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

CIVIL APPEAL NO. 207 OF 2015

(Arising From Misc. Application No. 002 of 2002)

RICHARD KAFUMBA ..... APPELLANT

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VERSUS

1. ATTORNEY GENERAL

2. UGANDA LAND COMMISSION

3. AES NILE POWER LTD

4. BUJAGALI ENERGY LTD ..... RESPONDENTS

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*(An appeal from the ruling of the High Court of Uganda at Jinja by Hon. Mr. Justice Godfrey Namundi, dated 4<sup>th</sup> May, 2015 from High Court Misc. Application No. 002 of 2015).*

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Mr. Justice Geoffrey Kiryabwire, JA

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Hon. Mr. Justice Christopher Madrama, JA

**JUDGMENT OF JUSTICE KENNETH KAKURU, JA**

This appeal arises from the Ruling and orders of Godfrey Namundi J in High Court Miscellaneous Application No. 02 of 2002 dated 15<sup>th</sup> May 2015.

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The learned Judge dismissed the application with costs. The appellant filed this appeal on 11<sup>th</sup> November 2015. It came up for hearing at this Court on 23<sup>rd</sup> April 2019. Judgment was reserved to be delivered on notice.

**The memorandum of appeal sets out the grounds as follows:-**

- 30  
1. *The Learned trial Judge erred in law to hold that Misc. Application No. 002 of 2002 was improperly before court.*

- 5        2. *The Learned trial Judge erred in law in refusing to deal with the merits of the Application.*

The following orders are sought:-

1. *The dismissal of Misc. Application No. 002 of 2002 be set aside and the same be remitted back to the High Court at Jinja for trial on its merits.*
- 10        2. *The Respondents be ordered to pay costs of the Appeal and before the High Court of Jinja.*

### **Representation**

At the hearing of the appeal *Mr. Julius Galisonga* learned Counsel appeared for the appellant, while *Mr. Johnson Natuhwera* learned Counsel appeared for the 2<sup>nd</sup> and  
15        3<sup>rd</sup> respondents. *Mr. Anthony Mbazira* learned Counsel appeared for the 4<sup>th</sup> respondent.

All parties sought and were granted leave to proceed by way of written submissions. It is on that basis that this Judgment has been prepared.

Both Counsel submitted on all the grounds of appeal. I have read the submission and  
20        the authorities cited therein. It appears to me that, this matter is simpler than all Counsel have considered it to be. The background to this appeal as far as I could discern from the record of appeal is as follows:-

The appellant on 15<sup>th</sup> January 2002 filed a notice of motion at the High Court seeking the following orders and declarations against the respondents herein:-

- 25        a. *A declaration that the Applicant and all other people affected by the Bujagali Hydro electric project have a right not to be compulsorily deprived of their land, crops and other developments without payment of prompt, fair and adequate compensation.*

- 5           b. *A permanent injunction be issued to restrain the Respondents, their agents and servants from entering upon the Applicant's land and or appropriating, taking over or destroying their buildings and/or crops until after paying prompt, adequate and fair compensation to the Applicants' satisfaction.*
- c. *The Respondents do pay to the Applicants the costs of this application.*

10   The facts that constituted the cause of action were set out in the notice of motion as follows:-

1. *The Applicant is a customary owner and/or licencees of land with developments thereon situate at Budondo sub-county, Jinja District.*
- 15   2. *The Respondents are threatening to take compulsorily take over the said land and that of hundreds of other residents in the area and lease it to the third Respondent for purposes of the Bujagali Hydroelectric Project without first paying prompt, adequate and fair compensation.*
3. *The Respondents have refused to pay or compensate for crops which were not more than four months old at the time of valuation.*
- 20   4. *The Respondents have refused to purchase the said land and developments thereon at a market price but are instead offering compensation which is not prompt, fair or adequate.*

When the matter came up for hearing before Lady Justice Flavia Anglin, J the respondents raised a number of preliminary objections. Namely that:-

- 25           1. *The application was improperly before Court.*
2. *The orders sought by the applicant are not available as the Court has no jurisdiction to grant constitutional declaration.*

5 The learned Judge over ruled the objectives and held *inter alia* that:-

1. *The suit is not a representative suit.*
2. *The respondents pay costs if the application.*

10 While determining the preliminary objections Lady Justice Flavia Anglin, J stated as follows at P.5 of her Ruling.

15 *As a matter of procedure, the Court ought to insist on permission described by the Rules being obtained before a matter is allowed to be fought out in a representable capacity - Chitaley and Rao in ALR Commentaries, the Code of Civil Procedure 7th Edition vol. II pages 1896 & 1997.*

20 *However, the application in this case was made under Article 50 (1) Constitution seeking reliefs already referred in this case. And according to the case of Ismail Serugo vs. KCC & Another (supra), it is the substance and not the form of the pleadings that should be considered. The fact that the relief claimed, if granted would benefit persons other than the actual plaintiff would be no criterion to judge the representative character of the suit.*

25 *Applying the holding in the above case to the current application, I find that the 1<sup>st</sup> objection cannot be sustained and it is accordingly hereby overruled.*

