of the Forest Reserve in the name of a donation of a farm school to the Busoga Kingdom Government. The Forest officials resisted that attempt. Meanwhile, Kakira rejected alternative offers of land elsewhere in Busoga arguing that the location of the school in Butamira Forest Reserve was essential for advertising the donation.

That view was rejected by the then Provincial Forest officer for the Eastern Region in the strongest terms:

"Though I am certain that the District Commissioner and Agricultural Officer have tried very hard to meet the wishes of donor of the gift, it has just not been possible to fill them, with the exacting conditions which he has laid down. Likewise, it would be foolish not to realize very clearly the implications of the present position, that we are being asked to alienate 300 acres of a small and very hard-worn forest estate, with land available elsewhere to satisfy the self advertisement of one individual". (Emphasis is mine).

The matter was put to rest when Dictator Idi Amin took over and expropriated properties owned by Departed Asians and their businesses. However events took a new turn when the Asians were allowed to return and repossess their properties. In 1997 Kakira Sugar

Works upon repossession, resurrected their dream to turn the Reserve into a plantation. They accordingly applied to the Forestry Department to utilize the Reserve for its operations. Their request was granted and a permit was allegedly issued giving the company right to use the Reserve for general purposes. With this new permit but without undertaking Environmental Impact Assessment as required by law, the company embarked on a scheme to clear the existing forest estate and replace it with sugar cane plantations. The Local Community which depended on the forest for forest products and as a source of water complained and formed a pressure group in protest. The circumstances under which the permit was issued were investigated by the Inspector General of Government and later by the Parliamentary Committee on Natural Resources. The Committee found that the permit had been issued fraudulently and without due regard. to the law.
It went further to recommend inter alia, that the permit be revoked. However, events took a new twist when the line Minister decided to take the matter to the floor of Parliament to pass a motion whether or not to allow Kakira Sugar Works to grow sugar cane in the Reserve. The motion was passed in favour of the project. To cut the long story short, a number of avenues were sought in order to solve the Butamira saga, including the office of the presidency to no avail. Hence this application.

The application was opposed by way of affidavit of one Justin Ecaat, the Director Environmental Monitoring and Compliance of the second respondent (NEMA).

The gist of the above affidavit is:

(i) That the second respondent advised Kakira Sugar Works Ltd to ensure, in the event that it was awarded the Land use of Butamira Forest Reserve by the Forestry Department, that the environment is protected. The said advice is contained in the letter of 13/6/2001 attached as annexture "A";

(ii) That the second respondent issued advice to the Ministry of Water, Lands and Environment on the Draft Terms of Reference (TOR) for a task force to carry out a socio economic assessment of the proposed degazetting of Butamira Forest Reserve. The Draft Terms of Reference is Annexture "B".

(iii) That the second respondent's technical opinion on the Forest Reserve was that no Environmental Impact Assessment (EIA) was required as long as measures to protect the environment were put in place.

(iv) That the Butamira Forest Reserve was not degazetted and that only change in land use was granted taking into account the conditions stated above.

(v) That the second respondent did not fail to discharge its statutory functions, considering its actions outlined above.

(vi) That an environmental restoration order cannot be issued against the second respondent since its actions or advice did not harm, are not harming and are not likely to

harm the environment in Butamira Forest Reserve in any way.

During the hearing the applicants were represented by Mr. Edson Ruyondo of Ruyondo and Company Advocates and Mr. Kenneth Kakuru of Kakuru and Company Advocates while the Attorney General's chambers represented the respondents. Both Attorneys rehearsed their respective affidavits in support of their positions.

The instant application raises four issues for determination:

(1) Whether the applicants have standing in this matter;

(2) Whether there was breach of Doctrine of public trust;

(3) Whether second respondent failed in its duties;

(4) Remedies available to the parties.

Before I set on the above issues I must make a general statement on the scope of Environmental law and policy. There is no doubt that environmental law must be seen within the entire political, social, cultural and economic setting of the country and must be geared towards development vision. In other words, it must act as an aid to socio-economic development rather than a hindrance. The law must be in harmony with the prevailing government efforts and need to attract more foreign and local investment and channel national energies into more production endeavours in industry and sustainable exploitation of natural resources. Lastly it must be seen in the constitutional and administrative set up of the country.

