THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 144 OF 2018

(ARISING FROM CIVIL SUIT NO. 252 OF 2015)

(CORAM: MADRAMA, MULYAGONJA, MUGENYI, JJA)

ATTORNEY GENERAL} ..... APPELLANT

VERSUS

1. ETOT PAUL PETER }
2. OKELLO DEO }
3. KIDEN SANTA }
4. OMARA JOHN PAUL}
5. CHIRA FRANCIS } ..... RESPONDENTS
6. OTIM ISAAC }
7. ETOT STEVEN }
8. ELWA ALBERT }
9. RUTH ETOT }

(Appeal from the judgment of the Hon. Justice Bashaija K. Andrew of the High Court Land Division in Civil Appeal 252 of 2015)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

This is appeal arises from the decision of Bashiaja J, judge of the High Court delivered on 15th September 2017. The background to the appeal is that the Respondents sued the Appellant and Sino Hydro Corporation Limited in H.C.C.S No. 252 of 2015 consequent to the compulsory acquisition of their land. The 1st, 2nd, 3rd, 4th and 5th Respondents were joint registered proprietors of land comprised in FRV 1169 Folio 22 Plot 76 measuring approximately 8.109 hectares at Nora Kamdini in Oyam district. The 1st, 6th, 7th, 8th and 9th Respondents were joint registered proprietors of land comprised in FRV 1169 Folio 23, Plot 77 Block 1 measuring approximately,

6.945 Hectares situated at Nora, Juma, Kamdini in Oyam district. Part of the two plots were compulsorily acquired by the Government of Uganda for the construction of a Hydro Electric Power Dam at Karuma. In the High Court, the Respondents case was that the Government acquired the suit land without duly compensating them. The land was acquired sometime around 2011 and 2012 for construction of the Karuma falls Dam by M/s. Sino Hydro Corporation Limited. The suit land measures approximately 8.109 hectares out of which a portion measuring 3.705 hectares was compulsorily acquired for the construction project. The remaining part of the land which falls outside the construction project was used as a dumping site and an access route by the construction firm.

Out of Plot 77 measuring approximately 6.945 hectares, 6.006 hectares was acquired by the Government for the construction project leaving approximately 0.939 hectares. Both Plot 76 and 77 have rocks whose quantity and valuation was also the subject matter of the suit for compensation.

The learned trial Judge allowed the suit and awarded the Respondents compensation in the sum of Uganda shillings 1,204, 063, 640/= as the market value of the suit land; Uganda shillings 8,327,919,600/= as the value of the rocks on the suit land, general damages of Uganda shillings 1,000,000,000/= and costs of the suit.

The Appellant was dissatisfied with the Judgment and orders of the High Court and appealed to this court on the grounds that:

1. The learned trial Judge erred in law and fact in awarding the sum of Shs. 1,204,063,640/= as compensation for the land and all the properties thereon which were taken over or destroyed during the acquisition by Government, which sum was not pleaded by the Plaintiffs and is in excess of the total compensation sum of Shs. 701, 513, 190 which was claimed in the Plaintiff's professional valuation report.

2. The learned trial Judge erred in law and fact in holding that compensation is payable for rock deposits on land and that rocks are compensated separately from the value of such land, while at the

same time also holding that rocks are part of land.

3. The learned trial Judge erred in law and fact in awarding the Plaintiffs the sum of Shs. 8, 327, 919, 600/= as the price of the rock deposits on the Plaintiffs' two plots, in addition to the award of compensation for the Plaintiffs' said land.

4. The learned trial Judge erred in law and fact in awarding the sum of Shs. 8, 327, 919, 600/= as compensation for rock deposits in the suit land, which figure was based on speculation and conjecture and in the absence of any evidence that the Plaintiffs were engaged in the business of rock exploitation, extraction or quarrying on the said land.

5. The learned trial Judge erred in law and fact in awarding the Plaintiffs general damages of Shs. 1,000,000,000/=, in disregard of the fact that the Plaintiffs are joint owners of the acquired suit land, and he thereby awarded an inordinately exorbitant sum of damages which is greater than the market value of the said land.

6. The learned trial Judge erred in law and fact when he awarded general damages in the absence of the Plaintiffs proving the circumstances to justify the award.

7. The learned trial Judge erred in law and fact in finding the 2nd Defendant jointly liable for the suit claims, in disregard of the parties; pleadings and evidence which showed that the Plaintiffs' suit land was compulsorily acquired by the Government for construction of the Karuma dam project, that the Ministry of Energy and Mineral Development was responsible for paying compensation for the acquired land, and that the 2nd Respondent was a contractor employed by the Government to construct the dam.

The Appellant prayed that this appeal is allowed with costs to the Appellant and the Judgment and orders of the High Court be set aside.

Representation

At the hearing of the appeal, the Appellant was represented by Hon. Kiryowa Kiwanuka, the Attorney General, Ms. Patricia Mutesi, Assistant Commissioner, and Ms. Jackie Amusogot, State Attorney.

The Respondents were represented by Counsel George Omunyokol, Counsel Andrew Kabombo, Counsel Mutyaba Bernard, and Counsel Ssozi Stephen Galabuzi.

Appellant's written submissions

On ground one, the Appellant's counsel submitted that the professional Valuation Report established the total compensation sum of Shs. 701, 513, 190/= as the market value of the acquired land and the structures on the land. This sum was pleaded at paragraph 12(b) and (c) (i), (ii) and (iii) of the Respondents' plaint. Counsel contended that the total sum of special damages which were pleaded and proved was UGX 813, 078, 140/=. The sum included the market value of the acquired land, semi - permanent structures, crops, trees, and the valuation and survey fees. Counsel submitted that the trial Judge erred in law and fact when he awarded the sum of Shs. 1,204,063,640/= for the acquired suit property which was neither pleaded by the Respondents at trial nor proved in the valuation report. She prayed that this Court sets aside the award of Shs. 1,204,063,640/= and finds that the Respondents are entitled to the sum of UGX 813, 078, 140/= which was proven as the fair and adequate compensation for the acquired land. Counsel further pointed out that the Government duly paid the Respondents the sum of UGX 813, 078, 146/=.

