THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA, AT KAMPALA

(CORAM: KATUREEBE; TUMWESIGYE; KISAAKYE; ARACH-AMOKO; ODOKI,TSEKOOKO; OKELLO; JJ.S.C.).

CONSTITUTIONAL APPEAL NO. 05 OF 2011

B E T W E E N

AMOOTI GODFREY NYAKAANA ::: APPELLANT

AND

1. NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY
2. ATTORNEY GENERAL
3. ADVOCATES COALITION FOR DEVELOPMENT & ENVIRONMENT
4. ENVIRONMENT ALERT ::::RESPONDENTS
5. GREENWATCH
6. UGANDA WILDLIFE AUTHORITY
7. THE ENVIRONMENTAL ACTION NETWORK

(Appeal from the Judgments and Orders of the Constitutional Court at Kampala, A.E. Mpagi-Bahigeine, A. Twinomujuni, C.N.B. Kitumba, C.K. Byamugisha and S.B. Kavuma, JJA, dated 9th November 2009 in Constitutional Petition No. 03 of 2005).

JUDGMENT OF B. M. KATUREEBE, CJ.

This appeal raises issues pertaining to environmental protection vis-à-vis individual property rights, and the Constitutionality of certain sections of the National Environment Act.

BACKGROUND.

The appellant filed a Constitutional Petition in the Constitutional Court (Constitutional Petition No. 03 of 2005) under the provisions of Article 137 (3) of the Constitution and Rule 3 of the Rules of that Court. In that Petition, the appellant challenged the Constitutionality of Sections 67, 68 and 70 of the National Environment Act (Cap 153) Laws of Uganda. He contended that the impugned sections contravene and are inconsistent with Articles 21, 24, 26, 28, 42, 44, 237 and 259 of the Constitution. He further contended that the impugned sections also contravene and are inconsistent with various international Human Rights Conventions and Instruments entrenched in the Constitution under Articles 20 and 45 of the Constitution. The appellant sought declaration and orders for redress.

There is no dispute as to the facts giving rise to the Petition. The appellant was the registered proprietor of land comprised in Leasehold Register Volume 3148 Folio 2 Plot 8 Plantation Road, Bugolobi, Kampala. He obtained

the lease from the then Kampala City Council for the purpose of constructing a residential house. He subsequently applied for and obtained the necessary approvals for the said construction and commenced work. In June 2004 environmental inspectors from the first respondent carried out an inspection of Nakivubo Wetland located in Nakawa Division. According to the inspectors, the appellant's house was in the wetland.

A meeting of residents and the inspectors was arranged whereby the residents were briefed about their properties being in the wetland. The appellant attended the meeting. The appellant refused to heed all calls to halt his construction. The 1st respondent then issued a restoration order and had it served on the appellant. The restoration order required the appellant to comply with certain conditions, including demolition of the house, within a period of 21 days. He failed or refused to do so, consequently the 1st respondent demolished the building on 8th January 2005. The appellant filed his petition.

At the hearing of the Petition before the Constitutional Court, only one issue was agreed to by the parties;

namely, whether sections 67, 68 and 70 of the National Environment Act are inconsistent or contravene Articles 21, 22, 24, 26, 27, 28, 43, 237 and 259 of the Constitution.

The Constitutional Court resolved the issue in favour of the respondents – hence this appeal.

Grounds of Appeal:

In this Court the appellant filed 11 grounds of appeal as follows:-

1. The Honourable learned Justices of the Constitutional Court erred in law and fact when they proceeded to decide the matter on the premise that the appellant's land was a wetland.

2. The Honourable learned Justices of the Constitutional Court erred and misdirected themselves in law and fact when they equated a restoration order to a charge sheet that commences the prosecution of a person who is charged with a criminal offence.

3. The Honourable learned Justices of the Constitutional Court erred in law and fact when in determining the purpose and objective of Section 67 they instead considered the main objectives of the National Environment Act.

4. The Honourable learned Justices of the Constitutional Court erred in law and fact when they held that the appellant had to show that the procedures laid down in the Section are as insufficient to achieve justice without frustrating the intention of the legislation.

5. The Honourable learned Justices of the Constitutional Court erred in law and fact when they held that the appellant failed to show that the safeguard contained in the impugned sections are insufficient to accord the appellant or anyone else a fair hearing.

6. The Honourable learned Justices of the Constitutional Court erred in law and fact when they found and held that the appellant's

proprietory rights were not infringed by the acts of the respondents

7. The Honourable learned Justices of the Constitutional Court erred in law and fact when they found and held that what was taken away from the appellant was misuse of the land in order to protect the environment.

8. The Honourable learned Justices of the Constitutional Court erred in law and fact when they priotised and gave undue preference to NEMA over the effect of the challenged Section 69.

9. The Honourable learned Justices of the Constitutional Court erred in law and fact when they failed to evaluate and appreciate the effect of the challenged provisions on the rights of the appellant guaranteed under Articles 26 and 28 of the Constitution.

10.The Honourable learned Justices of the Constitutional Court erred in law and fact when

they awarded costs to the 3rd, 4th, 5th, 6th and 7th respondents whose participation in the Constitutional Petition was voluntary and in defence of the public interest.

11. The Honourable learned Justices of the Constitutional Court erred in law and fact when in a matter of great public interest and concern ordered the appellant to pay costs to the respondent."

The parties all filed written submissions. At the hearing, the appellant was represented by Mr. Mohammed Mbabazi, while Ms. Christine Akello, Senior Legal Counsel, represented the 1st respondent, Mr. George Kalemera, Senior State Attorney represented the 2nd respondent and Ms. Sarah Naiga represented the 3rd, 4th, 5th, 6th, and 7th respondents.

Submissions of Counsel:

Counsel for the appellant argued all the 11 grounds of appeal jointly. He summarized what he called the main thrust and gravamen of the appeal in the following sub-

issues; namely, whether the appellant's certificate of title, physical land and house constructed on the property constituted property with rights guaranteed and protected under the Constitution; whether the appellant's property was a wetland subject to the management of the 1st respondent; and whether the method and procedure of demolishing the appellant's house and stopping him from using his land under sections 67, 68 and 70 of the National Environment Act was consistent with Articles 21, 22, 24, 26, 27, 28, 42, 44, 237 and 259 of the Constitution.

Counsel argued that the issuance and service on the appellant of the Environmental Restoration Order under Sections 67 and 68 of the National Environment Act and subsequent demolition of his house infringed on his right to fair hearing enshrined in Articles 28(1) 42 and 44 of the Constitution. To him, the appellant should have been given an opportunity to be heard before the restoration order could be served on him. He strongly criticized the Constitutional Court for using the analogy of a charge sheet with a restoration order. He contended that a restoration order is a judicial or adjudicatory decision, judgment or order like that of a tribunal which necessitated

the appellant being heard before it could be issued. He submitted therefore that the court had erred both in law and fact in equating this type of order to a charge sheet in a criminal trial. To counsel, there should have been an impartial and independent body to adjudicate between the investigation findings on one side and the appellant's defence on the other. It is only after this was done that a restoration order could be given. He asserted that the impugned Section 67, 68 and 70 of the National Environment Act do not allow the exercise of the right to fair hearing by the person receiving the restoration order. He particularly pointed out that section 68(7) expressly denies the person, like the appellant, the opportunity of being heard or making representations to the person conducting the inspection. Thus the restoration order had deprived him of his property which had to be demolished.

Counsel contended that the 1st respondent was the accuser, investigator, prosecutor and judge that made the decision to serve the Environment Restoration Order. Counsel cited the case of ***DIEDRICHS – SHURLAND &*** 25 ***ANOTHER –Vs- TALANGA – STIFTUNG & ANOR. (THE BAHAMAS [2006] UKPC 58*** which emphasized and

expounded on the right to be heard. He further cited what he called “a plethora of authority” on the right to fair hearing and principles of natural justice.

In support of his argument that the 1st respondent acted as a tribunal, he cited the decision of this court in ***JOHN KEN LUKYAMUZI –Vs- THE ATTORNEY GENERAL & THE ELECTORAL COMMISSION: SCCA NO. 2 OF 2007*** for the definition of the term “tribunal.” He further cited ***RIDGE –Vs- BALDWIN AND OTHERS [1963] 2 ALL ER*** for the proposition that a body clothed with powers to decide cannot lawfully proceed without affording the person to be affected with an opportunity to be heard.

Counsel further relied on the decision of this Court in ***MPUNGU & SONS TRANSPORTERS LTD –Vs- ATTORNEY GENERAL & KAMBE COFFEE FACTORY (COACH) LTD. SCCA NO. 17 OF 2001*** on the application of the audi alteram partem rule.

Counsel concluded by submitting that the procedure of issuing an Environment Restoration Order without affording the appellant the right to be heard is a violation of

the principle of fair hearing and natural justice, therefore, sections 67, 68 and 70 of the National Environment Act be declared null and void for being inconsistent with Articles 28, 42 and 44 of the Constitution.

On property rights, counsel sought to rely on Article 26 of the Constitution. He contended that as a lawful and registered proprietor of the land, he had been deprived of his property without compensation contrary to Article 26 of the Constitution, and without being given an opportunity to be heard, contrary to Article 28 of the Constitution. He further contended that far reaching powers that affect individual property ought to be exercised judicially after hearing all parties involved. He once again relied on ***RIDGE –Vs- BALDWIN AND OTHERS [1963] 2 All ER (***supra) in support of his argument.

Counsel then turned to the question as to whether the appellant's land was in fact a wetland. He contended that it was not, in so far as it had not been so declared as required by the **NEMA ACT** and the National Environment (Wetlands, River Banks and Lake Shores Management) Regulations, 2000. Counsel submitted that under those

regulations, it was a condition precedent before any land could be taken to be a wetland that the same be so declared and gazetted. It was also necessary to keep a national register of wetlands which had been so declared. Counsel contended that this had never been done. Therefore, his land was not a wetland and any interference with his property rights, leading to the demolition of his house was illegal and in contravention of his rights under Article 26 of the Constitution.

Counsel further argued that the appellant's privacy rights had been violated when the officers of the 1st respondent entered onto his land, contrary to Article 27 of the Constitution. Furthermore, the demolition of the appellant's property constituted a cruel and inhuman treatment of the appellant. He claimed that the appellant had been shot in the course of demolishing the house.

Finally, counsel submitted that sections 67, 68 and 70 of the **National Environment Act** varied and/or altered articles 21, 22, 24, 26, 27. 28 42, 44, 237 and 259 of the 25 Constitution thereby amending the said provisions of the Constitution by infection. He cited, in support, the case of

PAUL KAWANGA SSEMOGERERE -Vs- ATTORNEY 5 ***GENERAL: SCCA NO. 1 OF 2002.*** Counsel prayed that the appeal be allowed and consequential orders be made as prayed for.

In reply, Court for the 1st respondent first raised a preliminary point of law that the matters complained of did not raise any matter for constitutional interpretation and ought to be dismissed.

Counsel for the 1st respondent submitted that the right to private property is not an absolute right. It is subject to Article 237 of the Constitution. The right to own property is subject to the public trust doctrine. She noted that all wetlands are held in trust and are protected by the government or local government for the common good of the citizens of Uganda. It is in furtherance of the public trust doctrine that the law prohibits leasing or alienation of wetlands.

Counsel for the 1st respondent further stated that it was not necessary that a wetland should be gazetted before it

can be protected and she relied on Article 237(2) (b) of the Constitution. With regard to the right to privacy in relation to property, she noted that this arises only where there is a legitimate right to that property and no such ownership of property exists in the appellant's case.

Counsel for the second respondent adopted the first respondent's submissions and relied on Articles 237(b) of the Constitution and section 44(1) of the Land Act (Cap 227) Laws of Uganda.

On his part, counsel for the 3rd, 4th, 5th, 6th, and 7th respondents emphasized the constitutional provisions to protect the environment for the good of the country as a whole. He submitted that under the National Environment Act, special procedural requirements apply to developments likely to have significant impact on the environment especially if carried out in an environmentally sensitive area. The construction of a residential house in a wetland was an activity that was likely to impact on the environment, and should have been approved by the 1st respondent in accordance with the law. Counsel did not accept that the appellant's right to fair hearing had been

compromised in any way, and submitted that the authorities relied on by the appellant were irrelevant. Counsel fully supported the findings and decision of the Constitutional Court on this point. Counsel also submitted that the actions of the 1st respondent did not interfere with the property rights of the appellant. What was at stake was whether the use of land conform with the law on protection of the environment.

The Preliminary Point of Law:

As indicated above, both the 1st and 2nd respondent raised a preliminary point of law that the matters complained of by the appellant did not raise a matter for Constitutional interpretation, but rather were concerned with enforcement of rights. To them, this should have been addressed to the appropriate court under Article 50 of the Constitution.

