

Republic of Uganda

Advocates Coalition for Development and Environment v. Attorney General (2004)

in the High Court of Uganda at Kampala
Miscellaneous Cause No. 0100 of 2004¹

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

RULING:

The application is seeking for orders and declaration that:

- (1) The granting of a permit of Kakira Sugar Works Ltd by the first respondent contravenes Article 39 and 237 of the Constitution of the Republic of Uganda and Section 43 of the Land Act and was made ultra vires and as such is null and void.
- (2) The granting of the forest permit to Kakira Sugar Works Ltd by first respondent amounts to the defacto degazetting its statutory obligations when it permitted Kakira Sugar Works Ltd to occupy a forest reserve and change the land use without carrying out a full Environmental Impact Assessment Study.
- (3) The defacto degazetting Butamira Forest Reserve is in violation of the applicants' rights to a clean and healthy environment and protection of the country's natural resources. . . .

The general grounds for the application are:

- (a) That Government issued Kakira Sugar Works Ltd with a 50 year sugar cane growing permit in respect of Butamira Forest Reserve in contravention of the constitution and the law.
- (b) That the said defacto degazetting of Butamira Forest Reserve was affected amidst protest from the local communities who depended on the reserve for their livelihood through agro-forestry, and as such a full Environmental Impact Assessment ought to have been conducted by the second respondent.
- (c) That no project brief, Environmental Impact Assessment and environmental impact statement were submitted and or carried out by Kakira Sugar Works Ltd nor required of it by the first and second respondents; and neither were the local community's views and or concerns sought or addressed on the project before award of the land use license / permit.
- (d) That the said award of the land use license / permit violates the applicants' and other Ugandan citizens' rights to a lean and healthy environment, as well as, protection if the country's natural resources

¹ Available at <https://www.elaw.org/system/files/ug.Acode.v.AttorneyGeneral.doc>

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

. . . The Butamira Forest Reserve was established by the then Busoga Kingdom Government in 1929. It measured approximately 5.4 square miles. . . . In 1939 the Forest Reserve was leased to Kakira Sugar Works for a period of 32 years for the purpose of producing of firewood for the sugar company. Although the Sugar Works had the lease of the forest they were denied the right to change the use of the use of the land from forest to plantation. However all through the 1950s and beyond Kakira Sugar Works made several attempts to acquire the Reserve for sugarcane growing. . . .

The matter was put to rest when Dictator Idi Amin took over and expropriated properties owned by Departed Asians and their businesses. However events took a new turn when the Asians were allowed to return and repossess their properties. In 1997 Kakira Sugar Works upon repossession, resurrected their dream to turn the Reserve into a plantation. They accordingly applied to the Forestry Department to utilise the reserve for its operations. Their request was granted and a permit was allegedly issued giving the company right to use the reserve for general purposes. With this new permit but without undertaking Environmental Impact Assessment as required by law, the company embarked on a scheme to clear the existing forest estate and replace it with sugar cane plantations. The Local Community which depended on the forest for forest products and as a source of water complained and formed a pressure group in protest. . . . To cut the long story short, a number of avenues were sought in order to solve the Butamira saga, including the office of the presidency to no avail. Hence this application. . . .

The instant application raises four issues for determination:

- (1) Whether the applicants have standing in this matter;
- (2) Whether there was breach of doctrine of public trust;
- (3) Whether second respondent failed in its duties;
- (4) Remedies available to the parties.

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

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

(1) Locus Standi

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

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

“50 (1) Any person who claims that a fundamental or other right or freedom guaranteed under this constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.

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

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

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

In **Greenwatch Vs Attorney General and Another Misc. Cause N. 140/2002**, an action was taken against the Attorney General and NEMA under Article 50 of the Constitution for among other things failing or neglecting their duties towards the promotion or preservation of the environment. It was held that the state owes that duty to all Ugandans and any concerned Ugandan has right of action against the Governance of the Republic of Uganda and against NEMA for failing in its statutory duty.