The Appellant's counsel argued grounds 2,3,4,5 and 6 jointly. She submitted that there is no legal basis for awarding the Respondents Shs. 8, 327, 919, 600/= as compensation for the rock deposits on the suit property as Government is not liable to pay for rock deposits separately or in addition to the market value of the acquired land.

Counsel relied on Article 26(2)(a) & (b) and 237(2) of the Constitution and section 42 of the Land Act which he states vests in Government the power to acquire private property in public interest under a law which makes provision for prompt payment of fair and adequate compensation prior to taking possession of the property. She pointed out that section 77 of the

Land Act provides for valuation standards to be used in computing compensation for acquired land including; the open market value of unimproved customary land, the market value or replacement cost for buildings on the land and the value of standing crops on the land. Section 77(2) of the Land Act further provides for the payment of disturbance allowance and the applicable rates. Counsel contended that the section does not envisage compensation for rock deposits on the land. Counsel submitted that whereas section 77 of the Land Act provides for the payment of the market value of acquired customary land and is silent on the basis for assessing compensation for registered land, section 41(6)(a) of the Land Act provides a relevant interpretative guide as to the proper assessment of compensation for registered land. The section stipulates that any compulsory acquisition of land shall be at a fair market valuation assessed on a willing seller – willing buyer basis. Counsel pointed out that the courts have used the market value as the fair and adequate compensation in cases involving compulsory acquisition of registered land. She relied on **Pyrali Abdul Rasaul Esmail vs Adrian Sibo Constitutional Petition No. 9 of 1997** where the Constitutional Court held that the market value of the property in question assessed at the time of judgment is a reasonable measure of fair and adequate compensation. Counsel also relied on **Sheema Cooperative Ranching Society & 31 others v the Attorney General, H.C.C.S No. 103 of 2010** in which the High Court cited with approval **Buran Chandmary vs the Collector under the Indian Land Acquisition Act (1894) 1957 EACA 125** where it was held that the market value of land is the basis upon which compensation must be assessed. Counsel further relied on **Musisi Godfrey v Uganda National Roads Authority, H.C.C.S No. 217 of 2017** where the High Court cited with approval **Abdallah and others v the Collector for City Council of Kampala (1958) EA 779**, for the proposition that compensation for registered land must be based on the actual market value. Counsel also relied on **Halsbury's Laws of England, 4th Edition, Volume 8 (1), paragraphs 233 – 234, 278-279**, to argue that the position under English law is the same.

Secondly, the Appellant's counsel submitted that the definition of land is not limited to the earth's surface but extends to cover what is below and above the surface. To this effect, counsel relied on the definition of land in the Blacks' Law Dictionary, 9th edition and **'Words and Phrases Legally Defined'**

4th Edition, Volume 2 (L-Z). The definition was drawn from Lord Watson's judgment in **Glasgow Corporation v Farie (1888) 13 App. Case 657 at 659** where he held that the expression 'the land' cannot be restricted to vegetable mould or to cultivated clay but it naturally includes the upper soil including the sub soil, whether it is clay, sand or gravel. Counsel submitted that the same principle applies to Uganda. She relied on **'Principles of Land Law in Uganda' by John T. Mugambwa at page 50- 51**, section 2 of the Registration of Titles Act and the text; **'Elements of Land Law' by Kevin Gray, 2nd Edition** for the submission that substances ranging from stone, mineral ores, gravel, sand and china clay comprise 'land' for legal purposes.

In the premises, counsel submitted that unlike buildings and crops which are valued and compensated separately from the value of the unimproved land under section 77(1) of the Land Act, rocks, sand and clay constitute part of the land and ought not be valued and compensated separately. Further, whereas section 73 of the Land Act allows compensation for rock materials which were taken from private land for use in public projects, it does not provide payment for unexploited rock deposits in acquired land. In the premises, counsel submitted that the learned trial Judge erred in law and fact when he awarded compensation to the Respondents for the rocks on the suit property separately from and in addition to compensation for the suit land.

The Appellant's counsel further relied on **United States v Miller, 317 U.S 369, 374 (1943)** and an article titled **'Mineral Valuation in Eminent Domain Cases' Hastings Law Journal, Volume 7, Issue 2**, for the proposition that the courts in USA have consistently rejected attempts by landowners to claim compensation for the value of deposits of rock and similar materials separately from the market value of the land on the basis that such deposits are components of the land. In the said article, the learned author states that mineral deposits cannot be separately determined and valued independent of the land of which they are part but the land must be valued as land with the presence of mineral deposits being given proper consideration. The ultimate test is what an informed purchaser in the market would pay for the land having knowledge of the existence of the valuable deposits which are component parts of the land itself.

Further in **United States v Land in Dry Bed of Rosamond Lake, Cal. 143 F. Supp. 314 (S.D. Cal. 1956) at page 4** it was held that in eminent domain proceedings, the existence of valuable mineral deposits in the land in question constitutes an element which may be taken into consideration if it influences the market value of the land but there can be no recovery for both the value of the land and its mineral deposits as two separate items. Counsel further relied on **United States v 179.26 Acres of Land in Douglas Cty; United States Court of Appeals, Tenth Circuit Mar 26, 1981644 F. 2d 367 (10th Cir. 1981) at page 9** where it was held that in the case of land with minerals, the existence of those minerals is a factor of value to be considered in determining the market value of the property but the landowner is not entitled to have the surface value of the land and the value of the underlying minerals aggregated to determine the market value. The value of the mineral deposit is to be considered only to the extent to which it goes into and affects the overall market value of the property and it is generally not permissible to determine the value of a mineral deposit by estimating the number of tons in place and then multiplying the tonnage by a unit price per ton. Counsel relied on **Iske v. Omaha Public Power District; 178 N.W.2d 633 (1970) at page 4** where it was held that where stone or mineral deposits may have a bearing on the market value of the land, evidence as to the extent of those deposits is admissible but the award may not be reached by separately evaluating the land and the deposits.

