

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

CORAM:

HON. JUSTICE A.E.MPAGI-BAHIGEINE, JA.
HON. JUSTICEA. TWINOMUJUI, JA.
HON. JUSTICE C.N.B.KITUMBA, JA.
HON. JUSTICE C.K.BYAMUGISHA, JA.
HON. JUSTICE S.B.KAVUMA, JA.

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CONSTITUTIONAL PETITION NO.03/05

BETWEEN

AMOOTI GODFREY NYAKANA:.....PETITIONER

AND

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

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JUDGEMENT OF BYAMUGISHA, JA

The petitioner filed the instant petition under the provisions of **Article 137(3)** of the Constitution and **rule 3** of the Constitutional Court (Petitions and References) Rules S.I No. 91/05.

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The petition is challenging the constitutionality of sections 67, 68, and 70 of the National Environment Management Act (Cap 153) Laws of Uganda. He averred that the impugned sections contravenes and are inconsistent with Articles 21, 24, 26, 27, 28, 42, 44, 237 and 259 of the Constitution and various international

Human Rights Conventions and Instruments entrenched in the Constitution under Articles 20 and 45 of the Constitution.

The petitioner sought one declaration and orders for redress.

The petition was opposed by the first and second respondents who filed answers to the effect.

The facts which led to the filing of the petition are not in dispute. The petitioner is the proprietor of land comprised in LRV 3148 Folio 2 Plot 8 Plantation Road Bugolobi, a Kampala suburban. He obtained the title in 2004 to construct a residential house on the plot. He obtained the necessary approvals and commenced the work.

In June 2004 the first respondent through its inspectors carried out an inspection of Nakivubo wetland located in Nakawa Division. The inspectors found that the petitioner was constructing a house within a wetland.

The first respondent issued a restoration order which was served on the petitioner's foreman on the 20th July 2004. The order required the petitioner to comply with the conditions stated therein within a period of 21 days. He failed to do so and his unfinished building was demolished on 8th January 2005-hence this petition.

The parties agreed on one issue namely

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

I shall first set out the articles of the Constitution and provisions of the Neema Act that require interpretation.

Article 21 of the Constitution provides as follows:

“(1) All persons are equal before the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

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(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

(3) For the purposes of this article “discriminate” means giving different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

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(4).....”

Article 24 states that:

“No person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment”.

Article 26 is couched in the following terms:

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

10 *(2) No person shall be compulsorily deprived of property or any interest in or right over property or any interest in or right over property of any description except where 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

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

Part of **Article 28** provides thus:

Right to a fair hearing

“(1) In the determination of civil rights and obligations or any criminal charge, a person is entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.”

Article 43 also provides that:

“(1) 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 public interest.

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(2)Public interest under this article shall not permit-

- (a) political persecution;*
- (b) detention without trial;*
- (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.”*

The provisions of *section 67* under which the environment restoration order was

20 made 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 matter of the order;

10 *(d).....*

(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.

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Section 68 governs the service of the restoration order. It states:

“(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).....

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

Section 69 governs reconsideration of an environmental restoration order.

It provides as follows:

“(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.

20 *(2) Where a written request has been made as provided for under subsection (1), the order shall continue in effect until varied, suspended or withdrawn under subsection (3) and, if varied, shall continue in effect in accordance with the variation.*

(3) Where a request has been made under subsection (1), the authority shall, within thirty days after receipt of the request, reconsider the environment 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).

10 Counsel for all the parties addressed court orally and they also filed conferencing notes.

Chapter 4 of the Constitution deals with protection and promotion of fundamental and other human rights and freedoms.

It is evident from these provisions that some rights and freedoms are absolute while others are subject to some limitations and qualifications.

20 Before dealing with the issue which was framed for our determination it is imperative to remind myself of the principles of constitutional interpretation which have been laid down by this Court and the Supreme Court.

In the case of *Attorney General v Silvatori Abuki –Constitutional Appeal No. 1/98(SC)* Oder JSC stated the principle 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 v Big Drug Mark Ltd 1996 CLR 332**”.*

In the case of *Ndyanabo vAttorney [2001] EA 495* the Court of Appeal of Tanzania stated the principles when it stated that

“In interpreting the Constitution the court is guided by the general principles that(i) the constitution was a living instrument with a soul and consciousness of its own,(ii)fundamental rights provisions had to be interpreted in a broad manner,(iii) there is a rebuttable presumption that legislation was constitutional, and(iv) the onus of rebutting the presumption rested on those who challenge the legislation’s status save that, where those who supported a restriction on a fundamental right relied on a claw back clause, the onus was on them to justify the restriction.”