I note that this same issue was raised before the Constitutional Court. That Court overruled the objection and proceeded to hear the case. The respondents did not cross-appeal against that decision, but have continued to raise the matter in their submissions as if there was no decision. It is also to be noted that in the Constitutional

Court, according to the lead judgment of Byamugisha, JA., the parties agreed on one issue namely:-

"whether sections 67, 68 and 70 of the Nema Act are inconsistent or contravene Articles 21, 22, 24, 26, 27,28, 43, 237 and 259 of the Constitution."

It is that issue that the Constitutional Court determined which decision has given rise to this appeal.

Article 137(3) (a) of the Constitution states as follows:-

137 - (3) "A person who alleges that:-

(a) an Act of Parliament or any other law or anything in or done under the authority of any law…………..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."

This provision clearly sets out the jurisdiction of the Constitutional Court to construe and interpret Acts of Parliament in relation to the Constitution. This court has

considered the issue of the jurisdiction of the Constitutional Court in a number of decisions.
In ***PAUL K. SSEMOGERERE, ZACHARY OLUM AND JULIET RAINER KAFIRE –Vs- ATTORNEY GENERAL, Const. App. No. 1 Of 2002,*** the court held that when it comes to interpretation of the Constitution or to determine whether a given Act or provision is inconsistent with the Constitution, the Constitutional Court is vested with unlimited and unfettered jurisdiction.

The same had been held in ***ATTORNEY GENERAL -Vs- MAJOR GENERAL TINYEFUZA,*** **Const. App. No. 1 of 1997**. Additionally it was also decided that the Constitutional Court can grant remedies after making the appropriate declarations.
Given the issue that was agreed in the Constitutional Court, and given the clear provisions of the Constitution, I find it untenable for the respondents to be raising their preliminary point of law even at this stage. It is entirely without merit and accordingly I dismiss it.

The Issues:

In his written submissions before this Court, the appellant's counsel contended that although there were eleven grounds of appeal, ***"The main thrust and gravamen of this appeal"*** could be summarized in three issues:

a) "Did the appellant's certificate of title, physical land and house constructed thereon constitute property with rights guaranteed and protected under the Constitution?

b) "If yes, was the appellant's property a wetland subject to the management of the 1st respondent?

c) "If yes, was the method and procedure of demolishing the appellant's property and stopping him from using his land under sections 67, 68 and 70 of the NEMA ACT, consistent with Articles 21, 22, 24, 26, 27, 28, 42, 44, 237 and 259 of the Constitution."

The appellant's submissions outlined above seek to show that the appellant was wronged as alleged and therefore he is entitled to remedies.

I will deal with each of the issues as raised above.

To answer these issues one has to consider and construe a number of provisions of the Constitution. These include provisions relating to land ownership, land use, protection of fundamental human rights and protection of the environment.

In construing these provisions one has to bear in mind some of the principles of Constitutional interpretation as laid out by this Court. In ***PAUL K. SSEMOGERERE AND 2 OTHERS –Vs- ATTORNEY GENERAL, CONST. APP. NO. 1 of 2002***, it was held that in interpreting the Constitution, the entire Constitution has to be read as an integrated whole with no particular provision destroying the other but each sustaining the other so as to promote harmony of the Constitution. It has been further held that all provisions bearing on a particular issue should be considered together so as to give effect to the purpose of the Constitution (or

statute) as the case may be – ***SOUTH DAKOTA –Vs-*** 5 ***NORTH COROLINA, 192, US 268 (1940) LED 448.***

Since the appeal involves the issue of protection of fundamental human rights, we shall also be guided by the principle that the Constitution and particularly that part which protects and entrenches fundamental rights and freedoms must be given a generous and purposive interpretation to realize the full benefit of the right guaranteed, and both purpose and effect are important in determining constitutionality.

The first issue touches on the appellant's right to own property. The following provisions of the Constitution are relevant:

Article 26 states as follows:

(1) "Every person has a right to own property either individually or in association with others.

(2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except when the following conditions are satisfied-

(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and

(b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for-

(i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and

(ii) a right of access to a court of law by any person who has an interest or right over the property."

The next article we should consider is Article 237 on Land Ownership. It states as follows-(in so far as relevant)

237 (1) "Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution.

(2). "Notwithstanding clause (1) of this Article

(b) 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." (emphasis added).

Clause 3 of the articles sets out the land tenure systems which include leasehold. The appellant falls within this category as he owns the land in question by leasehold title from Kampala District Land Board.

The next relevant article is article 242 on land use. It states as follows:-

242:***"Government may, under laws made by Parliament and policies made from time to time, regulate the use of land."***

Article 245 on Protection and preservation of the environment is particularly relevant to this appeal. It states as follows:-

245 "Parliament shall, by law, provide for measures intended-

(a) to protect and preserve the environment from abuse, pollution and degradation;

(b) to manage the environment for sustainable development; and

***(c) to promote environmental awareness*.**

An analysis of the above provisions of the Constitution points to the principle that although one has a right to own land through one of the systems of land tenure listed in the Constitution, there may be situations which necessitate the government either to take over that land, or to regulate its use for purposes of promoting and protecting the environment for the common good of all the people of Uganda.

That is why Article 237(2) starts with the words "Notwithstanding clause(1) of this article" To my understanding, if a person owns by leasehold or any other form of tenure, some land, and that land contains a wetland, his ownership does not preclude the government from protecting that wetland provided it is done under the

law made by Parliament. Under article 242, the government may regulate the use of the land. Thus, the government may require that one uses the land for agriculture instead of housing construction if that will be for the common good of the people.

Similarly, under article 245, Parliament has made the law whose purpose is to protect and preserve the environment. That law is the National Environment Act. That law is the instrument that the State has to use to protect the environment from abuse, pollution and degradation. A person cannot degrade a wetland and cause pollution to other citizens simply because he owns the land. This would defeat the whole purpose of the Constitution which requires that citizens may own land, but not cause pollution or degradation of the environment which may affect other people and the country as a whole.

Therefore, the first question must be answered as follows:

The appellant's certificate of title, physical land and house constructed thereon did constitute property with rights guaranteed and protected by or under the Constitution. But the property was also affected by other provisions of

the Constitution which must be read together. Whether the land was leased to him by the Kampala City Council or any other authority is beside the point. Even the Kampala City Council ownership would be subject to the Constitutional provisions regarding protection of the environment.

With respect, the appellant's counsel failed to appreciate that Article 26 of the Constitution has to be read together with Article 237(1) and 237(2) (b) as well as with articles 242 and 245. The facts of this case clearly show that the appellant was advised on the improper use to which he was putting the land, i.e. constructing a house in an area said to be a wetland. He was not being deprived of his property. Furthermore, if counsel had studied the leasehold title that is held by the appellant he would have seen that the leasehold is subject to the provisions of the Land Act and rules made/saved there under. This should have directed him to look at the relevant provisions of the Land Act, i.e. Section 23, 43 and 44. Section 43 of the Land Act particularly requires the owner of any land to manage or utilize land in accordance with, inter alia, the National Environment Act. Section 43 states as follows:-

"A person who owns or occupies land shall manage and utilize the land in accordance with the Forest Act, the Mining Act, the National Environment Act, the Uganda Wildlife Act, and any other law."

This applies to all land owners including urban authorities like Kampala City Council and all who derive title from them.

Counsel treated the right of the appellant to own property as an absolute right that could not be fettered in any way. But Article 43 of the Constitution requires that in the enjoyment of their rights and freedoms, persons do not prejudice the rights and freedoms of others. Laws like the Land Act or the National Environment Act are specifically provided for in the Constitution to help ensure that when people exercise their rights over their property, they do not prejudice the rights of others or the public interest. This is what could conceivably happen if one obstructed a stream or wetland. Other persons would be affected either by suffering floods or drying up water sources. This must be addressed under the National Environment Act.

I agree with the judgment of the Constitutional Court that the appellant's proprietary rights were not taken away by the acts of the 1st respondent. He was only prevented from misusing the land.

The next question to answer is whether the appellant's land was a wetland subject to the management of the 1st respondent. This issue was never canvassed in the Constitutional Court and no findings or decision was made thereon. I have already set out the one issue that was argued for determination by that court and which the court decided on. It is that decision that is before this court on appeal. It should not be proper for this court to entertain matters which were not raised and decided upon in the lower court, which could have called evidence on the matter.
Be that as it may, I note that the Petition of the appellant itself did not raise the issue of whether his land was a wetland. He only raised issues of property rights and fair hearing. It is only in his affidavit in support of the Petition that he stated in paragraphs 17 and 18 thereof that he

knew his land was not a wetland, and that Kampala District Land Board could not have allocated to him land in a wetland. He stated further that there was no gazettement to that effect. This was replied to by the 1st respondent in the affidavit of Festus Bagoora in support of the reply to the Petition, in paragraph 8 (f) and (g) where he states thus:-

8(f) "That wetlands are defined by section 1 of the National Environment Act and are not determined at the discretion of 1st respondent, nor are the Petitioner or the Kampala District Land Board authorities on wetlands; and that therefore, neither the Petitioner nor the Kampala District Land Board can make a finding on whether or not the Petitioner's suit property is in a wetland."

8(g) "That gazettement is not a pre-condition for

protection of wetlands, which protection is accorded by law under Article 237(2) (b) of the Constitution, Section 44(4) of the Land Act, Section 36 of the National Environment Act and the National Environment (Wetlands,

River Banks and Lake shores Management) Regulations, S.I No. 3/2000."

It is important to note that the appellant had notice that his property was being considered to be in a wetland. Thus he was invited to, and he did attend, a Community Sensitization meeting held at Lidia Marchi Youth Centre near Bugolobi on 26th July 2004 where all the residents were advised that they were in a wetland and that they should suspend all activities. He chose to ignore this advice and continued his construction. Environmental Inspectors from NEMA, Kampala City Council and the Wetlands inspection Division visited him several times and advised him accordingly. He refused. [See Annecture K, Letter of the Executive Director NEMA to the appellant dated 5th January 2005.] This same letter states as follows in the first paragraph:-

"Nakivubo wetland was gazetted as a critical wetland in Kampala District and its boundaries are still being mapped out. This wetland includes where you are constructing an illegal structure along Plantation Road in Bugolobi, Nakawa Zone. You were served with a Restoration Order……."

The statement in the above letter that Nakivubo wetland was gazette as a critical wetland in Kampala was never challenged.

In subsequent proceedings before the Constitutional Court, i.e. in the conferencing notes or indeed in submissions before the court the issue of whether the appellant's land was a wetland was never raised again. The matter proceeded on the basis that it was a wetland, but concentrated on whether sections 67, 68 and 70 of the National Environment Act were consistent with Articles 21, 22, 24, 26, 27, 28, 42, 44, 237 and 259 of the Constitution.

On the basis of the record before me, I answer the issue in the affirmative that the appellant's land was in a wetland, and subject to the management of the 1st respondent.

The next question to answer is really the crux of the appeal. The question is whether the method and proceeding of demolishing the appellant's property and stopping him from using his land under sections 67, 68 and 70 of the National Environment Act, was consistent

with Articles 21, 22, 24, 26, 27, 28, 42, 44, 237 and 259 of the Constitution.

In arguing this issue, counsel for the appellant dwelt on the subject of whether the appellant was accorded fair hearing in the process leading to the demolition of the house. He cited many authorities on the subject to support his contention that he should have been accorded a fair hearing before the Restoration Order was served on him. Counsel further criticized the Constitutional Court for equating the Restoration Order with a charge sheet in a criminal offence.

I will set out in full the impugned provisions of section 67, 68 and 70 of the National Environment Act for better appreciation of the issue.

Section 67 states as follows:-

67(1) "Subject to the provisions of this Part, the

authority may issue to any person in respect of any matter relating to the management of the environment and natural resources,

an order in this Part referred to as an environment restoration order.

(2). An environment restoration order may be issued under subsection (1) for any of the following purposes:-

(a) Requiring the person to restore the environment as near as it may be to the state in which it was before the taking of the action which is the subject of the order;

(b) Preventing the person from taking any action which would or is reasonably likely to do harm to the environment.” (emphasis added).

(c)

……………………………………………………………………………………………………

……………………………………………………………………………………………………

(3)

(4)

(5) In exercising its powers under this section, the authority shall:-

(a) Have regard to the principles as set out in section 2;

(b) Explain the rights of the person, against whom the order is issued, to appeal to the court against that decision." (emphasis added).

Whereas section 67 deals with issuance of the restoration order, section 68 is concerned with the service of the order. It states, in part, as follows:-

"68(1) Where it appears to the authority that harm has been done or is likely to be done to the environment by any activity, by any person, it may serve on that person, an environmental restoration order requiring that person to take such action in such time being not less than twenty one days from the date of the service of the order, to remedy the harm to the environment as may be specified in the order.

(2)…………………………………………………..

(3) ………………………………………………….

(4) ………………………………………………….

(5) …………………………………………………...

(6) ………………………………………………….

(7) It shall not be necessary for the authority in exercising its powers under sub-section (3) to give any person conducting or involved in the activity the subject of the inspection or residing or working on or developing land on which the activity which is the subject of the inspection is taking place, an opportunity of being heard or by making representations to the person conducting the inspection." (Emphasis added).