Furthermore, the Appellant's counsel faulted the trial Judge for using the 'unit times price' method to determine the value of the land or natural deposits on the land. She contended that the method is speculative and disapproved for evaluation. The 'unit times price' method involves estimating the amount of the resource deposit in the land and multiplying it by a fixed price per unit after taking into account its production cost. Counsel relied on **'Mineral Valuation in Eminent Domain Cases' Hastings Law Journal, Volume 7, Issue 2, at page 165-177**, an article where the learned author noted that the 'unit times price' or 'tonnage multiplied by unit price' method is criticized for its disregard for market realities in so far as it assumes a stable demand, competition, production cost and does not reflect the risks and uncertainties inherent in the operation of an enterprise. Further, counsel relied on **United States v Land in Dry Bed of Rosamond**

Lake, Cal. 143 F. Supp. 314 (S.D. Cal. 1956) at page 4 and **United States v 13.40 Acres of Land in the City of Richmond, 56 F. Supp. 535 (N.D. Cal. 1944)** where the 'unit times price' method was rejected on account of being speculative. In the premises, counsel invited this court to find that the learned trial Judge erred in law and fact when he awarded UGX. 8, 327,919,600/= to the Respondents as compensation for the value of the rock deposits on the suit property.

With regard to the contention that the Government is liable to pay compensation for rocks which are taken from private land and used for public works in accordance with section 73 of the Land Act, counsel submitted that section 73 of the Land Act is not applicable where the Government compulsorily acquires ownership of the land. She submitted that the section is limited to instances where the Government is granted legal rights of access as may be necessary for the execution or maintenance of the works or the taking of materials from the land. In such instances, compensation for the rocks is justified as the ownership of the land remains vested in the land owner. In the premises, counsel submitted that section 73 of the Land Act does not apply to the facts of the instant case where the suit land was compulsorily acquired by the Government and ceased to be private land.

In the alternative, counsel submitted that whereas the Respondents sought an order for special damages for the value of the rocks which were quarried by the contractor to build the dam, the Respondents' plaint and the two Geological Reports (Exhibit P11 and Exhibit D1) did not particularise the quantity or value of the rocks which were allegedly quarried and used for construction of the dam. In the premises, counsel submitted that the trial Judge could not rely on section 73 of the Land Act to award the Respondents the value of the unexploited rock deposits in the suit property.

On ground 7 and 8, the Appellant's counsel submitted that the trial Judge erred in law and fact when he awarded the Respondents general damages of UGX. 1,000,000,000/=, firstly, because he did not consider the fact that the Respondents were joint owners which implies that even if the award was apportioned among them, it would still be disproportionate to their individual interest in the suit land since it was greater than the market value

of the suit land, and secondly, because the sum was exorbitant and greater than the market value of the suit property which was UGX. 813, 078, 140/=.

Further, counsel submitted that the learned trial Judge disregarded established principles in awarding general damages such as consideration of the value of the subject matter, economic inconvenience and the nature and extent of the breach. She relied on **Annet Zimbiha vs Attorney General, H.C.CS No. 0109 of 2011** for the said principles.

Lastly, counsel submitted that the trial Judge did not consider the circumstances of the case in awarding general damages. She submitted that the trial Judge ought to have considered that the suit property was acquired in public interest for the legitimate purpose of constructing the Karuma dam for the benefit of all Ugandans including the Respondents. Counsel relied on **Sheema Cooperative Ranching Society & 31 others v the Attorney General, H.C.C.S No. 103 of 2010** where the High Court declined to award general damages in circumstances where the Government acquired ranch land for purposes of resettling landless people. Further, counsel contended that the trial Judge ought to have disregarded the Respondents' argument that they were denied use of the suit property for six years without compensation. Counsel submitted that the trial Judge should have considered the evidence on record which showed that in 2014, the Government offered compensation of UGX. 703, 389, 747/= which the Respondents rejected and resorted to court instead of engaging in negotiations with the Ministry of Energy being the custodian of public funds. She contended that the delay in payment of compensation and any inconveniences caused resulted from the protracted and unsuccessful negotiations between the parties over a reasonable compensation. Counsel submitted that the delay should not be solely attributed to the Appellant.

In conclusion, counsel prayed that this court sets aside the award of general damages of UGX. 1,000,000,000/=. She prayed that this appeal is allowed, the judgment and orders of the trial Judge be set aside and the Respondents pay the costs of the appeal.

Respondents' submissions

In reply to the Appellant's submissions on ground one, the Respondents'

counsel submitted that the ground was over taken by events since the Appellant already paid the Respondents a sum of Shs. 813, 078, 140/= being the value of the suit land, the crops and dwellings houses on the suit land. The learned counsel pointed out that the said payment was made after the judgment of the trial Court and after the Respondents took out execution proceedings against the Government and an order of mandamus issued by the High Court on 27th March 2018 in Miscellaneous Application No. 257 of 2018 directing the Permanent Secretary of Ministry of Energy and Mineral Development to pay the Respondents the decretal sum in H.C.C.S No. 252 of 2015 within 14 days from the date of the Ruling. The Attorney General applied for and obtained a stay of execution from the Court of Appeal in Civil Application No. 0114 of 2018 on condition that the Appellant paid the undisputed sum of Shs. 813, 078, 140/=. The Respondents' counsel further conceded that the sum of Shs. 813, 078, 140/= was the correct amount which was pleaded by the Respondents and ought to have been awarded by the learned trial Judge and not Shs. 1,204,063,640/= which was awarded by the trial Court. Counsel submitted that this was an arithmetic error which ought to have been corrected under the slip rule without making it an issue or ground of appeal. In the premises, the Respondents' counsel invited this court to hold that the sum of Shs. 1,204,063,640/= which was awarded by the trial Judge to the Respondents was an arithmetical error which was replaced with the sum of Shs. 813, 078, 140/= and paid by the Government. He invited this court to invoke its power under Rule 32(1) of the Judicature (Court of Appeal) Rules to rectify the record to reflect the sum of Shs. 813, 078, 140/= as the amount paid by the Appellant to the Respondents.