With the above background in mind, I now proceed to discuss the issues raised in this matter.

(1) Locus Standi
One of the most spirited arguments by the respondent was that the applicants do not have locus standi to take up this action. It was contended that the applicants were mere impostors since they were not living near Butamira Forest Reserve. It was contended that people who live near Butamira who would be directly affected if the environment were to be upset by Government's dealings with the Reserve were not complaining about the decision Government had taken. It was concluded that the proprietors of Kakira Sugar Works Ltd to whom the responsibility of managing the Reserve was vested were living within its environs and as such as reasonable and rational human beings were not likely to endanger their own lives by polluting the environment in which they live.

The applicants brought this action under Article 50 of the Constitution claiming that their rights to a clean and healthy environment had been affected by the respondents' acts and omissions. That Article provides as follows:

"50 **(1)** ***Any person who claims that a fundamental or other right or freedom***

guaranteed under this constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.

(2) ***Any person or organization may bring an action against the violation of another person's or group's human rights.***

The importance of the above law is that it allows any individual or organization to protect the rights of another even thought that individual is not suffering the injury complained of or does not know that he is suffering from the alleged injury. To put it in the biblical sense the Article makes all of us our ***"brother keeper".*** In that sense it gives all the power to speak for those who cannot speak for their rights due to their ignorance, poverty or apathy. In that regard I cannot hide any pride to say that our constitution is among the best the would over because it emphasizes the point that violation of any human right or fundamental right of one person is violation of the right of all.

I am fortified in that thinking by the growing number of cases on environmental justice and good governance where Article 50 of the Constitution have been applied:

In **Greenwatch Vs Attorney General and Another Misc. Cause No.140/2002,** an action was taken against the Attorney General and NEMA under Article 50 of the Constitution for among other things failing or neglecting their duties towards the promotion or preservation of the environment. It was held that the state owes that duty to all Ugandans and any concerned Ugandan has right of action against the Government of the Republic of Uganda and against NEMA for failing in its statutory duty.

In the **Environmental Action Network Ltd Vs The Attorney General and NEMA Misc. Application No.39J2001**. Article 50 of the constitution was again interpreted where it was observed inter alia that the Article does not require the applicant to have the same interest as the parties he or she seeks to represent or for whose benefit the action is brought.

Lastly in the recent case of **British American Tobacco Ltd v s The Environmental Action Network; High Court Civil Application No. 27/2003; Ntabgoba PJ** (as he then was) had a lengthy discussion of Article 50 of the Constitution of Uganda wherein he held that the said Article does recognize the existence of marginalized groups like children, illiterates, the poor and the deprived on whose behalf any person or a group of persons could take an action to enforce their rights.

It is very clear from the above authorities that the applicants in this case were clothed with legal standing to take the instant action under Article 50
of the Constitution on behalf of the people of Butamira and other citizens of Uganda. They were therefore not busy bodies.

2. Whether there was **breach of the Doctrine of Public Trust.**
In very brief terms, the essence of the above doctrine is the legal right of the public to use certain land and waters. It governs the use of property where a given authority in trust

holds title for citizens. Citizens have two co-existing interests in trust land; the jus publicum, which is the public right to use and enjoy trust land, and the jus privatum, which is the private property right that may exist in the use, and possession of trust lands. The state may convey the jus privatum to private owners, but this interest is subservient to the jus publicum, which is the state's inalienable interest that it continues to hold in trust land or water: See Paul M. Bray: the Public Trust Doctrine.

In Uganda the above doctrine has been enshrined in the 1995 Constitution in its National Objectives and Directive Principles of State Policy as follows:

"The state shall protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda".

The Doctrine is restated in Article 237 (2)(b) of the Constitution which states:

"The Government or a local" Government as determined by parliament by law, shall hold in trust for the people and protect, natural lakes, rivers, wetlands, forest reserves, game reserves, National parks, and any land to be reserved for ecological and tourist purposes for the common good of all citizens:

The above provisions were operationalized by section 44 of the Land Act in the following terms:

"44 ***Control of Environmentally Sensitive areas***

(1) ***The Government or a local government shall hold in trust for the people and protect natural lakes, rivers, ground water, natural ponds, natural streams, wetlands, forest reserves, national parks and any other land reserved for ecological and tourist purposes for the common good of all citizens***
(2) .....