Section 69 provides for the reconsideration of an environmental restoration order. It states as follows:-

"69 (1) At any time within twenty one days after service of the environmental restoration order, a person upon whom the order has been served may, by giving reasons in writing, request the authority to reconsider that order.

(2) Where a written request has been made as provided for under sub-section (1), the order shall continue in effect until varied, suspended or withdrawn under sub-section

(3) and, if varied, shall continue in effect in accordance with the variation.

(3) Where a request has been made under sub-section (1), the authority shall, within thirty days after receipt of the request, reconsider the environmental restoration order and notify in writing the person who made the request of her or his decision on the order.

(4) The authority may, after reconsidering the case, confirm, vary, suspend or withdraw the environmental restoration order.

(5) ***The authority shall give the person who had requested a reconsideration of an environmental restoration order the opportunity to be heard orally before a decision is made."*** (Emphasis added).

It is these provisions of the National Environment Act that the appellant contends to be inconsistent with the named provisions of the Constitution.

I should here reiterate the principle of Constitutional interpretation that the Constitution must be read as a whole, with no one provision destroying another, and that provisions relating to a subject matter must be looked at together. The purpose and effect of the provisions in question must be considered to determine their Constitutionality.

The sage words of Oder, JSC, in ***ATTORNEY GENERAL –Vs- SALVATORI ABUKI SUPREME COURT CONST. APP. NO. 1/98***, are very apt. He stated thus:-

"The principle applicable is that in determining the Constitutionality of legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining Constitutionality of either an unconstitutional purpose or unconstitutional effect animated by an object the legislation intends to achieve. This object is realized through the impact produced by

the operation and application of the legislation. Purpose and effect respectively,. The sense of the legislation's object and ultimate impact are clearly linked if not indivisible. Intended and actual effect has been looked up for guidance in assessing the legislation's object and thus its validity. See THE QUEEN –Vs- BIG DRUG MARK LTD 1996 CLR 332."

The purpose of the impugned provisions of the NEMA Act has its base in the Constitution. One has to start with the National Objectives and Directive Principles of State Policy which are meant to *"guide all organs and agencies of the State, all citizens, organizations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society."*

Objective No. XIII commands the state to protect the natural resources of Uganda. It states 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."

Objective XXI obligates the State to ***"take all practical measurers to promote a good water management system at all levels."***

Objective XXVII obligates the State to protect the environment and to ensure that land, air and water resources are managed in a sustainable manner to promote development. In particular, under paragraph (ii) it states as follows:-

"The utilization of the natural resources of Uganda shall be managed in such a way as to meet the development and environmental needs of present and future generations of Ugandans; and, in particular, the State shall take all possible measures to prevent or minimize damage and destruction to land, air and water resources resulting from pollution or other causes." (Emphasis added).

These objectives and directives have been given added weight by article 8A of the Constitution which provides that:-

"(1) Uganda shall be governed based on principles

of national interest and common good enshrined in the national objectives and directives principles of State policy." (Emphasis added).

To my mind, this means that these objectives have gone beyond merely guiding us in interpreting the Constitution, but may in themselves be justiciable. The directives on protection of the environment must in my view be read together with Article 39 of the Constitution on the right to a clean and healthy environment to which every Ugandan has a right to.

In his letter referred to above, the Executive Director of National Environment Act refers to the Nakivubo wetland as a "critical wetland in Kampala District." Given the fact that Kampala is a city of more than 2 million people, it is not farfetched to see how so many other people could be impacted by the wrongful use of such critical wetland. The

Constitution obligates the State or its agencies to protect such wetland. As already indicated above, Article 245 of the Constitution obliges Parliament to pass a law providing for measures.

(a) "to protect and preserve the environment from abuse, pollution and degradation;

(b) "to manage the environment for sustainable development; and

(c) "to promote environmental awareness."

The National Environment Act is that law. So the purpose of that Act is to serve a Constitutional fiat, and if properly implemented, the effect would be to preserve the environment for the common good of the people of Uganda.

The appellant contends that the above provisions of the Act deprived him of the right to a fair hearing before his property could be demolished, contrary to Article 28 of the Constitution which guarantees a right to fair hearing. Furthermore, he argues, that under Article 44 of the Constitution, the right to fair hearing is non derogable.

The respondents argue that the provisions aforesaid, particularly Section 69 (5) (supra) give the appellant the right to be heard. They support the finding and decision of the Constitutional Court in that regard.

In her lead judgment, Byamugisha, JA, after considering the purpose of the National Environment Act and section 36 thereof that imposes restrictions on the use of wetlands, stated as follows:

"The Petitioner is not challenging the Constitutionality of these restrictions. In my view, it is these restrictions which gave the first respondent power to carry out inspection on the petitioner's property to ascertain whether the activities he was carrying out on the land was in conformity with the provisions of the section – hence the service of the restoration order. The restoration order is like a charge sheet that commences the prosecution of a person who is charged with a criminal offence. Normally a police officer does not give a hearing to a suspect before charging him or her. The purpose of the Act is to give the first respondent power to deal

with and protect the environment for the benefit of all including the Petitioner. The impugned sections in my view have in built mechanisms for fair hearing as enshrined in Article 28."

The learned Justice proceeds to point out that the petitioner, on receipt of the restoration order had 21 days within which to make representations to the first respondent for a review or variation of the order, which he failed, refused or neglected to pursue. The learned Justice further stated that the petitioner had failed to show that the procedures as laid down in the impugned sections were insufficient to achieve justice without frustrating the intention of the legislation. She concludes thus:-

"The Petitioner failed to show that the safeguards contained in the impugned sections are insufficient to accord him or anyone else a fair hearing. I have not been persuaded that the Petitioner's proprietary rights were infringed by the acts of the first respondent. What was taken away from him was misuse of the land and this was done to protect the environment."

I fully concur with the learned Justice of Appeal in her reasoning and findings. I note under Section 69(5) of the National Environment Act, the appellant was entitled to be heard orally before the final decision was made had he chosen to challenge the restoration order. I must also note that under Section 67(5)(b) the appellant had a right to appeal to court against the decision. This was another in – built protection within the law to ensure protection of his rights. Conceivably he could have sought a Court Order to prevent demolition of the property. He choose a physical fight.

The analogy of the criminal charge sheet, which Counsel for the appellant so vehemently criticized, is in my view very apt. Under the criminal law, a police officer, or indeed a private person, may arrest a suspected offender who is reasonably suspected to have committed or is about to commit a cognizable offence. See Sections 10 and 15 of the Criminal Procedure Code Act, Cap. 116. The purpose is either to prevent the commission of the crime, or to bring the offender as soon as possible to be charged in a Court of Law. The law does not require that the arresting officer should first give the suspect a fair hearing. That would

defeat the purpose of the law. But the law still presumes the suspect innocent and he/she is entitled to fair trial in a court of law. Similarly in the law relating to the protection of the environment, State Agencies like NEMA have been empowered to send out inspectors to check out on any abuses of the environment and prevent such abuses. It would, in my view, be disastrous if the law allowed the inspectors to enter into arguments and negotiations with persons suspected of harming the environment. The restoration order issued by NEMA after inspectors have made their report sets out in detail what has been damaged by the Petitioner and demands that it should be stopped or corrected. That is how it becomes analogous to a charge sheet in a criminal setting. The law, as pointed out then allows the Petitioner to respond to the matters raised. He can ask that the restoration order be cancelled where he can show grounds for doing so, or that it be varied. He is entitled even to be heard orally before the restoration order is implemented. He may also challenge that order in a court of law. His legal rights are fully covered under the sections he seeks to be declared unconstitutional.

The facts in this case show that the appellant not only ignored the restoration order and his right to challenge it and be heard, but he proceeded to go on with his construction even at awkward hours in total defiance thereof. In short, he continued to do further damage to the environment.

The need to protect the environment is enshrined in the Constitution. The State must act with vigilance to protect the environment to ensure that the common good is protected for the community as a whole.

In the 1st respondent's affidavit in support of the answer to the Petition, the first respondent raises an important issue to consider in matters of protection of the environment. The affidavit of ***FESTUS BAGORA*** dated 22nd April 2005, states in paragraph 8, in part, as follows:-

"8. In reply to paragraph 2 (v) (vi) and (vii) of the

Petition and paragraphs 15, 16, 17, 18 and 19 of the Petitioner's affidavit in support of the petition, the 1st respondent shall aver and contend as follows:-

(a) That a restoration order is issued under

Section 67 of the National Environment Act when harm has been or is likely to be caused to the environment; and that there is no legal requirement to grant the Petitioner a hearing before the restoration order is issued.

(b) That if the right to be heard in a court or a tribunal was a prerequisite to issuance of restoration orders, the environment would be seriously and adversely affected by acts of persons; and that the cardinal principles of precaution and polluter pays in environmental management would not achieve the desired effect of good environmental practice and protection." (Emphasis added).

It is to those cardinal principles of precaution and polluter pays in environmental management that I would now wish to turn.

The Supreme Court of India, while considering similar legislation to ours, i.e. the Environment (Protection) Act, 1986, has considered the above principles. In ***VELLORE CITIZEN'S WELFARE FORUM –Vs- UNION OF INDIA & OTHERS (1996) 5*** Supreme Court cases, 647, the court considered these principles at length. This was a case involving the pollution that was being caused by the discharge of untreated effluent by tannery industries in the state of Tami/Nadu. The Court considered the concept of sustainable development both in municipal as well as international context. It should be recalled that our own Constitution in objective no. XXVII (supra) the State is obligated to ***"promote sustainable development and public awareness of the need to manage land, air and water resources in a balanced and sustainable manner for the present and future generations."***

The Court discussed the concept of sustainable development as it has evolved in international law and adopted the definition adopted by the report of the ***WORLD COMMISSION ON ENVIRONMENT and DEVELOPMENT*** (the "Brumdtland Report). That Report defined ***"Sustainable Development"*** as ***"Development that***

meets needs of the present without compromising the ability of the future generations to meet their own needs." The Court stated thus:-

"We have no hesitation in holding that "sustainable Development" as a balancing concept between ecology and development has been accepted as part of the customary international law though its salient features have yet to be finalized by the international law jurists……………

We are, however, of the view that "The Precautionary Principle" and "The Polluter Pays Principle" are essential features of "Sustainable Development." The "Precautionary Principle" – in the context of municipal law – means:

(i) The Environmental measures – by the State Government and the Statutory authorities must anticipate, prevent and attack the causes of environmental degradation.

(ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(iii) The “Onus of proof” is on the actor or the developer/industrialist to show that his action is environmentally benign.”

On “the Polluter Pays Principle” the court had this to say:-
“The “Polluter Pays Principle” as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of “sustainable Development” and as such the Polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.”.

In this case, the wetland in question has been characterized by NEMA as a critical wetland around the Capital City, Kampala. It drains into Lake Victoria which has immerse ecological and economic importance not only to the City but to the Country and the region as a whole.

Such wetland should call for properly planned and controlled utilization so that the Constitutional requirement to use the resources for sustainable development is realized. Individual developers putting up houses in such a critical wetland unregulated by NEMA may have grave consequences in future. In that case the State will have failed to protect the environment and use the natural resource – wetland – in a sustainable manner. Indeed, the allegation by the appellant that other people may have confirmed with developments would point to a failure of the **NEMA** to do its job, but a justification for the desecration of the wetland.

Furthermore, the right to a clean and healthy environment enshrined in the Constitution must be protected by the State.

It is my opinion that the above principles must be adopted and applied if the State is to carry out its Constitutional mandate to protect the environment and guarantee a clean and healthy environment for the citizens, while at the same time promoting sustainable development.

In further regard to the issue of the right to fair hearing that the appellant sought to push so hard for, it is sufficient to refer to the case of ***REV. BAKALUBA PETER MUKASA –Vs- BETTY NAMBOOZE BAKILEKE (SCCA NO. 4 OF 2009)*** where this court considered and pronounced itself on the matter of fair hearing. This case was in fact cited by counsel for the appellant. In that case, this court laid down the guidelines in determining whether the right to a fair hearing had been violated, and emphasized the fundamental nature of that right in our Constitution. In the case of ***MPUNGU & SONS TRANSPORTERS LTD –Vs-*** 15 ***ATTORNEY GENERAL, (SCCA NO. 17 OF 2001)*** this court had emphasized the cardinal nature of the right to fair hearing but also emphasized the need to put in into context. The court cited with approval the decision in ***RUSSELL –Vs- NORFOLK [1949]1 ALL E.R. 109*** wherein Turker, L.J, stated thus:-

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is

acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case. I think from first to last the plaintiff did have such an opportunity.”

I am persuaded by that reasoning. Each case should be examined on its own facts and sets for circumstances, and the test should be whether the person was accorded a reasonable opportunity to be heard or to present his side of the case.