In reply to grounds 2, 5 and 6, the Respondents' counsel submitted that the learned trial Judge was right to award compensation to the Respondents for the rock deposits on the suit property separately from the value of the suit property. Counsel submitted that the valuation reports of the Ministry of Energy and Mineral Developments, marked Exhibits P.5, deliberately omitted rocks from the items due for compensation even when the Government knew that there were rock deposits on the suit land. He contended that the Attorney General ought to have advised the Ministry of Energy and Mineral Developments to include the value of the rock deposits in the valuation report.

The Respondents' counsel submitted that Section 77 of the Land Act should be read together with section 73 of the Land Act which provides for a mutual agreement between the undertaker and the land owner before the property can be acquired. If there is no mutual agreement, then the affected land may be compulsorily acquired in accordance with section 42 of the Land Act, section 3 of the Land Acquisition Act, and Article 26 and 237(2) of the Constitution. The learned counsel faulted the Appellant for failure to comply with section 73 of the Land Act in compulsorily acquiring the Respondents' land. He relied on **Annet Zimbiha vs Attorney General, H.C.C.S No. 0109 of 2011** where the High Court awarded mesne profits to the Plaintiff in that case as compensation for the Government's unlawful occupation and utilization of her land without prior compensation. The Respondents' counsel also relied on **Alister Fraser v Her Majesty the Queen [1963] SCR 455**, where the Canadian Supreme awarded compensation to the Plaintiff in that case for rocks excavated from his land.

Further, counsel contended that section 77 of the Land Act was not intended to deprive any person of his or her right to property guaranteed under Article 26 and 237(1) of the Constitution.

The learned counsel for the Respondents submitted that the US authorities relied on by the Attorney General are not applicable to Uganda and further that the US cases are distinguishable from the facts of the instant case in so far as none of them dealt with the issue of compensation for rock deposits. That the cases were decided basing on US legislation which does not apply to Uganda. He also submitted that some of the cases cited by the learned Attorney General dealt with mineral rights whereas rock deposits which form the subject of contention in the instant case do not qualify as minerals in the meaning prescribed in Article 244(5) of the Constitution. In the premises, counsel concluded on grounds 2, 5 and 6 and that the trial Judge was right to award the Respondents the sum of UGX. 8, 327, 919, 600/= as compensation for the value of the rock deposits separate from the market value of the suit land.

In reply to the Appellant's submission that the trial Judge in awarding compensation for the exploited rock deposits determined an issue which was not pleaded, the Respondents' counsel submitted that the trial Judge

acted well within his powers prescribed under Order 5 rule 13 of the Civil Procedure Rules. He relied on **Prince J.D.C Mpuga Rukidi vs Prince Solomon Iguru, SCCA No. 18 of 1994** where the Supreme Court held that the fact that issues are framed at the commencement of the hearing does not mean that they cannot be amended by adding or deletion. The Supreme Court further held that Order 5 rule 13 of the Civil Procedure Rules allows the court at any time before passing judgment to amend the issues and frame additional issues which appear necessary for determination of the matter in controversy between the parties.

In reply to ground 7 and 8, the Respondents' counsel submitted that the award of general damages of UGX. 1,000,000,000/= was fair and proportionate to the market value of the suit land. Further, that the learned trial Judge took into account the pain and suffering that the Respondents went through because of the Appellant's actions. Further, counsel submitted that the award is reasonable in light of the circumstances of the case where the Government failed to promptly compensate the Respondents before compulsorily acquiring the suit land. The Respondents obtained partial compensation of UGX. 813, 078, 140/= after a spirited fight in court and were blocked from accessing their land by the Government's security agents deployed on the suit land. Further, the Respondents' crops and properties on the suit land were destroyed by the Government without compensation. Counsel submitted that the award of general damages was premised on the inconvenience that the Respondents went through for more than 6 years since 2011 when they were deprived of the use of their land.

In reply to ground 9, counsel submitted that the Appellant's argument that the trial Judge erred in law and fact in finding the 2nd Defendant jointly liable, is untenable since the 2nd Defendant was properly served with summons to file a defence in H.C.C.S No. 252 of 2015 but failed to file a written statement of defence. The case proceeded in its absence and the trial court properly found both defendants liable. Further, counsel contended that the Appellant did not inform the trial court that it was acting for the 2nd defendant nor did counsel for the Appellant file a defence on behalf of the 2nd defendant. Counsel relied on **Sengendo v Attorney General [1972] 1 EA 140** where it was held that a party who does not file a defence has no locus to appear or make

any representations before the court.

In reply to ground 10, the Respondents' counsel submitted that the Appellant is not entitled to any relief it seeks since the grounds of its appeal have no merit. Further, he submitted that the Appellant is estopped by virtue of a letter written by the Solicitor General to the Permanent Secretary of Ministry of Energy and Mineral Development advising him to comply with the orders of the trial court and pay the decretal sums to the Respondents. Counsel relied on **Etot Peter Paul and others v the Permanent Secretary, Ministry of Energy and Mineral Development and another, HCMA No. 257 of 2018**, where Justice Bashaija K. Andrew held that the Government was barred by the principle of estoppels from turning around and purporting not to pay the Respondents. Secondly, counsel submitted that the Appellant cannot approbate and reprobate the judgment and orders of the trial court. He relied on **Ddegeya Trading Stores (U) Limited vs Uganda Revenue Authority [1997] KALR 388** for this submission.

In conclusion counsel prayed that this appeal is dismissed with costs for the appeal and the trial court.