(3) .....

(4) ***The Government or a local government shall not lease out or otherwise alienate any natural resources referred to in this section.***

(5) ***The Government or a local government may grant concessions or licenses or permits in respect of any natural resources referred to in this section subject to any law.***

(6) ***Parliament or any other authority empowered by parliament may from time to time review any land held in trust by the Government or a local government whenever the community in the area or district where the reserved land is situated so demands".***

Article 237 (2) (b) should be read together with section 44 (4) of the Land Act. The same should apply to Article 237 (2) (a) and Section 42 of the Land Act. The two provisions

allow Government or a local government to acquire land in public interest subject to Article 26 of the Constitution and conditions set by parliament.

It is clear from the above expositions that Butamira Forest Reserve is land which government of Uganda holds in trust for the people of Uganda to be protected for the common good of the citizens. Government has no authority to lease out or otherwise alienate it. However, Government or a local government may grant concessions or licenses or permits in respect of land held under trust with authority from parliament and with consent from the local community in the area or district where the reserved land is situated.

In the instant case there was evidence that the permit was granted to Kakira Sugar Works amidst protests from local communities which raised up a pressure group of over 1500 members who depended on the reserve for their livelihood through agro-forestry, and source of water, fuel and other forms of sustenance. There was therefore breach of public trust doctrine. I must add that this doctrine was applied by the then Principal Forest Officer when he rejected the demands to alienate to Reserve to Kakira Sugar Works Ltd in 1956: See quotation above.

3. Whether the second respondent failed in its statutory duties under the National Environment Act.

It was contended for the applicants the second respondent failed in its Statutory duties in allowing Kakira Sugar Works to change the land use in the Forest Reserve without Environmental Impact Assessment and project brief. It was further contended that the said project would affect the rights of the applicants to a clean and healthy environment and the right to the protection of the country's natural resources.

The National Environment Act established National Environment Management Authority (NEMA) the second respondent as the overall body charged with the management of environmental issues in Uganda with power to co-ordinate, monitor and supervise all activities in the field of the environment.

It is upon the second respondent to ensure that the principles of environmental management set out below are observed:

(a) to assure all people living in the country the fundamental right to an environment adequate for their health and well being;

(b) to encourage the maximum participation by the people of Uganda in the development of policies, plans and processes for the management of the environment;

(c) to use and conserve the environment and natural resources of Uganda equitably and for the benefit of both present and future generations, taking into account the rate of population growth and the productivity of the available resources;

(d) to conserve the cultural heritage and use the environment and natural resources of Uganda for the benefit of both present and future generations;

(e) to maintain stable functioning relations between the living and nonliving parts of the environment through preserving biological diversity and respecting the principle of optimum sustainable yield in the use of natural resources;

(f) to reclaim lost ecosystems where possible and reverse the degradation of natural resources;

(g) to establish adequate environmental protection standard and to monitor changes in environmental quality;

(h) to publish relevant data on environmental quality and resource;

(i) to require prior environmental assessments of proposed projects which may significantly affect the environment or use of natural resources;

(j) to ensure that environmental awareness is treated as an integral part of education at all levels;

(k) to ensure that the true and total costs of environmental pollution are borne by the polluter;

(1) to promote international co-operation between Uganda and other states in the field of the environment: See Section 2 of National Environment Act.

The duties of the second respondent are further spelt out in section 6 of the Act.

In the instant case the second respondent has been challenged for allowing Kakira Sugar Works to change land use in the Forest Reserve without Environmental Impact Assessment and project brief.

It was further contended that the said project would affect the rights of the applicants to a clean and health environment and the right to the protection of the country's natural resources. Lastly, it was contended that the second respondent had failed in its duty to conserve the environmental and natural resources for the benefits of the present and future generations.