In the appeal, as pointed out, we are dealing with a grave matter of protecting the environment as commanded by the Constitution. This is a matter that is of interest to, and impacts on the community as a whole. The individual’s interest must be viewed in the context of that larger interest of society as a whole and in the context of the Constitution and the laws made thereunder.

The impugned provisions while providing for measures to protect the environment, do contain provisions whereby the appellant could have exercised his right to be heard by challenging the environmental restoration order within the stipulated period. Had he done so, he had a right to be heard in person. He could have challenged the order in a court of law. He chose not only to ignore the environmental restoration order, but continued in carrying out the very activities he had been advised to discontinue. In those circumstances, I find it unacceptable that he should now be heard to say that he was denied a fair hearing. He just refused to take the opportunity accorded to him by the law.

In that regard, I find that the impugned provisions are not inconsistent with any provision of the Constitution as alleged. These provisions actually gave the appellant reasonable opportunity for him to present his case and be heard.

In the circumstances, it is my considered opinion that this appeal should fail.

I would have considered ordering that the appellant make good the damage he did to the wetland, but since the 1st respondent already destroyed his structures, it would not be fair to do so.

I would dismiss the appeal with costs to the 1st and 2nd respondent in this court and in the court below. I would not award costs to the 3rd, 4th, 5th, 6th, 7th respondents since these voluntarily applied to be joined as parties because of the interest they have in protecting the environment. They will bear their own costs.

In the result, by six to one majority decision the appeal is dismissed with costs to the 1st and 2nd respondents in this court and in the court below.

Delivered at Kampala this *20th* day of *August* 2015.

……………………

B. M. KATUREEBE

CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KATUREEBE, CJ; TUMWESIGYE; KISAAKYE; ARACH-AMOKO; JJSC, ODOKI; TSEKOOKO; OKELLO; AG. JJSC]

CONSTITUTIONAL APPEAL NO. 05 OF 2011

BETWEEN

AMOOTI GODFREY NYAKANA ::APPELLANT

AND

1. **NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY**
2. **ATTORNEY GENERAL**
3. **ADVOCATES COALITION FOR DEVELOPMENT & ENVIRONMENT**
4. **ENVIRONMENT ALERT**
5. **GREENWATCH**
6. **UGANDA WILDLIFE SOCIETY**
7. **THE ENVIRONMENT ACTION NETWORK::::::::::::::::::::::::: RESPONDENTS**

[An Appeal from the decision of the Constitutional Court of Uganda at Kampala, (Bahigeine, Twinomujuni, Kitumba, Byamugisha, Kavuma, JJA) dated 22nd September 2011 in Constitutional Petition No. 03 of 2005]

<u>JUDGMENT OF DR. KISAAKYE, JSC.</u>

The appellant (Nyakana), appealed to this Court after the Constitutional Court dismissed his Petition challenging the constitutionality of section 67, 68 and 70 of the National Environment Act and the actions of the National Environment Management Authority taken on the basis of the said sections, including the demolition of his house which was under construction.

I have had the opportunity to read in draft the judgment of Katureebe, CJ. in which he entirely agrees with the decision of the Constitutional Court, with the exception of the order of costs to the 3rd, 4th, 5th, 6th, and 7th respondents.

I agree with the main thrust of his Judgment that the Environment should be protected. I also agree with him that the National Environment Act entrusted this responsibility with the National Environment Management Authority, hereinafter referred to as NEMA. That notwithstanding, I am of the strong view that the other equally entrenched Constitutional provisions which guarantee citizens' rights to a fair hearing, equal protection of the law, property and privacy rights must also be protected and also be observed by NEMA when it is exercising its statutory powers and obligations to protect the environment. I therefore with all due respect to the learned Chief Justice, respectfully disagree with his decision to dismiss this appeal.

I would instead allow this appeal, set aside the order and decision of the Constitutional Court on the grounds given in this Judgment.

Background to the Appeal

The background to this appeal is as follows. Nyakana filed Constitutional Petition No. 03 of 2005 in the Constitutional Court in which he alleged that sections 67, 68 and 70 of the National Environment Act, Cap 153 are inconsistent with Articles 21, 24, 26, 27, 28, 42, 44, 237 and 259 of the Constitution and International Instruments entrenched in the Constitution under Articles 20 and 45 of the Constitution.

He further alleged that the act of NEMA issuing an Environmental Restoration Order in respect of his alienated land and the consequent entry unto his premises resulting in the demolition of his developments thereon viz a residential house was inconsistent with and contravened the same Articles of the Constitution.

He prayed for the following declarations from the Constitutional Court:

1. ***That sections 67, 68 and 70 of the National Environment Act, Cap 153 are inconsistent with Articles 21, 24, 26, 27, 28, 42, 44, 237 and 259 of the Constitution and the various International Human Rights Convention and Instruments entrenched in the Constitution under Articles 20 and 45.***

   Redress by way of orders for:

   a)Permanent injunction against the respondent, its officials, agents or servants restraining and preventing it/them from interfering with the Petitioner's property rights and interests in his property.

   b) Restitution and/or restoration of the Petitioner's developments on his land comprised in Leasehold Register Volume 3148 Folio 2 Plot 8 at Plantation road, Bugolobi Kampala in the same state and condition as at the time of demolition by the respondent on 8th January 2005.

   c) A reference to the High court to investigate, compute and determine the compensation payable to the Petitioner equivalent in monetary terms to the demolished development/property at the prevailing current market value.

   d) Constitutional damages

   e) Costs of this Petition"

The Constitutional Court dismissed his Petition with costs to the respondents and he appealed to this Court on the following grounds:

1. ***The Honourable learned Justices of the Constitutional Court erred in law and fact when they proceeded to decide the matter on the premise that the appellant's land was a wetland.***

2. ***The Honourable learned Justices of the Constitutional Court erred and misdirected themselves in law and fact when they equated a restoration order to a charge sheet that commences the prosecution of a person who is charged with a criminal offence.***

3. ***The Honourable learned Justices of the Constitutional Court erred in law and fact when in determining the purpose and objective of Section 67 they instead considered the main objectives of the NEMA Act.***

4. ***The Honourable learned Justices of the Constitutional Court erred in law and fact when they held that the appellant had to show that the procedures laid down in the section are as insufficient to achieve justice without frustrating the legislation.***

5. ***The Honourable learned Justices of the Constitutional Court erred in law and fact when they held that the appellant failed to show that the safeguard contained in the impugned sections are insufficient to accord the appellant or anyone else a fair hearing.***

6. ***The Honourable learned Justices of the Constitutional Court erred in law and fact when they found and held that the appellant's proprietary rights were not infringed by the acts of the respondents.***

7. ***The Honourable learned Justices of the Constitutional Court erred in law and fact when they found and held that what was taken away from the appellant was misuse of the land in order to protect the environment.***

8. ***The Honourable learned Justices of the Constitutional Court erred in law and fact when they prioritized and gave undue preference to NEMA over the effect of the challenged section viz section 69.***

9. ***The Honourable learned Justices of the Constitutional Court erred in law and fact when they failed to evaluate and appreciate the effect of the challenged provisions on the rights of the appellant guaranteed under Articles 26 and 28 of the Constitution.***

10. ***The Honourable learned Justices of the Constitutional Court erred in law and fact when they awarded costs to the 3rd, 4th, 5th, 6th and 7th respondents whose participation in the Constitutional Petition was voluntary and in defence of public interest.***

11. ***The Honourable learned Justices of the Constitutional Court erred in law and fact when in a matter of great public importance and concern ordered the appellant to pay costs to the respondents.***

He prayed for the following orders:

a) ***The judgment of the Constitutional Court in Constitutional Petition No. 03 of 2005 be set aside and judgment entered in favour of the appellant as per reliefs, remedies and redress sought in the Petition.***

b) ***Costs for this appeal and in the Court below***

For ease of reference, I have reproduced the impugned sections of the National Environment Act in their entirety.

Section 67 of this Act provides as follows:

"(1) ***Subject to the provisions of this Part, the authority may issue to any person in respect of any matter relating to the management of the environment and natural resources an order in this Part referred to as an environmental restoration order.***

(2) ***An environmental restoration order may be issued under subsection (1) for any of the following purposes—***

(a) requiring the person to restore the environment as near as it may be to the state in which it was before the taking of the action which is the subject of the order;

(b) preventing the person from taking any action which would or is reasonably likely to do harm to the environment;

(c) awarding compensation to be paid by that person to other persons whose environment or livelihood has been harmed by the action which is the subject of the order;

(d) levying a charge on that person which represents a reasonable estimate of the cost of any action taken by an authorized person or organization to restore the environment to the state in which it was before the taking of the action which is the subject of the order.

(3) An environmental restoration order may contain such terms and conditions and impose such obligations on the persons on whom it is served as will, in the opinion of the authority, enable the order to achieve all or any of the purposes set out in subsection (1).

(4) Without prejudice to the general effect of the purposes set out in subsection (1) or the powers of the authority set out in subsection (2), an environmental restoration order may require a person on whom it is served to—

(a) take such action as will prevent the commencement or continuation of or the cause of pollution;

(b) restore land, including the replacement of soil, the replanting of trees and other flora and the restoration, as far as may be, of outstanding geological, archaeological or historical features of the land or the area contiguous to the land specified in the order;

(c) take such action as will prevent the commencement or continuation of or the cause of an environmental hazard;

(d) cease to take any action which is causing or may cause or may contribute to causing pollution or an environmental hazard;

(e) remove or alleviate any injury to land or the environment or to the amenities of the area;

(f) prevent damage to the land or the environment, aquifers beneath the land and flora and fauna in, on, under or about the land specified in the order or land or the environment contiguous to land specified in the order;

(g) remove any waste or refuse deposited on land specified in the order;

(h) deposit waste in a place specified in the order;

(i) pay such compensation as is specified in the order.

(5) In exercising its powers under this section, the authority shall—

(a) have regard to the principles as set out in section 2;

(b) explain the rights of the person, against whom the order is issued, to appeal to the court against that decision."

On the other hand, section 68 of the National Environment Act provides as follows:

"(1) Where it appears to the authority that harm has been or is likely to be caused to the environment by an activity by any person, it may serve on that person an environmental restoration order requiring that person to take such action, in such time being not less than twenty-one days from the date of the service of the order, to remedy the harm to the environment as may be specified in the order.

(2) An environmental restoration order shall specify clearly and in a manner which may be easily understood—

(a) the activity to which it relates;

(b) the person or persons to whom it is addressed;

(c) the time at which it comes into effect;

(d) the action which must be taken to remedy the harm to the environment and the time, being not less than thirty days or such further period as may be prescribed in the order, within which the action must be taken;

(e) the powers of the executive director to enter land and undertake the action specified in paragraph (d);

(f) the penalties which may be imposed if the action specified in paragraph (d) is not undertaken;

(g) the right of the person served with an environmental restoration order to appeal to the court against that order.

(3) ***The authority may inspect or cause to be inspected any activity to determine whether that activity is harmful to the environment and may take into account the evidence obtained from that inspection in any decision on whether or not to serve an environmental restoration order.***

(4) ***The authority may seek and take into account any technical, professional and scientific advice which it considers to be desirable for a satisfactory decision to be made on an environmental restoration order.***

(5) ***An environmental restoration order shall continue to apply to the activity in respect of which it was served notwithstanding that it has been complied with.***

(6) ***A person served with an environmental restoration order shall, subject to this Act, comply with all the terms and conditions of the order that has been served on him or her.***

(7) ***It shall not be necessary for the authority in exercising its powers under subsection (3) to give any person conducting or involved in the activity the subject of the inspection or residing or working on or developing land on which the activity which the subject of the inspection is taking place, an opportunity of being heard by or making representations to the person conducting the inspection."***

Lastly, section 70 of the National Environment Act provides as follows:

"(1) ***Where a person on whom an environmental restoration order has been served fails, neglects or refuses to take the action required by the order, the authority may, with all necessary workers and other officers, enter or authorize any other person to enter any land under the control of the person on whom that order has been served and take all necessary action in respect of the activity to which that order relates and otherwise to enforce that order as may seem fit.***

(2) ***Where the authority exercised the power under subsection (1), it may recover as a civil debt, in any court of competent jurisdiction from the person referred to in subsection (1), the expenses necessarily incurred by it in the exercise of that power."***

Consideration of the Appeal

Before I delve into the merits of this appeal, it is important, in my view to reflect on the constitutional framework under which NEMA and all other actors are expected to follow while executing their constitutional and statutory mandates.

There is no doubt that the Constitution clearly entrenches the right to a clean and healthy environment in Article 39. Furthermore, Article 237(2)(b) of the Constitution also provides as follows:

> ***"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 touristic purposes for the common good of all citizens;"***

This article imposes an obligation on the part of the Government or a local government to hold wetlands and other national resources in trust for all Ugandans.