In respect of the second objection she stated as follows;-

*"The applicant does not indicate anywhere in the current application that there was a contract that was entered into prior to the 17/08/05 on*

5 *behalf of the 4th respondent. On the other hand, the 4th respondent admits that the suit land was leased to it by government and a certificate of title was obtained in respect of the land.*

*The authorities relied upon by counsel for the 3<sup>rd</sup> and 4th respondents are therefore not applicable to the circumstances of the present application. It is apparent that the 4th respondent was added as a party for acts committed after its incorporation. And its presence as a party is necessary for all issues arising out of the application to be decided once and for all so that a multiplicity of suits can be avoided - see section 33 Judicature Act. That objection also fails for those reasons.”*

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15 When it came to this 3<sup>rd</sup> objection the learned Judge held that:-

*“The issue raised by this objection is whether this court has jurisdiction to entertain the application.*

*Under **Article 50 (1)** of the Constitution an aggrieved party can apply to a competent court for redress where his/her right and freedom are infringed. While **Article 137 (3)** entitles a person to petition the Constitutional Court for a declaration to that effect, where anything done in an Act of Parliament, law or act by any authority contravenes any provisions of the Constitution.”*

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The learned Judge therefore found that the applicant now the appellant was properly before the Court. Further that, they could not be faulted for having proceeded by way of notice of motion. She accepted the submissions of Counsel for the applicants that, it was the obligation of Parliament to make procedural law to operationalise Article 50 of the Constitution and their absence of such rules could not vitiate the proceedings before her.

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5 She emphasised that, an aggrieved party cannot be left without any means of  
accessing justice simply because no specific procedure had been provided by the  
law. She accepted the principle set in *Olive Cassy Janndoo vs Attorney General of*  
*Guyan [1971] AC 972* that:-“Where there are no rules of procedure by which Court can  
10 *be approached to enforce rights, Courts can be approached by any means until the*  
*rules are made”.*

The learned Judge further pointed out that, this Court in *Bukenya Church Ambrose vs*  
*Attorney General Constitutional petition No. 026 of 2006* held that:- even though the  
law had not been enacted under Article 50(4), Article 50 (1) and (2) of the  
Constitution are not in abeyance since Civil Procedural Act and Civil Procedure  
15 Rules are part of the laws that were saved by Articles 174 of the Constitution.

Lady Justice Anglin went on to find that the application disclosed a cause of action  
against all the respondents. She accordingly dismissed all the preliminary  
objections. She ordered that the application proceeds to be heard on its merits. This  
was on 12<sup>th</sup> December 2012. Apparently for one reason or the other, she did not go  
20 on to hear and determine the matter. It had to be moved to another Judge.

On 21<sup>st</sup> May 2014 the matter proceeded before Hon. Justice Namundi. He granted  
leave to the parties to proceed by way of written submissions on the basis of the  
pleading that were already on record.

He dismissed the matter on 14<sup>th</sup> May 2015 for the following reasons.

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1. The applicant in his submissions raised issues which were not contained in his pleadings.
  2. The applicant prayed for punitive damages.
  3. The application ought to have been brought as a representative suit and not as an action under Article 50 of the Constitution.

- 5
4. The matter raised in the application which includes fraud cannot be determined in an application by notice of motion.
  5. That the remedies sought by the applicant under Article 50 are not available to the applicants because they are limited in nature.
  6. The applicant ought to have proceeded under Section 19 of the Civil  
10 Procedure Act by way of ordinary suit.
  7. Only in exceptional circumstance can a party institute a suit otherwise that by way of plaint.
  8. The application is dismissed as it is improperly before Court with costs.
  9. The applicant is at liberty to file a fresh suit.

15 This decision is as interesting as it is strange. With all due respect the learned trial Judge completely misconceived the law and procedure relating to suits brought for enforcement of rights under Article 50 of the Constitution. For that reason he erred when he dismissed the application for the reasons set out above.

20 Without hesitation and with all due respect I find that, the reasons set out in the Ruling of Justice Namundi outlined above have no basis at law. My understanding of the law is that:-

- Where a party raises issues of fact that are not pleaded by way of evidence or during submissions, the Court would simply ignore them.  
25 The Court would not dismiss the suit on that account alone.
- Where a party prays for damages that are not pleaded, proved or applicable, the Court may decline to award them. It does not dismiss the suit on that account on a preliminary part of law.
- A party may proceed under Article 50 of the Constitution alone or with  
30 others. The parties to a suit under Article 50 may or may not be

5 aggrieved. A party has a choice to proceed by Article 50 or by a representative suit. They are not exclusive.