In very brief terms an Environmental Impact Assessment is a study conducted to determine the possible negative and positive impacts which a project may have on the environment. It is conducted before the project is started in order to evaluate its socio-economic benefits to the citizens. It is a very vital dynamics in planning for sustainable development.

The legal and institutional framework in Uganda is to the effect that before any project which is described in the third schedule of the National Environment Act is carried out, the developer must first submit a project brief to the lead agency which is the second respondent. Thereafter an Environmental Impact Assessment shall be undertaken by the developer where the lead agency is of the view that the project:

(a) may have an impact on the environment;

(b) is likely to have a significant impact on the environment, or

(c) will have a significant impact on the environment; Section 19 of the National Environment Act.

The Act also provides in the third schedule projects where Environmental Impact Assessment are mandatory. For the purpose of this case, they are:

(a) any activity out of character with surroundings;

(b) any activity causing major changes in land use;

(c) forestry related activities, including clearance of forest areas;

(d) large scale agriculture;

(e) activities in natural conservation areas, including formulation or modification of forest management policies.

In the instant case it was indicated that the permit was to effect change in land use whereby Kakira Sugar Works was to use the forest Reserve for planting sugar canes. Such activity would definitely be out of character with surroundings since it would entail changes in the land use from forestry to agriculture. Moreover it would involve clearance of a large forest for the purpose of large-scale agriculture. Butamira is a natural conservation area. The law is clear that all the above activities would not be carried out without Environmental Impact Assessment. Butamira saga is more delicate because it involves the interest of the local community whereby even common sense should have demanded that an Environmental Impact Assessment study be carried out to determine social, political, cultural and economic impact of the project. If it is true that land in Uganda belongs to the people as provided in the laws, it should be equally true that the local community in Butamira should have been consulted as a matter of transparency, accountability and good governance as demanded by the public trust doctrine which I have alluded to above. For the above reasons I do agree that the second respondent failed in its duty to ensure that Environmental Impact Assessment was carried out as required by the law.

As for the right to a clean and healthy environment, the National Environment Act provides that every person shall have the right to a healthy environment and one of the

duties of the second respondent is to ensure that all people living in the country have the fundamental right to an environment adequate for their health and wellbeing. Let me emphasize this point by picking quotation from the Indian Supreme Court in **MC Mehta Vs Union of India and others AIR 1988 Supreme Court 1037.**

"Man is both creature and moulder of his environment which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when through rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment the natural and man made, are essential to his wellbeing and to the enjoyment of the basic human rights, even the right to life itself'.

The right to health does not therefore stop at physical health. It covers intellectual, moral, cultural, spiritual, political and social wellbeing. Politically and socially, Butamira Forest Reserve belongs to the local community in Butamira. The people of Butamira also have a moral, cultural economic and spiritual attachment to Butamira Forest Reserve as a source of sports, worship, herbal medicine, economy etc.

It was therefore not proper to deprive them without consulting them and conducting a proper study. Lastly in alienating the Reserve the second respondent also failed in its constitutional and statutory duty to conserve the environment and natural resources equitably and for the benefit of both the present and future generations.

4. Remedies available to the parties:
It is clear from the above analysis that Butamira permit if it was ever granted at all was null and void by the fact that no project brief and Environmental Impact Assessment were ever carried out as required by the law. The alienation of the Reserve could only be done with due consultation of the local community and the relevant district as provided by the law. If the project is very vital for the development of the nation, proper procedure outlined above should have been followed to put it in place.

For the above reasons I find that the applicants are entitled to all the orders sought above except the restoration orders against the respondents. Such orders are only relevant to the party who is guilty of the environmental damage.

Lastly this being public interest litigation, I would not wish to make any orders as to costs. Public interest litigation usually involves the interest of the poor, ignorant, deprived, ill-informed, desperate and marginalized society where justice is always high horse. The courts of law should always be slow at awarding costs in such matters in order to enhance access to justice.

Conclusion:
In conclusion, this application is upheld with all the orders prayed for save orders for restoration. Parties to bear their own costs.

RUBBY AWERI OPIO

JUDG E

11/7/2005

Kenneth Kakuru
Edson Ruyondo for applicant
Mike Chibita for Respondent