Resolution of the Appeal

I have duly considered the written submissions of the Appellant and Respondents, the record of appeal and the law. The duty of this court as a first appellate court is to reappraise the evidence on record and draw its own inferences and come to its own conclusions on matters of fact and law. This duty may flow from Rule 30 (1)(a) of the Rules of this Court which provides that the Appellate Court may reappraise the evidence and draw inferences of fact. Further, the duty of a first appellate court has been set out in various precedents. In **Peters v Sunday Post Limited [1958] 1 EA 424 at page 429** the East African Court of Appeal held that a first appellate court should review the evidence in order to determine whether the decision of the trial court on the matter or matters in controversy should stand. In **Fr. Narsensio Begumisa & 3 others v Eric Tibebaga SCCA No. 17 of 2002**, Mulenga JSC, held that on a first appeal, the parties are entitled to obtain from the appellate court its own decision on controversies of fact as well as of law. In exercising its duty, the appellate court should make due allowance for the fact that it has neither seen nor heard the witnesses. It

must weigh the conflicting evidence and draw its own inferences and conclusions.

The plaintiff's action in the High Court was for declaration that they are entitled to possession of their land (the suit property) and in the alternative for adequate and prompt compensation for the value of the suit property compulsorily acquired by the defendants. The plaintiffs who are now the respondents sought a declaration that they are entitled to the remainder of the suit property not taken over by the government but which is nonetheless wrongly and unlawfully occupied by the defendants. It was for an order directing the Registrar of Titles to issue residual titles to the plaintiffs in respect of the remainder of the land not affected by the construction of the Karuma hydroelectric power dam. The plaintiffs also sought for declaration that the trespass on the suit property by the government of Uganda and construction of the dam by the 2nd defendant in the suit premises without payment of adequate and prompt compensation to the plaintiffs is unlawful and unconstitutional. Further that the actions of the 2nd defendant for quarrying rocks from the suit premises of crashing/aggregating and utilising the same for construction of the dam without payment of prompt and adequate compensation was unlawful and unconstitutional. They sought a declaration that the defendant's removal/destruction of the plaintiffs dwelling houses, crops, mango trees, wild trees and medicinal plants without compensating the plaintiffs from the suit premises is unlawful and unconstitutional. The plaintiffs further claimed special damages for the value of the rocks quarried/mined by the 2nd defendant in the suit premises, the market value of the suit properties, the value of the crops, mangoes, wild trees, medicinal plants damaged/removed by the defendants from the suit properties as particularised in the plaint. They sought punitive damages, general damages and interest at the rate of 25% per annum from the date of filing the suit till payment in full as well as costs.

The facts averred in the plaint are not controversial. What is of particular interest is that the particulars of special damages averred in paragraph 12 of the plaint was the sum of Uganda shillings 813,078,140/= as the quantum of the compensation pursuant to an agreed valuation report and the sum was conceded as due by the appellant and paid.

At the trial by the High Court, three issues were framed by the learned trial judge pursuant to the agreement of the parties in their joint scheduling memorandum as follows:

1. (a) Whether the plaintiffs are entitled to compensation for the suit properties taken over by the government for construction of the hydroelectricity dam at Karuma; (b), if so how much?
2. (a) Whether the plaintiffs are entitled to the value of the rock deposits on the suit properties which are excavated, crushed, sold and/or used by the defendant for construction of the hydroelectricity dam at Karuma (b) if so, how much?
3. Whether the plaintiffs are entitled to the reliefs claimed.

On issue number 1, the learned trial judge found that the government had acquired the suit property by the time of filing of the suit and answered issue 1 (a) in the affirmative. The learned trial judge found that the figure of Uganda shillings 1,204,063,640/= had been proved by the plaintiffs and was awarded as a fair and adequate compensation for the land and all the properties therein which had been taken over or destroyed during the acquisition by the government in both plots of land.

On issue number 2 which dealt with the rock deposits, the learned trial judge found that rock deposits had been omitted in the valuation report of the government by the Ministry of Energy & Mineral Development exhibits P5 and P6 which only listed land; housing or dwelling houses, and crops which may be compensated. The learned trial judge found that the plaintiffs are entitled to compensation for the rocks and answered issue number 2 (a) in the affirmative. On the question of the quantum of compensation, he relied on the report of the government geologist giving a quantum of Uganda shillings 8,327,919,600/= which he awarded as the total price of the rock aggregate on both plots.

On issue number 3 which dealt with the reliefs sought by the plaintiffs, the learned trial judge adopted holding on issues 1 and 2 thereby awarding a sum of Uganda shillings 1,204,063,640/= which also was to attract interest at 8% per annum from the date of filing the suit till payment in full. Secondly, the learned trial judge awarded the value of the rock deposits on plot 76 and 77 in the amount of Uganda shillings 8,327,919,600/= with interest at 8% per

annum from the date of judgment till payment in full.

The learned trial judge issued an order directing the Registrar of Titles to issue residual titles to the plaintiffs in respect of portions of land on plot 76 and 77 not taken over or compulsorily acquired by the government for the construction of the Karuma Dam.

The learned trial judge further awarded a sum of Uganda shillings 1,000,000,000/= as a fair and adequate amount of general damages. The learned trial judge declined to find that the plaintiffs are entitled to claim punitive damages in the circumstances and awarded costs of the suit against the Attorney General.

I note that the plaintiffs aver in paragraph 5 of the plaint that they are registered proprietors of the suit property and that they intended to develop the suit property as an Eco - lodge and also for the purposes of growing an orchard. That on or around 2011/2012 the Ministry of Energy and Mineral Development of the Government of Uganda (hereinafter referred to as the Government of Uganda or GOU) decided that the suit properties among other properties should be the site for the new Karuma hydropower project. Particularly Freehold Register Volume 1169 Folio 22 known as Plot 76 Block 1 at Nora, Juma, Kamdini, Oyam South has a certificate of title dated 4th of May 2012 and registered on 2nd May 2012 in the names of Etot Paul Peter, Okello Deo, Kiden Santa, Omara John Paul and Ochira Francis. Secondly, Freehold Register Volume 1169 Folio 23 known as Plot 77 Block 1 at Nora, Juma Kamdini, Oyam South is a certificate of title dated 4th May 2012 and Registered on 2nd May 2012 in the names of Etot Paul Peter, Otim Isaac, Etot Steven, Elwa Albert and Ruth Etot. Plot 77 has 8.109 ha while Plot 77 has 6.945 ha.