In furtherance of this obligation, Government enacted the National Environment Act. The purpose of this Act is spelt out in the preamble to the Act as follows:

> ***"An Act to provide for sustainable management of the environment; to establish an authority as a coordinating, monitoring and supervisory body for that purpose; and for other matters incidental to or connected with the foregoing."***

There is therefore no doubt, going by the provisions already cited that NEMA was established pursuant to the State's obligation to protect the environment. The Act gives NEMA wide ranging powers to issue Environmental Impact Assessment reports and to carry out audits to ensure that no activity results in environmental degradation. The duties placed on NEMA are reinforced in section 2(2) of the National Environment Act which provides for the principles of environment management that NEMA must ensure are observed**.** Section 2(2)(c) in particular lays out one of the principles NEMA is required to follow thus:

> ***"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"***

The above provisions notwithstanding, there is also no dispute that in 1995, the people of Uganda set for themselves a very high bar in Article 20(2) of the Constitution when they

unequivocally pronounced that the fundamental rights and freedoms of the individual shall be respected by all. This Article provides as follows:

> ***"The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons."***

This Article exempted no one in the executive, legislative or judicial arm of government. Having solemnly declared that the obligation to respect, uphold and promote the rights and freedoms of individuals and groups rests on everyone, the same Constitution proceeded to enumerate very wide ranging fundamental rights and freedoms which are provided for in Articles 21 to 42 that should be respected, upheld and promoted by all organs and agencies of government.

The Constitution however deemed it fit to provide for a general limitation on the fundamental rights and freedoms in Article 43 which provides that in the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

The Constitution in the same article further provides that:

> ***"Public interest under this article shall not permit—***
>
> ***(a) …;***
>
> ***(b) …;***
>
> ***(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution."***

It is therefore clear that while our Constitution permits limitations on the enjoyment of the rights guaranteed under it, those limitations are only permissible to prevent the prejudicing of the rights of others and to protect public interest, which is justifiable in a 'free and democratic society or as provided for by the same Constitution.

Having laid out the constitutional framework on which the challenged sections and NEMA's actions should be assessed, I will now proceed to consider the challenged sections of the National Environment Act.

Consideration of the constitutionality or otherwise of Sections 67, 68 and 70 of the National Environment Act. (Grounds 4, 5, 6, 7, 8 and 9 of appeal)

The sole issue the parties agreed to put before the Constitutional Court was framed as follows:

> "***Whether sections 67, 68 and 70 of the National Environment Act are inconsistent or contravenes Articles 21, 22, 24, 26, 27, 28, 43, 237 and 259 of the Constitution."***

The Constitutional Court dismissed the appellant's Petition on the ground that he did not make out a case on which the Court could grant the declarations sought. Byamugisha, JA, who wrote the lead judgment on behalf of the Court, reasoned as follows:

> ***"In order for the Petitioner to succeed, he has to show prima facie that the impugned sections are inconsistent with or contravene the articles of the Constitution which he cited. The purpose of the National Environment Act according to its preamble is:***
>
> > ***"To provide for sustainable management of the environment; to establish an authority as a coordinating, monitoring and supervisory body for that purpose; and for other matters incidental to or connected with the foregoing."***
>
> ***The functions of the 1st respondent with regard to environment are set out in section 6 of the NEMA Act.***
>
> ***…***
>
> ***The purpose of the Act is to give the respondent power to deal with and protect the environment for the benefit of all including the petitioner.***
>
> ***The impugned sections in my view have in built mechanisms for fair hearing as enshrined in Article 28.***
>
> ***On receipt of the restoration order, the petitioner had 21 days within which to make a presentation to the 1st respondent for a review or variation of its order. Procedures before any tribunal which is acting judicially should be fair and be seen to be so. The petitioner had to show that the procedures laid down in the sections are insufficient to achieve justice without frustrating the intention of the legislation. The petitioner failed to show that the safeguards contained in the impugned sections are insufficient to accord him or anyone else a fair hearing. I have not been persuaded that the petitioner's proprietary rights were infringed by the acts of the 1st respondent. What was taken away from him was misuse of the land and this was done to protect the environment."***

The majority decision has agreed with the Constitutional Court. I however take issue, just as the appellants did, with part of the holding of the Constitutional Court, as I will discuss in this Judgment.

I have carefully studied the impugned sections of the National environment Act. NEMA is authorized under sections 67 and 68 to issue very wide ranging orders directing the recipient to do any one or more of the following:

a) *To restore the environment to as near as it may be, to the state in which it was before the taking of the action which is the subject of the order, [section 67(2) (a)]*

b) *To refrain from taking any action which would or is reasonably likely to do harm to the environment, [section 67(2) (b)]*

c) *To give compensation to other persons whose environment or livelihood has been harmed by the action which is the subject of the order, [section 67(2) (c)]*

d) *To pay a charge which represents a reasonable estimate of the cost of any action taken by an authorized person or organization to restore the environment to the state in which it was before the taking of the action which is the subject of the order, [section 67(2) (d)]*

e) *To take such action as will prevent the commencement or continuation of or the cause of pollution, [section 67(4)(a)]*

f) *To restore land, including the replacement of soil, the replanting of trees and other flora and the restoration, as far as may be, of outstanding geological, archaeological or historical features of the land or the area contiguous to the land specified in the order, [section (67(4)(b)]*

g) *To take such action as will prevent the commencement or continuation of or the cause of an environmental hazard, [section 67(4)(c)]*

h) *To cease to take any action which is causing or may cause or may contribute to causing pollution or an environmental hazard, [section 67(4)(d)]*

i) *To remove or alleviate any injury to land or the environment or to the amenities of the area, [section 67(4)(e)]*

j) *To prevent damage to the land or the environment, acquifers beneath the land and flora and fauna in, on, under or about the land specified in the order or land or the environment contiguous to land specified in the order, [section 67(4)(f)]*

k) *To remove any waste or refuse deposited on land specified in the order, [section 67(4)(g)]*

l) *To deposit waste in a place specified in the order, [section 67(4)(h)] and*

m) *To pay such compensation as is specified in the order, [section 67(4)(i)]*

Furthermore, section 68(6) of the National Environment Act provides that a person once served with an Environmental Restoration Order shall, subject to the provisions of the Act, comply with all the terms and conditions of the order that has been served on him or her.

Section 68(3) of the National Environment Act also grants powers to NEMA to carry out inspections into any activity and to enter into a private citizens' land without duly notifying the owners of their purpose. This Section authorizes NEMA to carry out inspections as follows:

> ***"The authority may inspect or cause to be inspected any activity to determine whether that activity is harmful to the environment and may take into account the evidence obtained from that inspection in any decision on whether or not to serve an environmental restoration order."***

On the other hand, section 68(7) authorizes NEMA to undertake inspections without the input of the alleged violator giving his or her side of the story. The section specifically excluded the right of the affected persons to be heard by NEMA inspectors as follows:

> ***"It shall not be necessary for the authority in exercising its powers under subsection (3) to give any person conducting or involved in the activity the subject of the inspection or residing or working on or developing land on which the activity which***

the subject of the inspection is taking place, an opportunity of being heard by or making representations to the person conducting the inspection."

Section 68(1) further permits NEMA to issue such an alleged violator an Environmental Restoration Order hence, condemning him or her of having harmed the environment without giving such a person any hearing or opportunity to be heard. Given the order of the sub-section, it is even possible for NEMA to issue the Environmental Restoration Order even before it has carried out any inspection or got any technical advice to that effect. NEMA is authorized to move *'if it appears that either harm has been or is likely to be caused to the environment.'*

The impugned sections of the National Environment Act in as far as they denied the appellant the right to a fair hearing were unconstitutional and so were the acts of the first respondent based on the impugned sections. In my view, it was incumbent upon NEMA, as an authority exercising quasi judicial power, to give a fair hearing to the appellant before condemning his property.

This Court pointed out the dangers of vesting investigating, prosecuting and adjudicating powers in one body in ***John Ken Lukyamuzi v. The Attorney General & Anor., Constitutional Appeal No. 2 of 2007*** where Lukyamuzi challenged the loss of his Parliamentary seat acting on the basis of the Inspectorate of Government's Report. The IGG had found him in breach of the Leadership Code because he failed and/or refused to declare his wealth as required by the Leadership Code Act.

Commenting on the actions of the Inspectorate, Justice Tumwesigye, JSC observed as follows:

"It would not be in the interest of promoting proper administration of justice in this country to allow a situation where the power of investigation, prosecution and adjudication are combined in one institution. If an institution such as the IGG is big enough, it can have divisions within it, one among them for carrying out the function of investigation and another for carrying out the function of prosecution. However, in my view, it would not be proper to have a division conducting adjudication in respect of the cases investigated by the same institution. For proper administration of justice, a court or tribunal should be independent of agencies which investigate or prosecute cases before it. This is necessary to give persons brought before such a court or tribunal confidence that they will get a fair hearing and justice in the end. … I respectfully agree …that the operational set up of the IGG as an institution makes

breach of the principle of nemo judex in causa sua (no person shall be a judge in his or her own cause) unavoidable. For example, in the appellant's case if you read the report or "judgment" of the IGG to the Speaker of Parliament, the IGG is the complainant, the investigator and the judge, all rolled into one. Breaches of the Leadership Code are punished with severe penalties… In my view such penalties should be imposed by a court of law or a tribunal established by law which observes due process. The right to a fair hearing guaranteed by Articles 28(1) and 44(c) of the Constitution is about due process which must be observed by all courts of law or tribunals for justice not only to be done but also to be seen to be done."

According to **Words & Phrases Legally Defined Vol. 2: D-J** at page 124:

> ***"The expression "due process of law"…should also include the holding of a hearing in which the principles of fundamental justice recognized by our legal system would be applied. The word "law" here means not only the law to be found in the statutes, but is also used in its abstract or general sense, and includes what are known as the principles of natural justice."*** as ***Per Noel ACJ*** in ***National Capital Commission v. Lapointe [1972] FCR 568 at 571, FCTD"***

Furthermore, Black's Law Dictionary 5th Ed. at page 262 lays down the essential elements of Due process of law as follows:

> ***"The essential elements of due process of law are notice and opportunity to be heard and to defend in orderly proceeding adapted to the nature of case, and the guarantee of due process requires that every man have protection of day in Court and benefit of general law. Daniel Webster defined this phrase to mean a law which hears before it condemns, which proceeds on inquiry and renders judgment only after trial."***

The right to fair hearing is fundamental. This Court has recognized the fundamental nature of the right to be heard in various decisions it has rendered and on several occasions, has nullified decisions reached by statutory and administrative bodies on the basis that the party affected by their decision was not given a fair hearing.

Recently, in ***Omunyokol Akol Johnson v. The Attorney General, [Supreme Court Civil Appeal No. 06 of 2012]*** , this Court concurred with the findings of the trial Court and the Court of Appeal and set aside the dismissal of the appellant who was not accorded an opportunity to be heard by his employer.

Similarly, in the recent decision of ***National Council for Higher Education v. Anifa Kawooya Bangirana, [Supreme Court Constitutional Appeal No. 04 of 2011]***, this Court also held that, the appellant should have given the respondent a hearing before it recalled the respondent's Certificate of Equivalence. We rejected the argument by the appellant that it would allow the respondent a right to be heard after it had recalled her Certificate.

It therefore follows that the rules of natural justice are very clear. You hear all the parties before condemning them. In the case of the National Environment Act, the reverse is true. NEMA condemns first and then purports to give actual or alleged violators a hearing. However it retains all the powers to stick to its original verdict, that is: the initial Environmental Restoration Order it had issued before holding such a review hearing. In the alternative, if NEMA does not receive any representations, it can proceed to carry out whatever orders it deems necessary against the actual or perceived degrader of the environment, even though the person against whom they are enforcing such an order may not be the person responsible for the degradation or the other activities named in the Environmental Restoration Order or may not have even been served with the Environmental Restoration Order.

With the exceptions of sub-sections 67(5) and 68 (4) of the Act, I therefore find that the remainder of these impugned sections do contravene Articles 26, 27 and 28 of the Constitution.
I find that the rest of the impugned sections are inconsistent with several provisions of the Constitution. I am therefore unable to uphold the constitutionality of these provisions. In this Judgment, I have given clear examples which show that sections 67, 68 and 70 of the National Environment Act are inconsistent and contravene several provisions of the Constitution. In my view, the contentions of the appellant in his Petition were well founded.
The unconstitutionality of these provisions is not remedied by section 67(5) which requires NEMA to have regard to the principles of environment management set out in section 2, because the preceding sections already offer wide discretionary powers to NEMA to do any of the acts authorized under sections 67 and 68 of the Act.

Secondly, there is also no provision in the National Environment Act which sets up a quasi-judicial Tribunal or Committee to hear requests for reconsideration of Environmental Restoration Orders issued by NEMA. Given these gaps, it cannot be ruled out that the very NEMA Inspector(s) who made the inspection or their superior who made the decision to issue an Environmental Restoration Order may be the same person or persons who are responsible for making the decision on a request for its reconsideration. It therefore follows that, although section 69 of the National Environment Act offers an opportunity for a person served with an Environmental Restoration Order to request for its reconsideration, this, in my view, does not remedy the inconsistency of sections 67 (2)&(4) and 68 which I have already pointed above. This is because section 69 only becomes operational if the recipient of the Environmental Restoration Order moves NEMA to reconsider it. Given the low levels of literacy in all fields including legal literacy in Uganda, it is very unlikely that the majority of Ugandans who may be found by NEMA to either be consciously harming the environment or engaging in activities that may cause harm to the environment will be aware about these provisions or that NEMA will bring them to their attention.