- Article 50 is for enforcement of rights. In this case the parties bought a suit to protect their right to the land under Article 126 from being compulsory acquired without prior prompt and adequate compensation.
- Proceeding by way of affidavit evidence does not exclude oral evidence by way of cross examination or otherwise. A finding that fraud was not proved is determined after the hearing and not before.
- Remedies available to a party seeking redress under Article 50 are for all intents and purposes the same as those available to any litigant proceeding under Civil Procedure Rules on any other.
- A party has a chance to proceed under Article 50 by plaint or by notice of motion.
- The definition of a suit includes notice of motion. A suit therefore can be commenced by notice of motion and that would not vitiate it in anyway. See *Nakitto & Brothers Ltd vs Katumba, 1983 [HCB] 70, NAPE vs AES Nile Power High Court Miscellaneous No. 268 of 1999.*
- Lastly learned trial Judge erred when he dismissed the suit on account of procedural impropriety, a matter that had already been determined by another Judge in the same suit.

In *Nakitto & Brothers Ltd vs Katumba, [1983] HCB 70, Kityo, J* held that:

*“The expression “notice of motion” falls within the meaning of “suit” as used and defined in s.2 of the Civil Procedure Act, Cap 65, where suit is defined as “All Civil proceedings commenced in any manner prescribed” The...”*



5 See also: *Kaur and others v City Auction Mart Ltd* [1967] 1 EA 108

I note that this suit from which this appeal arises in Miscellaneous Application No. No. 002 of 2002

10 This was an error as it ought to have been classified as a Miscellaneous Cause. A Miscellaneous Cause stands on its own as a suit. It does not originate from other proceedings as in the case in Miscellaneous Applications which are by and large interlocutory.

15 The learned trial Judge could with all due respect have been belabouring under a mistaken belief that, the matter before him was an Miscellaneous Application and not a Miscellaneous Cause as the mistake in classification had originated from the Registry.

20 Be that as it may, the question of procedural impropriety had been full canvassed by parties and resolved in its finality by the same Court by Lay Justice Flavia Anglin. None of the parties appealed the decision. It was binding on the Court. The Court had become *functus officio* in respect of that specific question. See: *-Goodman Agencies Ltd vs Attorney General & Another, Constitutional Court Constitutional Petition No. 03 of 2008*. It had no jurisdiction to re-open it. By doing so Justice Namundi sat on appeal in respect of a decision of his sister Judge Lady Justice Anglin. Not only did he sit in appeal on her Ruling, he effectively set it aside and substituted it with his own. He had no power to do so.

25 There is only one High Court of Uganda. The personality of the individual Judges does not matter. One Judge of the High Court cannot reverse vary, or set aside a decision of another in the same case in the same proceedings, except in an application for review brought under Order 46 of the Civil Procedure Rules S.I 71-1.

5 It is common practice that is absolutely legal for one suit file to move from one Judge to another. Whenever that happens, the next Judge simply continues from where the last one had stopped. The proceedings are all deemed to be before one Court. The High Court.

10 There was already a decision on record that the suit proceeds and be determined on merit. That order could only have been set aside on appeal or review. Issues for determination ought to have been adjudicated upon by Namundi, J as there was already an order on record directing that the Court to proceed with the full hearing. This was not done. This dispute has taken almost 18 years in our Courts. This is an  
15 unacceptable delay and it is regrettable.

I find merit in this appeal which is hereby allowed.

(1)The Ruling of Justice Namundi the subject of this Appeal is hereby set aside.

(2)It is hereby ordered that the suit proceeds with full hearing on its merits  
20 before another Judge of the High Court without any further delay.

(3)The costs of this appeal shall be borne by the respondents jointly and severally.

**Dated at Kampala** this .....<sup>15<sup>th</sup></sup>.....day of April..... 2021.

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**Kenneth Kakuru**  
**JUSTICE OF APPEAL**

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

CIVIL APPEAL NO. 207 OF 2015

(Appeal from the Ruling of the High court of Uganda at Jinja before Namundi J dated 4<sup>th</sup> day of May, 2015 in Misc. Application No.002 of 2002)

**RICHARD KAFUMBA===== APPELLANT**

**VERSUS**

1. ATTORNEY GENERAL
2. UGANDA LAND COMMISSION
3. AES NILE POWER LTD
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**CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA**

**HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA**

**HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA**

**JUDGMENT OF HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA**

I have had the opportunity of reading the draft Judgment of the Hon. Mr. Justice Kenneth Kakuru, JA.

I agree with his Judgment and I have nothing more useful to add.

Dated at Kampala this.....<sup>15<sup>th</sup></sup>..... day of .....<sup>April</sup>.....2021.

  
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**HON. MR. JUSTICE GEOFFREY KIRYABWIRE**  
**JUSTICE OF APPEAL**

THE REPUBLIC OF UGANDA,  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
CIVIL APPEAL NO 207 OF 2015  
(CORAM: KAKURU, KIRYABWIRE, MADRAMA JJA)

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**JUDGMENT OF CHRISTOPHER MADRAMA, JA**

I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Kenneth Kakuru, JA.

I agree with the facts and analysis of the issues set out in the judgment. I concur with the judgment and orders of my learned brother Hon. Mr. Justice Kenneth Kakuru, JA that the appeal be allowed with the orders he has proposed and I have nothing useful to add.

Dated at Kampala the 15<sup>th</sup> day of April 2021

  
Christopher Madrama

**Justice of Appeal**