What these two decisions establish is that if the purpose of an Act of Parliament is inconsistent with a provision of the Constitution, the Act or the provision being challenged shall be declared unconstitutional. Similarly, if the effect of implementing a provision of the Act is inconsistent with a provision of the Constitution, that provision of the Act shall be declared unconstitutional.

Mr Mbabazi and Bakiiza represented the petitioner while Mr Kakuru, Ms Akello and Mr Kalemera, State Attorney, represented the respondents.

- 10 In his submissions Mr Mbabazi stated that the property of the petitioner is protected by Article 26 of the Constitution and the demolition of the house affected his rights. He referred to article 28 which provides for fair hearing in the determination of civil disputes and contended that the petitioner was not accorded a fair hearing as the owner of the house.

He claimed that the petitioner was subjected to degrading and inhumane treatment and there was unequal application of the law in that the petitioner's neighbours have continued to develop their plots without any interference from the respondents.

He invited court to grant the orders sought together with orders for redress.

In reply, Mr Kakuru opposed the petition and submitted that the petitioner was not deprived of his property and that ownership of property goes with duties and obligations. He pointed out that section 43 of the Land Act requires an owner of land to manage and utilize it in accordance with the Forest Act, the Mining Act, the National Environment Act, the Water Act, the Wildlife Act and any other law. He claimed that what was taken away from the petitioner was abuse of the land.

On the impugned sections, counsel submitted that section 68 gives a person who has been served with a restoration order 21 days to lodge a complaint and request
10 for reconsideration of Nema's decision. The opportunity to be heard is embedded in section 69 which provides for oral hearing by a person who has been served with a restoration order.

He invited court to dismiss the petition.

Ms Akello submitted on behalf of the first respondent. She stated that Article 39 of the Constitution guarantees a clean and healthy environment. She pointed out Article 237 (2)(b) of the Constitution and section 44 of the Land Act make wetlands a public resource which must be protected.

On the restoration order learned counsel submitted that the 1st respondent carried
20 out an inspection and found that the petitioner was erecting a structure on a

wetland. She claimed that the petitioner knew about the restoration order and he was also called at a sensitization meeting. She, too, pointed out that section 69 provides for a hearing.

She invited court to dismiss the petition.

Mr Kalemera associated himself with the submissions of counsel for the respondents and added that the right to own property is not absolute. He invited court to find that the impugned sections fall under Article 43 of the Constitution.

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 forgoing”.

The functions of the first respondent with regard to environment are set out in section 6 of the Nema Act. 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 first respondent. 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.

- 10 The impugned sections in my view have in built mechanisms for fair hearing as is enshrined in Article 28.

On receipt of the restoration order, the petitioner had 21 days within which to make a presentation to the first 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 any one 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 am not satisfied on the evidence before us that the petitioner made out a case on which this court can grant the declarations he sought.

Consequently the petition is dismissed with costs to the respondents.

Dated at Kampala this...09thday of...November.....2009.

10 **C.K.Byamugisha**
Justice of Appeal

JUDGMENT OF HON HUSTICE A.EN.MPAGI-BAHIGEINE, JA

I have read the judgment prepared by C.K.Byamugisha, JA. I entirely agree with her reasoning and would only add for emphasis that such wetlands could not be granted to private individuals/entities because the State holds such natural resources in trust for the citizenry and they must be preserved for the public benefit, in this case to protect the environment.

20 The petitioner would not be entitled to any redress.

Since my Lords A.Twinomujuni, C.N.B.Kitumba and S.B.K.Kavuma JJA all agree the petition stands dismissed with costs to the respondents as proposed in the lead judgment.

Dated at Kampala this**09th**day of**November**.....2009

HON. JUSTICE A.E.N.MPAGI-BAHIGEINE,
JUSTICE OF APPEAL

JUDGMENT OF TWINOMUJUNI, JA

I have had the benefit of reading the judgment, in draft, of Hon Justice C.K.Byamugisha, JA. I concur and I have nothing useful to add.

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Dated at Kampala this ...**09th** ...day of**November**.....2009

HON JUSTICE AMOS TWINOMUJUNI,
JUSTICE OF APPEAL

JUDGMENT OF C.N.B.KITUMBA, JA

I have had the benefit of reading in draft the lead judgment of Byamugisha, JA.

I agree with her reasoning and conclusion that the petition lacks merit.

20 I would dismiss the petition with costs to the respondents.

Dated at Kampala this**09th**day of**November**..... 2009

C.N.B.KITUMBA,
JUSTICE OF APPEAL

JUDGMENT OF S.B.K.KAVUMA, JA

I have read, in draft, the lead judgment of Byamugisha, JA. I agree with that judgment, the reasoning and conclusions in it and the orders she proposes.

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Dated at Kampala this ...**09th**day of**November**.....2009

S.B.K.KAVUMA
JUSTICE OF APPEAL