With due respect, I find that the Constitutional Court erred in law when it declined to consider the inconsistency or otherwise of sections 67, 68 and 70 with the Constitution and instead held that "the Petitioner had to show that the procedures laid down in the sections are insufficient to achieve justice without frustrating the intention of the legislation" and that "the Petitioner failed to show that the safeguards contained in the impugned sections are insufficient to accord him or anyone else a fair hearing."

This Court has similarly held that the procedure provided for in section 69 of the National Environment Act, which allows for persons who have been served with an Environmental Restoration Order to seek for a review of variation is sufficient to discharge NEMA's constitutional obligation to give a fair hearing to persons affected by Environmental Restoration Orders.

In my view, the procedures laid down under the impugned sections and which were relied on by NEMA do not meet the constitutional standard in as far as they do not give the party likely to be affected by the Environmental Restoration Order an opportunity to be heard before NEMA makes that decision.

With all due respect, I respectfully disagree with the conclusion of the Constitutional Court and my colleagues at this Court. First of all, section 69 of the National Environment Act is problematic because, as the appellant argued, it makes NEMA the investigator, prosecutor, judge and executioner of its orders.

Secondly, section 69 of the National Environment Act only provides for a hearing after NEMA has condemned an alleged environmental degrader unheard in the Environmental Restoration Order it issued. It cannot, in my view, rectify or remove the unconstitutionality of section 67, 68 & 70 with respect to these sections not giving such persons a right to be heard, infringing the right to property during the process of inspection and/or demolition of such structures as NEMA would have condemned having been built in a wetland.

With due respect to the learned Justices of the Constitutional Court and my colleagues on the Coram, I respectfully disagree with their conclusions that the appellant did not make out a case for the court to grant the declarations he sought with respect to sections 67, 68 and 70 of the National Environment Act.

On the contrary, I agree with the submissions of counsel for the appellant that sections 67, 68 and 70 of the National Environment Act contravene Articles 26 (the right to property), Article 27 (the right to privacy), and Article 28(the right to a fair hearing) and Article 42 (Right to just and fair treatment in administrative decisions).

It should further be noted that this appeal is not only concerned with the question whether sections 67, 68 and 70 of the National Environment Act are inconsistent with or contravene the Constitution. The appellant, on the other hand, based his petition and this appeal on several other constitutional provisions found in the Bill of Rights, which include Articles 21, 26, 27, 28, 42 and 44.

The respondent, on the other hand, relied on various constitutional provisions intended to protect the environment and other natural resources. These include Articles 39, and 237(2)(b), which I have quoted earlier in this Judgment.

The Constitutional Court, in my view, focused on the provisions protecting the environment and paid little regard to those relied on by the appellant. This approach, in my view, was at variance with the principles of Constitutional interpretation which are well known and have been followed from time to time by this Court and the Constitutional Court.

One of the relevant principles which should have guided the Court in this appeal is the rule of harmony or completeness which requires that Constitutional provisions should not be looked at in isolation. Rather, the Constitution should be looked at as a whole with no provision destroying another but supporting each other. This is the rule of harmony, the rule of completeness, and exhaustiveness and the rule of paramountancy of the Constitution. This has been stated in several decisions of this court which include ***Paul Semogerere v. Attorney General, Constitutional Appeal No. 1 of 2002*** and ***Attorney General v. Susan Kigula and Others, Constitutional Appeal No. 03 of 2006***, among others.

Another principle of constitutional interpretation requires that where several provisions of the Constitution have a bearing on the same subject, they should be read and considered together so as to bring out the full meaning and effect of their intent**.** None should be ignored or preferred over the other. This principle has been restated in several decisions of this Court and in the Constitutional Court.

Furthermore, this Court has also held in several cases, which include ***Attorney General V Uganda Law Society, Constitutional Appeal No. 1 of 2006*** that a constitutional provision containing a fundamental right is a permanent provision intended to cater for all times to come and must be given an interpretation that realizes the full benefit of the guaranteed right.

Lastly, in ***Attorney General v. Salvatori Abuki, Constitutional Appeal No. 1 of 1998***, this Court held that a non-derogatable article confers absolute protection and should be enforced by all government and non-government organs and individuals.

In ***Tinyefuza v. Attorney General, Constitutional Petition No. 1 of 1996***, Manyindo, DCJ (as he then was) rightly summed these principles as follows:

> ***"The entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountancy of the written constitution."***

I entirely agree with the position as stated by the learned Deputy Chief Justice.

In line with the principles of constitutional interpretation discussed above, it therefore follows that while NEMA was tasked with the responsibility of protecting the environment for the

benefit of all Ugandans who are living and those to come, it must also respect the rights of Ugandans entrenched in the Constitution, while it is performing its duties. For it cannot be true that the Constitution or the National Environment Act gave NEMA a waiver to observe and respect the constitutionally protected rights in order to protect the environment, while restricting each and every other constitutionally and/or statutorily established body to perform its respective duties while respecting the Constitution and the rights guaranteed under it.

It is my view that no article in the Constitution warrants and gives a right to NEMA to trample on other equally entrenched rights guaranteed to Ugandan citizens by the same Constitution from which it derives its powers. The enabling sections in the National Environment Act however do so in the manner I have described in this Judgment. The challenged sections of the National Environment Act are very problematic because, as the appellant argued, they make NEMA the investigator, prosecutor, judge and executioner of its orders. In so doing, they have failed to meet the Constitutional test and should therefore be declared so, for being inconsistent with and in contravention of the cited provisions of the Constitution.

Sections 67, 68 & 70 of the National Environment Act are inconsistent with or contravene Articles 21 and 28 of the Constitution because they also create opportunities for abuse by NEMA officials which can result in bias, discriminatory and preferential treatment of individuals by the NEMA officials without giving those persons affected the opportunity to be heard and before they are found guilty of harming the environment or engaging in activities that are either harming or are likely to harm the environment.

The Constitutional Court and this Court have justified the need for NEMA to act unilaterally to save the environment without any delay. I am not convinced that these fears are founded.

I am fortified in my view by the fact that the quashing of the impugned provisions would not lead to a defeat of the purpose of the National Environment Act. On the contrary, NEMA will still be able to protect the wetlands and other forms of the environment, while at the same time respecting the other constitutionally guaranteed rights of all those persons who are either suspected of or who have been found to have engaged in activities that are harmful to the environment. NEMA will still be able to take advantage of section 3(3) of the National Environment Act, which grants NEMA a statutory right to apply to court for any order to restrain or stop an impending or actual degradation of the environment upon receiving information to that effect. This section provides as follows:

"In furtherance of the right to a healthy environment and enforcement of the duty to maintain and enhance the environment, the authority or the local environment committee so informed under subsection (2) is entitled to bring an action against any other person whose activities or omissions have or are likely to have a significant impact on the environment to—

(a) prevent, stop or discontinue any act or omission deleterious to the environment;

(b) compel any public officer to take measures to prevent or to discontinue any act or omission deleterious to the environment;

(c) require that any ongoing activity be subjected to an environmental audit in accordance with section 22;

(d) require that any ongoing activity be subjected to environmental monitoring in accordance with section 23;

(e) request a court order for the taking of other measures that would ensure that the environment does not suffer any significant damage."

In addition to section 3(3), NEMA can also take advantage of section 71 of the National Environment Act to seek issuance of Environmental Restoration Orders from the Court. Section 71 provides as follows:

"(1) Without prejudice to the powers of the authority under sections 67, 68 and 69, the court may, in any proceedings brought by any person, issue an environmental restoration order against a person who has harmed, is harming or is reasonably likely to harm the environment.

(2) For the avoidance of doubt, it shall not be necessary for a plaintiff under this section to show that he or she has a right of, or interest in, the property, in the environment or land alleged to have been harmed or in the environment or land contiguous to such environment or land."

A Court issued Environmental Restoration Order, in my view, would ensure due process of the law. While it can be argued that this section gives a right to other persons other than NEMA to apply to Court for Environmental Restoration Orders, there is nothing to stop NEMA from

taking advantage of it as well. This is because under section 4 of the National Environment Act, NEMA is a body corporate, with capacity to sue and be sued in its own name.

By NEMA taking advantage of these sections, the environment will, in my view, be protected in a sustainable manner while taking into account the needs of present and future generations. Otherwise, it would be wrong and unsustainable, in my view, to have a situation where the courts allow the rights of the present generation to be violated in the name of preserving the rights of a future generation to live in a safe environment and to enjoy all the other rights guaranteed under Chapter 4 of our Constitution and the various international instruments Uganda has ratified.

Article 20 of the Constitution imposes the duty to respect, protect and promote the fundamental rights and freedoms guaranteed under Chapter 4 of the Constitution of Uganda on organs and agencies of government. As the Constitutional Court rightly noted in ***Maj. Gen. David Tinyefuza v. Attorney General; Constitutional Petition No. 01 of 1996,***

> ***"… it is the duty of this court to enforce the paramount commands of the Constitution. The current thrust of highly persuasive opinions from courts in the Commonwealth is to apply a generous and purposive construction of the Constitution that gives effect to and recognition of fundamental human rights and freedoms. We believe that this is in harmony with the threefold injunctions contained in Article 20(2) commanding the respect of; upholding and promoting human rights and freedoms of the individual and groups enshrined in chapter 4 by all organs and agencies of government and by all persons. To hold otherwise, may be to suggest that Article 20(2) is idle and vain."***

I therefore find, based on the discussions and reasoning given in this Judgment that learned Justices of the Constitutional Court erred in law and fact when they held that:

(a) the appellant had to show that the procedures laid down in the section are insufficient to achieve justice without frustrating the legislation;

(b) the appellant failed to show that the safeguards contained in the impugned sections are insufficient to accord the appellant or anyone else a fair hearing; and

(c) the appellant's proprietary rights were not infringed by the acts of the respondents.

(d) what was taken away from the appellant was misuse of the land in order to protect the environment.

I would accordingly allow grounds 4, 5, 6, 7, 8 and 9 of the appeal.

Ground 1 of the Appeal

I will now turn to consider ground 1 of the Appeal. Under this ground, counsel for the appellant faulted the Constitutional Court for having decided the Petition on the premise that the appellant's land was a wetland.

It is indeed true that the Constitutional Court did not consider this issue of whether the appellant's land was a wetland, given that the parties never specifically framed it for the Court's consideration and that they only raised one issue on whether sections 67, 68 and 70 are inconsistent with or contravene the various articles of the Constitution as was alleged in the Petition.

The Constitutional Court also did not find it important, on its volition, to address itself to this question of whether the land in question was a wetland and whether there was any need for NEMA to gazette such wetlands. My colleagues on the panel have similarly declined to consider it on grounds that it had not been raised for the determination of the Constitutional Court.

I do agree that the issue whether the appellant's land was a wetland or not was never specifically framed at the Constitutional Court. However, as the record of appeal and all the pleadings clearly indicate, this issue was evident from the pleadings and was important to the determination of part of the appellant's Petition. It was therefore an unfortunate oversight on the part of counsel on both sides not to specifically frame it, and also for the Constitutional Court not to address it as a fundamental issue lying at the core of the appellant's case.

Although the question whether the appellant's land was a wetland was not canvassed at the Constitutional Court, I have found it necessary to delve into this ground of appeal. This is because it is only if the question is answered in the affirmative that NEMA's actions with respect to the appellant's land, including the demolition of the appellant's house in pursuance of the Environmental Restoration Order to protect the environment, could be justified.

I will now turn to examine the provisions relating to wetlands. Section 1(ooo) of the National Environment Act defines a wetland as:

"Areas permanently or seasonally flooded by water where plants and animals have become adopted."

Furthermore, Regulation 2 of ***The National Environment (Wetlands, River Banks & Lake Shores Management) Regulations, S.I. No.3/2000*** also defines wetlands as follows:

"Areas permanently or seasonally flooded by water where plants and animals have become adapted; and include swamps, dambos, areas of marsh, peatland, mountain bogs, banks of rivers, vegetation, areas of impeded drainage, or blackish salt."

The National Environment Act definition of a wetland is vague, in my view, as almost any part of Uganda could easily qualify to be termed as a wetland, depending on the season. The definition in the Regulations complicates the situation even further by adopting of a much more complex and technical definition of a wetland. How for example, are ordinary, law abiding citizens supposed to know what a 'dambo' or 'mountain bog' or 'blackish salt' mean or are, to avoid degrading them?