In **the environmental action Network Ltd Vs Attorney General and NEMA Misc. Application No. 39/2001**. Article 50 of the constitution was again interpreted where it was observed inter alia that the Article does not require the applicant to have the same interest as the parties he or she seeks to represent or for whose benefit the action is brought.

Lastly in the recent case of **British American Tobacco Ltd Vs The Environmental Action Network; High Court Civil Application No. 27/2003; Ntabgoba PJ** (as he then was) had a

lengthy discussion of Article 50 of the Constitution of Uganda wherein he held that the said Article does recognise the existence of marginalized groups like children, illiterates, the poor and the deprived on whose behalf any person or a group of persons could take an action to enforce their rights.

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

(2) Whether there was breach of the Doctrine of Public Trust.

In very brief terms the essence of the above doctrine is the legal right of the public to use certain land and waters. It governs the use of property where a given authority in trust holds title for citizens. Citizens have two co-existing interests in trust land; the *jus publicum*, which is the public right to use and enjoy trust land, and the *jus privatum*, which is the private property right that may exist in the use, and possession of trust lands. The state may convey the *jus privatum* to private owners, but this interest is subservient to the *jus publicum*, which is the state's inalienable interest that it continues to hold in trust land or water: See Paul M. Bray: the Public Trust Doctrine.

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

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

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

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

The above provisions were operationalized by section 44 of the Land Act

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

In the instant case there was evidence that the permit was granted to Kakira Sugar Works amidst protests from local communities which raised up a pressure group of over 1500 members who depended on the reserve for their livelihood through agro-forestry, and source of water, fuel and other forms of sustenance. There was therefore breach of public trust doctrine. . . .

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

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

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

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

- (a) may have an impact on the environment;
- (b) is likely to have a significant impact on the environment, or
- (c) will have a significant impact on the environment; Section 19 of the National Environment Act.

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

- (a) any activity out of character with surroundings;*
- (b) any activity causing major changes in land use;*
- (c) forestry related activities, including clearance of forest areas;*
- (d) large scale agriculture;*
- (e) activities in natural conservation areas, including formulation of modification of forest management policies.*

In the instant case it was indicated that the permit was to effect change in the land use whereby Kakira Sugar Works as to use the forest reserve for planting sugar canes. Such activity would definitely be out of character with surroundings since it would entail changes in the land use from forestry to agriculture. Moreover it would involve clearance of a large forest for the purpose of large-scale agriculture. Butamira is a natural conservation area.

The law is clear that all the above activities would not be carried out without Environmental Impact Assessment. Butamira saga is more delicate because it involves the interest of the local community whereby even common sense should demanded that an Environmental Impact Assessment study be carried out to determine social, political, cultural and economic impact of the project. If it is true that land in Uganda belongs to the people as provided in the law, it

should be equally true that the local community in Butamira should have been consulted as a matter of transparency, accountability and good governance as demanded by the public trust doctrine which I have alluded to above. For the above reason I do agree that the second respondent failed in its duty to ensure that Environmental Impact Assessment was carried out as required by the law.

As for the right to a clean and healthy environment, the National Environment Act provides that every person shall have the right to a healthy environment and one of the duties of the second respondent is to ensure that all people living in the country have the fundamental right to an environment adequate for their health and wellbeing. Let me emphasize this point by picking quotation from the Indian Supreme Court in MC Mehta Vs Umar of Indian and others AIR 1988 Supreme Court 1037.

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

The right to health does not therefore stop at physical health. It covers intellectual, moral, cultural, spiritual, political and social wellbeing. Politically and socially, Butamira Forest reserve belongs to the local community in Butamira. The people of Butamira also have a moral, cultural, economic and spiritual attachment to Butamira Forest Reserve as a source of sports, worship, herbal medicine, economy etc. It was therefore not proper to deprive them without consulting them and conducting a proper study.

(4) Remedies available to the parties.

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