The controversy in this appeal mainly revolves from the holding of the learned trial judge on the 2nd issue framed at the trial; namely:

> (a) Whether the plaintiffs are entitled to the value of the rock deposits on the suit properties which are excavated, crushed, sold and/or used by the defendant for construction of the hydroelectricity dam at Karuma (b) if so, how much?

The appellants abandoned ground is 3 & 4 of the appeal. The appellant

however challenged the decision of the trial court awarding the sum of Uganda shillings 8,327,919,600/= for rock deposits and the subsequent and inevitable pursuant to pleadings issue is whether the award was for the rock deposits or for aggregates which had been mined and processed for construction. Ground 1 of the appeal was conceded by the respondents who agree that the learned trial judge erred to award Uganda shillings 1,204,063,640/= when the correct sum to be awarded based on the pleadings for a claim of special damages is in the valuation report of Uganda shillings 813,078,140/=. The appellant also conceded to this sum and the question in controversy in the appeal primarily revolves on the compensation for rock deposits separately from the valuation of the land which was conceded by the appellant as the right quantum for compensation in the 1st ground of appeal. The other grounds therefore challenge not only the quantum for compensation for rock deposits separately from compensation for the land acquired but also the principle for compensation of rock deposits separate from the land. If this controversy is resolved, it will determine the appeal.

The remaining question of fact is whether it was the rock that had been quarried which was the subject of the contested award or whether it was the rock deposits. This is both a question of the pleadings and of the evidence. Because ground 1 of the appeal was conceded and grounds 3 and 4 were abandoned by the appellant, what is left are grounds 2, 5 and 6 of the appeal.

Ground 2 of the appeal:

The learned trial judge erred in law and fact in holding that compensation is payable for rock deposits on land and that rocks are compensated separately from the value of such land, while at the same time also holding that rocks are part of the land.

Ground 5 of the appeal:

The learned trial judge erred in law and fact in awarding the plaintiffs general damages of shillings 1,000,000,000/=, in disregard of the fact that the plaintiffs are joint owners of the acquired the suit land, and he thereby awarded and in ordinate delay exorbitant sum of damages which is greater that the market value of the suit property.

Ground 6 of the appeal:

The learned trial judge erred in law and fact when he awarded general damages in the absence of the plaintiffs proving the circumstances to justify the award.

Ground 2 of the appeal will be handled separately while grounds 5 and 6 of the appeal are intertwined and concern only the issue of the award of general damages. I will start with the ground 2 of the appeal and resolve grounds 5 and 6 jointly.

As far as ground 2 of the appeal is concerned, the learned trial judge awarded a sum of Uganda shillings 8,327,919,600/= as the price of the rock deposits. The learned trial judge found that the rock deposits were valued and quantified by a geologist commissioned by both the plaintiffs and the government. Secondly, the ownership of the rock was not in dispute and the fact that the land was compulsorily acquired by the government was also not in dispute. He considered the fact that the defendant (the Attorney General) submitted that the rocks were minerals under the control of the government. The question was therefore whether rocks, clays, and related objects form part of the land. The court noted that rocks were not included in the definition of "minerals" under article 244 (1) of the Constitution and particularly the word "mineral" is found in article 244 (5) of the Constitution and does not include clay, murram, sand or any stone commonly used for building or similar purposes.

It is from these premises that the learned trial judge held as follows:

> Secondly, and most importantly, under Article 237 (1) (supra) land belongs to the citizens of Uganda. Section 2 of the Mining Act must therefore be read together with Articles 244 (5) (supra). In this particular case, the overriding law is the Constitution and as such the position to be taken by court is that rocks are stones commonly used for building or for similar purposes and are excluded from the definition of 'minerals'. Therefore, compensation would be payable for rock deposits on land belonging to the landowners.

Following the above premises, the learned trial judge considered the evidence of the presence of rocks and the quarrying of rocks carried out by the 2nd defendant (the contractor) and its use in the construction of the dam. He noted *inter alia* that the plaintiffs had not at that date been compensated

for the rocks and government had by conduct compulsorily acquired and taken over the plaintiffs' land and rocks without compensation contrary to article 26 (b) (1) of the Constitution. The learned trial judge further considered the alternative argument that because "land" includes rocks, the valuation and compensation of the affected land cannot be valued separately. To resolve the issue, the learned trial judge considered the evidence and found that the arguments of the Attorney General who represented the 1st defendant could not be sustained as they were not supported by evidence. This is because according to exhibits P5 and P6, the government only listed certain categories for compensation namely land; houses or dwelling houses, crops that can be compensated and omitted to mention "rocks". The learned trial judge noted that because the GOU deliberately omitted in its report the mention of "rocks" and the Attorney General knew that the rocks formed part of the land, the Attorney General was duty bound to advise the GOU to include the value of the rocks in the valuation report. He noted that the value of the land could have been inclusive of the rocks if the Ministry of Energy and Mineral Development included it in the valuation report and the notices. The learned trial judge primarily relied on the evidence of the valuation report of the geologist which confirmed the existence of rock deposits of the suit land and separately estimated the tonnage of the deposits at 594,851 tons. He concluded that this showed that the value of rocks was to be considered separately from the value of the land for compensation and answered the issue number 2 (a) of the agreed issues in the affirmative.

From the outset, the action of the GOU or the assertions of the plaintiffs at the time of their engagement on the issue of compensation is not material for purposes of establishing the principles of law of whether rocks form part of the land. The 2nd issue is also an issue of law as to whether in valuing land, it is presumed that all that forms part of the land should be considered in arriving at the quantum of compensation for that land. Lastly, the question of fact is whether in the circumstances of the plaintiffs' case, the person who valued the property erroneously or inadvertently did not include the value of the "rocks".

Before going into the merits of the above controversies I have set out, it should be noted that the construction of a hydroelectric power dam in as

much as it may need or require rocks or stones, would, in theory, affect the value of the land containing rock deposits in the surrounding areas if they were to be acquired for purposes of quarrying business for selling to the Contractor for the works.