Section 36 of the National Environment Act, on the other hand, regulates building and other activities that may be undertaken in a wetland. It provides as follows:

(1) No person shall—

(a) reclaim or drain any wetland;

(b) erect, construct, place, alter, extend, remove or demolish any structure that is fixed in, on, under or over any wetland;

(c) disturb any wetland by drilling or tunnelling in a manner that has or is likely to have an adverse effect on the wetland;

(d) deposit in, on or under any wetland any substance in a manner that has or is likely to have an adverse effect on the wetland;

(e) destroy, damage or disturb any wetland in a manner that has or is likely to have an adverse effect on any plant or animal or its habitat;

(f) introduce or plant any exotic or introduced plant or animal in a wetland, unless he or she has written approval from the authority given in consultation with the lead agency.

(2) The authority may, in consultation with the lead agency, and upon an application to carry on any activity referred to in subsection (1), make any investigation it considers necessary, including an environmental impact assessment referred to in

section 19 to determine the effect of that activity on the wetland and the environment in general.

(3) The authority shall, in consultation with the lead agency, and by statutory order, specify the traditional uses of wetlands which shall be exempted from the application of subsection (1).

Byamugisha, JA addressed herself to this Section in her Judgment when she observed as follows:

"With regard to the wetlands section 36 of the Act imposes restrictions on the use of wetlands and to carry out any activity on the wetlands requires written approval of the 1st respondent. The petitioner is not challenging the constitutionality of these restrictions. In my view, it is these restrictions which gave the 1st respondent power to carry out inspection on the petitioner's property to ascertain whether the activities he was carrying out on the land was in conformity with the provisions of the section- hence the service of the restoration order."

As can clearly be seen from the provisions of section 36, building in a wetland is not outlawed by National Environment Act. What is required is that any such building or other activity can only be done after NEMA's approval. It therefore follows that a mere finding that a given person has constructed a building in a wetland is not per se, sufficient to support the conclusion that the environment or wetland has been degraded.

In response to Nyakana's contention that his land was not in a wetland and that no gazetting of the same had been made, NEMA filed an Affidavit in Reply sworn by Mr. Festus Bagora, where he averred as follows:

8 (f) That wetlands are defined by section 1 of the National Environment Act and are not determined at the discretion of the 1st respondent, nor are the Petitioner or the Kampala District Land Board authorities on wetlands; and that, therefore, neither the Petitioner nor the Kampala District Land Board can make a finding on whether or not the Petitioner's suit property is in a wetland.

(g) That gazettement is not a pre-condition for protection of wetlands, which protection is accorded by law under Article 237(2)(b) of the Constitution, section 44(4) of the Land Act, section 36 of the National Environment Act and the National Environment (Wetlands, River Banks & Lake Shores Management) Regulations, S.I. No.3/2000

In light of NEMA's pleadings and failure to comply with the express provisions of the law to gazette the land which is a subject matter of this appeal as a wetland, it was erroneous, in my view, for the Constitutional Court to proceed with the appellant's petition, on the premise that it was in a wetland.

As I discussed before, the National Environment Act and the National Environment (Wetlands, River Banks & Lake Shores Management) Regulations, S.I. No.3/2000 specifically impose a duty on NEMA to gazette wetlands which it failed to do in this particular case. In my view, it is therefore imperative that before NEMA condemns persons of harming the environment or for failure to seek its approval before any construction or activities, that the wetlands are known and gazetted.

In the absence of NEMA's clear designation and gazetting of wetlands that should be protected, the Constitutional Court and indeed this Court would, in my view, be treading very dangerously, to uphold the constitutionality of sections 67, 68 & 70 of the National Environment Act which permit NEMA to unilaterally act and issue Environmental Restoration Orders and to proceed to demolish structures and take such other punitive measures as it may deem fit, against a person suspected or believed to be degrading the environment, without due process of the law. This is especially so where such a person has even been issued with a Certificate of Title and has a duly approved building plan from the relevant local authority.

I therefore find that the learned Justices of the Constitutional Court erred in law and fact when they proceeded to decide the appellant's Petition on the premise that the land where he was constructing a house was as a wetland, without having evidence on the record to support NEMA's claims. Accordingly, I would allow ground 1 of the appeal.

Ground 2 of Appeal

I will now turn to consider ground 2 of appeal. Under this ground, counsel for the appellant faulted the learned Justices of the Constitutional Court for holding that the Environmental Restoration Order was similar to a charge sheet issued in criminal proceedings.

In her lead Judgment, Byamugisha, JA. held as follows in respect to the Environmental Restoration Order:

> ***"The restoration order is like a charge sheet that commences the prosecution of a person who is charged with a criminal offence. Normally a police officer does not give a hearing to a suspect before charging him or her."***

I disagree with the analogy that was made and conclusion reached by the Constitutional Court and the majority in this Court which equates an Environmental Restoration Order with a Charge Sheet. In my view, the analogy used by the Constitutional Court was erroneous. A close look at the provisions of sections 67 and 68 of the National Environment Act reveals that NEMA is not obliged to issue Environmental Restoration Orders. However, when NEMA opts to issue the Environmental Restoration Orders, it would not simply be charging the actual or alleged degrader of the environment. It would be pronouncing its verdict against the real or perceived degrader of the environment and require compliance with it. Failure to comply with the Environmental Restoration Order would result in NEMA taking further action by enforcing any one or more of the orders I already highlighted in this Judgment, under the discussion of whether sections 67, 68 and 70 of the National Environment Act are unconstitutional.

The nature and effect of the Environmental Restoration Order is in clear contrast to a charge sheet in criminal proceedings, which as the learned Justice Byamugisha, JA correctly put it, only commences criminal proceedings. After the accused has been charged, he is not condemned and required to serve a sentence. Rather, the charging of the accused is followed by the taking of his or her plea. Where the accused pleads not guilty, a trial will commence and the accused person will fully participate in the hearing while the State adduces evidence against him/her. He/she has the opportunity to cross-examine the witnesses testifying against him, to scrutinize all the evidence tendered and lastly to put up his/her defence (if he/she wishes to do so). All this is done before the presiding judicial officer makes a decision finding the accused person guilty as charged or acquitting him.

An Environmental Restoration Order, however, is not issued to commence proceedings. As the discussion on sections 67 and 68 earlier in this Judgment clearly shows, an Environmental Restoration Order is issued at the conclusion of investigations and NEMA's internal processes where NEMA's inspection findings are made, considered and decided upon. This is done after NEMA has reached the conclusion and made a decision that the recipient of the Environmental Restoration Order is either about to harm or has harmed the environment in the manner stated in the Environmental Restoration Order. NEMA then proceeds to 'convict' him and to order/direct

him or her to take such remedial measures as NEMA, in its own exclusive opinion deems fit, to 'restore' the environment. It is worth noting that throughout the entire process before the Environmental Restoration Order is issued, the person alleged to be harming or likely to harm the environment has no opportunity to participate in it. Hence, the Environmental Restoration Order is issued in total disregard to the due process of the law for the real or alleged degrader of the Environment.

In the appeal under consideration, these orders are clearly evidenced from the following quote taken from the Environmental Restoration Order.

> ***"You are given Twenty one Days (21) from the date of this Restoration Order within which to comply. This Environmental Restoration Order comes into effect from the date of this Restoration Order.***
>
> ***TAKE NOTICE that failure to comply with the above directives/orders shall result into this Authority or any other person authorized taking all the necessary steps against you to ensure that the above directives are complied with***
>
> ***TAKE FURTHER NOTICE that this Authority may recover as a civil debt in Court the expenses necessarily incurred by it or any other authorized person in the Exercise of enforcing this Restoration Order."***

The true nature and effect of the Environmental Restoration Order became evident in the actions of NEMA with respect to the appellant's land. When NEMA came to the conclusion that it needed to enforce its orders, it did not resort to Court. Rather it only sought assistance from another arm of Government (the Police) to enforce the Environmental Restoration Order it had issued to the appellant.

In a letter to the Police which I have reproduced in its entirety in the following section, NEMA made additional prejudicial claims against the appellant, and proceeded to request for security from Police to 'restore the environment' by demolishing the appellant's house. NEMA's letter read as follows:

> ***"Wednesday, January 05, 2005***
> ***The Director CID Headquarters Kampala***
> ***Attention: Mr. Stephen Kamukuguzi D/SSP***
> ***CID Headquarters***

KAMPALA

RE: PROSECUTION OF GODFREY NYAKANA AND PROVISION OF SECURITY DURING THE RESTORATION OF NAKIVUBO WETLAND IN NAKAWA DIVISION.

The protection of the environment and wetlands in particular, has been provided by law. Article 237(2)(b) of the Constitution provides that Government or a local government shall hold in trust for the people and protect wetlands for the common good of all citizens. This is reiterated by section 44 of the Land Act Cap. 227. In addition, sections 36 and 37 of the National Environment Act Cap 153 provide for restricted use and sustainable management of wetlands. In addition, under section 3 of Cap. 153 every person is obliged to maintain and enhance the environment.
NEMA is also required to issue restoration orders where the environment has been significantly affected. Where restoration orders are issued NEMA may authorize their enforcement through other organs of Government. The National Environment (Wetlands, River Banks and Lake Shores Management) Regulations, S.I No. 3/2000 have been particularly put in place to protect wetlands from encroachment and to regulate activities in the wetlands.

In regard to the above subject matter, Nakivubo wetland located in Nakawa and Makindye Divisions has been gazetted as a critical wetland in Kampala District. An inventory of affected persons with structures was made in June 2004 and they were issued with Environmental Orders to the effect that they should:-

(i) Stop any further degradation of the wetland;
(ii) Demolish all illegal structures erected within the wetland; and
(iii) Restore to as near as possible the wetlands ecosystems to their original state before the degradation activities were undertaken.

A community sensitization meeting was also held at Lidia Macchi Youth Centre-Bugolobi (near St. Kizito Primary school) on Sunday 25th July 2004. During the

meeting, participants were directed to suspend all activities in the wetland until the gazettment process is finalized.

One of the people who were issued with Restoration Orders was Godfrey Nyakana, who purportedly owns Plot 8 on Plantation Road. That plot is in the wetland. To-date he has not complied with the Restoration Order Ref: NEMA/ERO/KLA/02/07/2004 (attached) issued to him, but instead has caused more degradation of the wetland. Mr. Nyakana is also one of those who attended the community sensitization meeting that was conducted at Lidia Macchi Youth Centre-Bugolobi (on Sunday 25th July 2004.

On many occasions, Environmental Inspectors from this Authority, Kampala City Council and Wetlands Inspection Division have stopped the erection of Nyakana's above said structure but he has always later resumed construction especially during awkward hours, despite repeated warnings to stop. Indeed, he is still erecting the illegal structure in the wetland. The period during which he was required to restore the wetland has since passed.

In view of the above, the National Environment Management Authority under section 68(1) of the National Environment Act, are going ahead to enforce the provisions of the Environmental Restoration Order served on Mr. Nyakana.

The purpose of the letter, therefore, is to request you to play your role of prosecuting Mr. Nyakana under section 101(a) of the National Environment Act, for the offence of failing or refusing to comply with the Restoration Order issued to him. We are also requesting you to provide security to the team mandated by NEMA to restore the wetland in view of Mr. Nyakana's failure to comply with the Restoration Order. This activity is planned to take place on Thursday 6th January 2005 starting at 4:00 AM.

I look forward to our continued collaboration on this matter.

(Sign)

Aryamanya-Mugisha, Henry
EXECUTIVE DIRECTOR "

It is worth noting that NEMA scheduled this house demolition exercise to commence at 4.00 a.m.

As is clearly evident from NEMA's letter to the Police, NEMA's interpretation of what the effect of the Environment Restoration Order and its powers to act on such Orders after issuing them, is consistent with my interpretation that the combined effect of section 67, 68 and 70 of the National Environment Act is to give NEMA an unfettered right to trample and violate all the Constitutionally entrenched rights to fair hearing and due process of the law, property and privacy. For example, I am not aware of any law in Uganda which prescribes what time of the day or night a person can build. It is common practice for big construction companies in this country and elsewhere to undertake night construction when there is minimal interruption from other users, particularly in areas with a lot of human and/or commercial activity.

Given the clear distinction between the nature and effect of an Environment Protection Order and a Charge Sheet I have discussed above, I find that the learned Justices of the Constitutional Court erred and misdirected themselves in law and fact when they equated the environment restoration order to a charge sheet that commences the prosecution of a person who is charged with a criminal offence. I would therefore allow Ground 2 of appeal to succeed.

Whether Nyakana's Failure to seek NEMA's review was a relevant factor to take into account in determining his Constitutional Petition?

I now wish to turn to the particular facts of this appeal and consider the merits of the appellant's claims vis a vis NEMA's actions undertaken under the authority of the sections 67, 68 and 70 of the National Environment Act.

According to the record, NEMA demolished the appellant's house because he ignored the Environmental Restoration Order it had issued against him. The Environmental Restoration Order read as follows:

" ***Monday, July 19, 2004***

TO: Mr. Nyakana Godfrey
Plantation Road, Bugolobi Parish
Nakawa Division
Kampala District

ENVIRONMENTAL RESTORATION ORDER
(Issued under Section 67(1) of the National Environment Act Cap 153)
REGARDING
DEGRADATION OF NAKIVUBO WETLAND
LOCATED IN NAKAWA DIVISION
KAMPALA DISTRICT

TAKE NOTICE that on 13th July, 2004, Environmental Inspectors and officials from Kampala City Council, Wetlands Inspection Division and the Police carried out inspections in Nakivubo wetland located in Nakawa Division in Kampala District to assess compliance of land use with environmental laws and regulations.

The findings of the inspections indicate that you have continuously degraded the wetland in an illegal manner by dumping soil and constructing a housing structure in a wetland contrary to the National Environment Act Cap 153 and the Regulations made there under.

You are therefore ORDERED to immediately comply with the following environmental improvement order(s)-

1. ***Demolish the house structure you have constructed in the wetland***
2. ***Remove all the debris arising thereof from the demolition of the house structure including the soil you have dumped in the wetland and dispose it off in a safe place without causing any more degradation of the environment; and***
3. ***Restore as near as possible the wetland to its original state before dumping the soil in it.***

You are given Twenty one Days (21) from the date of this Restoration Order within which to comply. This Environmental Restoration Order comes into effect from the date of this Restoration Order.

TAKE NOTICE that failure to comply with the above directives/orders shall result into this Authority or any other person authorized taking all the necessary steps against you to ensure that the above directives are complied with.

TAKE FURTHER NOTICE that this Authority may recover as a civil debt in Court the expenses necessarily incurred by it or any other authorized person in the Exercise of enforcing this Restoration Order.

(Sign)

Aryamanya-Mugisha, Henry

EXECUTIVE DIRECTOR "

According to the Environmental Restoration Order, NEMA had undertaken an inspection which established that the appellant had degraded Nakivubo wetland by dumping soil in it and by constructing a house therein. NEMA also contended that the Nyakana had continued with building his house even after he was directed to stop and was notified in a meeting and by inspectors on his site.

Despite the claims of NEMA of having met with Nyakana and also of having carried out the inspection of the wetland Nyakana is said to have degraded, NEMA opted to neither tender in the minutes of the residents' meeting they alleged the appellant attended nor a copy of the inspection report they relied upon to demolish the appellant's house.

Bagora, in his affidavit sworn on behalf of NEMA averred as follows:

7 ***(a) That in June 2004, the 1st Respondent's inspectors carried out an inspection of Nakivubo wetland located in Nakawa and Makindye Divisions of Kampala and found that the petitioner was degrading a part of the wetland situate at Bugolobi on Plantation Road, by constructing a house on a plot he purportedly owns.***

(b) That an inventory of affected persons with structures in the wetland was made in June 2004 and they were issued with Environmental Restoration Orders.

…

(e) That the 1st Respondent called the Petitioner to a community sensitization meeting held at Lidia Macchi Youth Centre-Bugolobi (near St. Kizito Primary School) on Sunday 25th July 2004. During the meeting, participants were directed to suspend all

activities in the wetland until gazettement process is finalized; and that evidence by way of video tape shall be adduced at the hearing of this petition to show that the Petitioner was given audience to air his views during the meeting."

The facts that Mr. Bagora deponed to in his Affidavit filed on behalf of NEMA are at variance with those that were stated in the Environmental Restoration Order NEMA claimed to have served on the appellant. First, although the Environmental Restoration Order (which I have produced in this Judgment) was dated July 19, 2004, Bagora swore that the appellant and other affected persons were served with Environmental Restoration Orders in June 2004. Secondly, NEMA claimed in the Environmental Restoration Order to have carried out inspections on the Nakivubo wetland on 13th July 2004. However, Bagora in his affidavit claimed that inspections were carried out in June 2004. Thirdly, according to Bagora's affidavit, it is after issuing Environmental Restoration Orders to the appellant and other affected persons that NEMA called the appellant to a community sensitization meeting on 25th July 2004 where the appellant and others in attendance were directed to suspend all activities in the wetland until the gazettement process is finalized. However, under the terms of the Environmental Restoration Order which was issued on July 19, 2004, NEMA had already reached a decision that the appellant had '*continuously degraded the wetland…by dumping soil and constructing a housing structure in the wetland contrary to the National Environment Act and the Regulations made there under.*'

Under the same Environmental Restoration Order, the Environmental Restoration Order took immediate effect and required the appellant to comply with it within 21 days. There was no mention in the Environmental Restoration Order of the appellant's right to seek a reconsideration of the Environmental Restoration Order under section 69, as was claimed by the respondents. The question that arises is why would NEMA issue contradictory documents with conflicting dates and sequence of events regarding the same incident?

In NEMA's letter to the Police which I have already reproduced in this judgment, NEMA claimed that "on many occasions", it stopped Nyakana from erecting his structure in a wetland. However, when it was taken to task to reply to Nyakana's Petition, the only evidence it was able to tender was (i) a copy of the Environmental Restoration Order, which it claimed had been served on Nyakana but was in effect served on Mr. Kugonza Sam, who signed as Nyakana's foreman and (ii) affidavit evidence claiming that Nyakana had notice of his alleged degradation of Nakivubo channel, because he had attended a 'Community Sensitization Meeting' where

NEMA informed attendees to halt their development ‘until it had finalized the process of gazetting their land as a wetland’.

In defending the Petition, NEMA also placed great reliance on the fact that Nyakana had attended a sensitization meeting of all stakeholders and that this was a sufficient impartial hearing for Nyakana and other affected persons. However, NEMA chose not to attach the minutes and/or report of the sensitization meeting or the inspection it referred to in the Environmental Restoration Order it served on Nyakana. I find it very surprising that NEMA even went ahead to depone that it was not even its duty to define or gazette wetlands!

In the appeal under consideration, there was no hearing before a restoration order with such grave repercussions was issued. Findings of the Inspectors were never communicated to the appellant to respond to them. Only NEMA’s inspectors and management knew the scope and findings of their investigation which led to the issuance of the Environmental Restoration Order. NEMA did not place the Inspection Report on record to guide the Court. After their investigation, NEMA delivered its verdict against the appellant and afterwards enforced it by demolishing the appellant’s house. The Process of issuing, serving and enforcing the Environmental Restoration Order, was in my view, unconstitutional.

The gravity of such an Environmental Restoration Order issued against the appellant without according him an opportunity to be heard cannot be taken lightly especially when one looks at the orders and actions that were required of the appellant. These included demolition of the house structure already erected; removal of all debris arising thereof from the demolition of the house structure including the soil dumped in the wetland and disposing it off in a safe place without causing any more degradation of the environment; and restoration to as near as possible the wetland to its original state before dumping the soil in it.

NEMA and the Constitutional Court took comfort in the meeting that NEMA claimed to have held with the locals/residents regarding the wetland in question. However, no minutes of the meeting were put on record to show what was discussed, who attended this meeting, and what the outcomes of this meeting were. Does video evidence, for example show what was discussed? Were the “residents” who attended owners of land in the affected land or the users of the wetland? The meeting was also held in the “process of gazetting the wetland.” How did the meeting validate the whole process culminating into demolition of the appellant’s house?

Furthermore, under section 67(5) (b), NEMA is required to explain to the person against whom an Environmental Restoration Order has been issued, the right to appeal to Court. This section would seem to imply that service of the Environmental Restoration Order has to be effected in person. Yet in this appeal under consideration, NEMA served someone at the appellant's site, who signed for the Environmental Restoration Order as a foreman. The question arises whether service on the foreman was effective service on the appellant?

Secondly, since this sub-section 67(5)(b) creates a right of appeal to a Court of law against the Environmental Restoration Order, two possible scenarios could arise. One is a situation where the person served with an Environmental Restoration Order would be challenging the Environmental Restoration Order in court, while NEMA is invoking its powers under sections 68 and 70 of the National environment Act to proceed to put into effect the orders contained in the Environmental Restoration Order, hence rendering the appeal nugatory.

On the other hand, a person served with an Environmental Restoration Order could seek and obtain an injunction against NEMA and hence incapacitate it or unduly delay NEMA's ability to intervene to protect the environment. In the first scenario, the right to appeal would be rendered meaningless, while in the second scenario, NEMA's ability to act in a timely manner would be greatly curtailed. But this could easily be avoided if NEMA ensured due process in issuing Environmental Restoration Orders or sought Court ordered Environmental Restoration Orders.

But as the facts of the appeal under consideration show, NEMA opted to act under the provisions of National Environment Act hence rendering the minimal protection this sub-section could have offered to not be realized.

By ensuring due process of the law in its operations, NEMA would not be incapacitated from acting against environmental degraders or from responding in a timely manner against environmental threats. In the appeal under consideration, for example, NEMA claimed to have discovered that Nyakana, the appellant, was degrading Nakivubo Channel in June or July 2004. However, it only proceeded to demolish his house in January 2005. Although delays in court processes are not unusual, it cannot be said that NEMA could have failed to obtain a temporary injunction from the Court much earlier than the six months it took before it demolished the appellant's house at 4.00 a.m. in the dead of the night.

There is also need to recognize the dangers associated with NEMA issued Environmental Restoration Orders. What if the person served with the Environmental Restoration Order is not the owner of the land or the violator, for instance a tenant who ends up having his or her personal property destroyed. As court, we need to take notice of the danger of having property of innocent persons destroyed because NEMA Inspectors are empowered by the National Environment Act not to talk to anybody as it enforces its mandate. The inspectors can enter at any time to inspect and have no duty to explain themselves and also NEMA can enforce its Environmental Restoration Orders at any time, including 4 a.m.!. This is a draconian way of doing things.

The Constitutional Court also criticized Nyakana for his failure to move NEMA to reconsider the Environmental Restoration Order. With all due respect to the learned Justices of the Constitutional Court, I am of the view that the constitutionality of the impugned sections (sections 67, 68 and 70) did not depend on Nyakana's refusal or failure to comply with the Environmental Restoration Order or to seek for its reconsideration under section 69 of the National Environment Act. This is because any one who had not directly suffered personal damage could have brought this Petition under Article 137(3) & (4) of the Constitution challenging the constitutionality of the impugned sections

With due respect to the learned Justices, it is my view that the role of the Petitioner in this case was to petition the Constitutional Court about the alleged contravention and/or inconsistency of the impugned sections of the National Environment Act with the provisions of the Constitution he cited. Having done that, it was the constitutional duty of the Constitutional Court to consider the merits of those allegations and to determine whether to grant the declarations sought and the appropriate redress. Hence it is my finding that the Constitutional Court erred in law when it hinged its decision in this Petition on the Petitioner's (now appellant's) conduct.

Prayers for Redress

As for prayers the appellant made seeking for redress, I also find that since Nyakana's house was demolished by NEMA without due process of the law, he is entitled to compensation for the value of the house and such other attendant relief arising from NEMA's conduct.

I have made no findings on grounds 3 and 8 of appeal because they are, in my view, inconsequential to the resolution of this appeal. I have also made no findings with regard to the

challenged sections of the National Environment Act vis a vis Articles 237 and 259. In my view, except to the extent I have discussed Article 237 in this Judgment, I did not find it necessary to consider either of these Articles any further.

Grounds 10 and 11 of the appeal

Grounds 10 and 11 of the appeal were concerned with the Constitutional Court's decision to award costs against the appellant to NEMA, the Attorney General and 5 other respondents who had voluntarily joined the proceedings in public interest.

I am aware that the learned Chief Justice in his Judgment has reversed this order, with the exception of the first and second respondents. I agree with him. But I also believe that the appellant should not be condemned in costs even to the 1st (NEMA) or the 2nd respondents (the Attorney General).

Both the Petition and this appeal, in my view, raised important questions, on how we can protect our environment while respecting constitutionally guaranteed rights. Even though the appellant has by virtue of the majority decision of this Court lost his appeal, his appeal has nevertheless made a contribution to the jurisprudence of this country, on the issues of how to balance the need and duty to protect the environment imposed on the State in Uganda vis-à-vis other equally entrenched rights which are protected by the same Constitution, such as the right to property, to a fair hearing by administrative bodies, to privacy and the right to equal protection of the law. I would therefore allow grounds 10 and 11 of appeal accordingly order that each party bear their own costs.

Conclusion

In conclusion, for the reasons I have given in this Judgment I would allow the appeal and make the following orders:

(1) That with the exception of section 67(5) and 68 (4) of the National Environment Act, sections 67, 68 and 69 of the National Environment Act are inconsistent with Articles 21, 26, 27, 28 and 44 of the Constitution.

(2) As for the redress prayed for, I would refer the matter to the High Court to assess the appropriate compensation due to the appellant, special and general damages from the demolition of his house and infringement of his rights.

(3) Each party should bear their costs.

DATED at Kampala this ……… day of …………………… 2015

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HON. DR. ESTHER KISAAKYE, JSC

JUSTICE OF THE SUPREME COURT.