On the first limb of the argument on the point of law, article 244 of the Constitution seems to be conclusive and it is necessary to set it out as far as is relevant. Article 244 (1) of the Constitution provides as follows:

> (1) Subject to article 26 of this Constitution, the entire property in, and the control of, all minerals and petroleum in, on or under, any land or waters in Uganda are vested in the government on behalf of the Republic of Uganda.

The head note of article 244 of the Constitution clearly indicates that it is concerned with "minerals and petroleum". Article 244 (1) of the Constitution reserves all minerals and petroleum in, on or under any land. Minerals and petroleum can therefore never be part of the land for purposes of ownership of the land through any lawful tenure. Ownership is reserved and vested in the GOU. Secondly article 244 (2) of the Constitution provides for the role of Parliament to make laws regarding the exploitation of minerals and petroleum. Of particular interest is article 244 (3) of the Constitution which provides that minerals, mineral ores and petroleum shall be exploited taking into account the interest of the individual landowners, local governments and the government. The expression "minerals" is defined by article 244 (4) of the Constitution. Secondly the expression "petroleum" is also defined by article 244 (4) of the Constitution. I do not need to set out those definitions because article 244 (5) clearly excludes stones and provides in article 244 (5) of the Constitution as follows:

> (5) For the purposes of this article, "mineral" does not include clay, murram, sand or any stone commonly used for building or similar purposes.

There is a subtlety in the use of the word "stone" as opposed to the use of the word "rock". This disparity in the use of words has to be resolved. "Stones" are derived from or commonly derived from rock. They may be stones which may not form part of the "rock" below. How would this use of the two words be resolved? In substance, "rocks" and "Stones" have the same substance and composition and may be distinguished from minerals

and petroleum. Minerals may be mined out of "a rock". What is "any stone commonly used for building or similar purposes"? This goes to the heart of the definition of "rock" and "stone".

According to the **Cambridge International Dictionary of English Cambridge University Press 1995, Low price edition 1996** the word "rock" means:

> ... the dry solid part of the Earth's surface, or any large piece of which sticks up out of the ground or the sea.

Illustrations include:

> *Mountains and cliffs are formed from rock. They had to drill through several metres of rock to find oil. The houses along the shore have been built into the rock.*

On the other hand, the word "stone" means:

> ... the hard solid substance found in the ground which is often used for building ...

Illustrations include:

> *a stone wall/floor. The flight of stone steps. A primitive stone axe. They cut enormous blocks of stone out of throwing stones at the police*

These definitions and illustrations demonstrate that a rock is a large piece of stone jutting up out of the ground while stones are relatively moveable pieces of rock often used in the construction industry. Going back to the context of the Constitution, article 244 (5) of the Constitution excludes "any stone commonly used for building or similar purposes. There is no use of the word "rock". Stones may be quarried out of rock. The controversy seems not resolved through the exclusion of stones under article 244 (5) of the Constitution from the definition of "mineral" under article 244 (1) of the Constitution. Further analysis has to be undertaken.

The word "mineral" is defined by article 244 (4) which provides that the word "mineral":

> ... means any substance, other than petroleum, whether in solid, liquid or gaseous form occurring naturally in or on the earth, formed by or subject to a geological process.

A rock occurs naturally on the earth and is formed by a geological process. Stones are a subset of rock. Substrata of the earth may be rock and land in mountainous places may be partly comprised of rock. The word "land" on the other hand is not defined in the Constitution. In the context of article 237 of the Constitution, the concept of land deals with the ownership of a territory on earth by people. Article 237 (1) provides that land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in the Constitution. Article 237 (2) reserves in government or local government subject to the property rights under article 26 of the Constitution, the right to acquire land in the public interest under conditions governing such acquisition prescribed by Parliament. However, natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes may be vested in government or local government to hold in trust for the common good of all citizens. The land tenure systems under which the people of Uganda may own land include customary, freehold, Mailo and leasehold.

The land tenure system under which people may own land is prescribed and what is reserved from that ownership of land are minerals and petroleum. This demonstrates most strongly that minerals and petroleum are part of the land save for being vested in the Government as an exception to the general rule. This can be deduced from the Constitution omitting reference to rocks in the exclusions to the definition of "minerals or petroleum". Noteworthy and a matter for which judicial notice can be taken is that petroleum or other minerals may be extracted from rock. Rock is part of the earth and it is conceivable to lease land which is mainly rocky. Land may also have soil substrata, sand or clay. It's quite technical to exclude the word "sand" from the word "soil" or "clay" this is because land mass may have sandy soils or clay soil. The land "may be rocky". It may be partly rock and partly soil or sand. It is the substance from which soil is made over a period of time. People who live in mountainous regions may own land and part of that land may be rocky. As far as the dictionary definition of soil is concerned, the **Cambridge International Dictionary of English** (supra) defines 'soil' to mean the material on the surface of the ground in which plants grow. It includes light/heavy/strong fertile soil. The word "sand"

means a mass of very small grains which used to be rock and which form deserts and some beaches. "Clay" on the other hand is also defined to mean "thick heavy earth that is soft when wet and hard when dry or baked".

The word "land" is not defined by the Land Act cap 227 laws of Uganda. In context, the land of Uganda includes all its geographical territory inclusive of what lies beneath the surface. The sum total of the above definition shows that the word "land" denotes the territorial right, dominion and control of a person or people who have title of ownership to a measured or defined piece of land. It is used in the territorial sense and the tenure systems further define the concept of land ownership. Land may be held on a lease or in perpetuity. The kinds of ownership that may be exercised by the owner of the land is qualified by certain rights in the use of land that is vested in the government which right the government exercises on behalf of the people. The word "rock" when territorially present in the domain of the tenure system owned by a particular person such in customary tenure, freehold tenure, Mailo tenure or leasehold tenure, vests in such a person according to the characteristics of that tenure.

Last but not least the term "Land" is a legal term and is *inter alia* defined by **Osborn's Concise Law Dictionary Eleventh Edition** to mean:

> According to the Law of Property Act 1925:
>
> "land includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege or benefit in, or over, or derived from land".

Any tenure of land in Uganda owned by private persons excludes minerals and petroleum and article 244 of the Constitution of the Republic of Uganda. Land as stated above includes the rocks. Prima facie it was erroneous to value land and rock separately.

Going to the major controversy, it is my judgment that the rock found on the territory or the domain of the person who owns the land in terms of the land tenure system is part of the land and the learned trial judge did no err in law to hold that rock in Plots 77 and 76, being the suit land belonged to the plaintiffs before its compulsory acquisition. The title of the plaintiffs to the

rock is established by the certificate of registration to the land known *inter alia* as plot 77 and 76. As to how far that domain or title of the plaintiffs may go into the depths of the Earth is a matter for debate and not necessary for resolution in this appeal. Further, and in theory the surface land may have a different user from the depth if minerals can be separately mined without disturbing the surface rights. What is material being that all the land in Uganda vested in the people to be owned in accordance with the land tenure system provided for in the Constitution. The sovereign territory of Uganda similarly vests in the people according to the land tenure system. Government is only vested with the rights to minerals and petroleum and other natural features such as lakes and rivers which it holds for purposes stated in the Constitution under article 237. Such right to land or minerals may be for game parks used for tourist attractions or any site which may be used as a tourist attraction that is vested in the state for the public purpose and the public good. Both parties agree that the respondents who were the plaintiffs in the High Court owned the land which was compulsorily acquired. The issue of whether the rock is a "mineral" has similarly been resolved by finding that it is not. It is simply part of the substance for which any tenure system may be comprised of inclusive of the soil which may be sandy, clay or other kinds of soil or stones. A house may be built on rock. The tenure of anybody who has land which is partly rock cannot be challenged. It is part of the land. The only matter for resolution is whether in the circumstances, the valuation of the land separately from the rock is tenable in law and lastly whether in the circumstances, the matter was properly resolved on matters of fact as to whether the valuation was for rock or extracted stones from the rock or for both.

It should be noted that part of the plaintiff's suit in the High Court was for declaration that the 2nd defendant's acts of quarry of rocks from the suit property, crashing/aggregating and utilising the same for construction of the dam, without payment of prompt and adequate compensation to the plaintiffs, is unlawful and unconstitutional. This part of the suit deals with the extraction of stones from rock and using the same for construction without prior compensation. It properly captures the controversy of whether the compensation was for stones extracted from rock prior to the compensation contrary to article 26 of the Constitution which requires

prompt and adequate compensation prior to taking over or for both rock and stones. Further this is a matter of great public importance for purposes of public works which may be delayed on account of negotiations on the value of the property to be compulsorily acquired in the public interest. The above notwithstanding, the question of the extraction of the rock is a question of fact and the issue is whether the subsequent valuation of the suit property after compulsory acquisition as a matter of fact should include the extracted stones. Besides this, is the issue of compulsory acquisition by the government of Uganda (GOU). The 2nd defendant, is a contractor for whose purposes of construction the GOU acquired the plaintiff's property. To what extent are they jointly liable. Are they not part and parcel of the action by GOU? Are they not the agents of the GOU?

As far as public works are concerned a quick reference should be made to sections 42 of the Land Act which deals with compulsory acquisition and section 73 of the Land Act which deals with public works. Section 42 of the Land Act reads as follows:

> 42. Acquisition of land by the Government.
>
> The Government or a local government may acquire land in accordance with articles 26 and 237(2) of the Constitution.

Further Section 73 of the Land Act provides that:

> 73. Execution of public works.
>
> (1) Where it is necessary to execute public works on any land, an authorised undertaker shall enter into mutual agreement with the occupier or owner of the land in accordance with this Act; and where no agreement is reached, the Minister may, compulsorily acquire land in accordance with section 42.
>
> (2) Where under subsection (1), an authorised undertaker executes public works upon or takes stone, murram or similar material from the land, the authorised undertaker shall have over the land such rights of access and other rights as may be reasonably necessary for the execution, construction and maintenance of the works or, as the case may be, the taking of the material; and the land shall be deemed to be subject to those rights whether or not they have been registered under the Registration of Titles Act.
>
> (3) An authorised undertaker executing public works on land under this section

shall promptly pay compensation to any person having an interest in the land for any damage caused to crops or buildings and for the land and materials taken or used for the works.

(4) Any dispute as to compensation payable under subsection (3) shall be referred to a land tribunal.

The controversy in the submissions of counsel was whether the compulsory acquisition of the plaintiff's property was made under section 42 of the Land Act which provides that the local government or the Government may acquire land in accordance with articles 26 and 237 (2) of the Constitution. Secondly, whether it falls under section 73 of the Land Act which provides for compensation by an authorised undertaker executing public works on land under this section. The resolution of the controversy is that sections 26 and 237 (2) (a) of the Constitution permits the Government or a local government, subject to the provisions of article 26 of the Constitution, to acquire land in the public interest and the conditions governing such acquisition shall be that prescribed by Parliament. On the other hand, section 73 of the Land Act deals with the execution of public works on any land by an authorised undertaker. An authorised undertaker who may require materials such as murram or stone while executing public works may engage in mutual agreement with the occupier or owner of the land in accordance with the Land Act. If such negotiations do not succeed, the Minister may compulsorily acquire the land in accordance with section 42 of the Land Act. Further, where an authorised undertaker takes stone or Murram or similar material from the land, the owner or occupier of land shall give to the undertaker such right of access and other rights as may be reasonably necessary for execution, construction and maintenance of the works or as the case may be for the taking of materials and the land shall be subject to those rights whether or not they have been registered. The authorised undertaker executing public works is required to promptly pay compensation to any person having an interest in the land for any damage caused to crops or buildings for the land and for the materials taken or used for the works.

The distinction between section 42 and 73 of the Land Act is that the compensation under section 73 (3) of the Land Act is not necessarily for the acquisition of land but for damages occasioned to crops or buildings and for

materials taken or used for the public works. On the other hand, where mutual negotiations fail, the Minister may compulsorily take over the land in which case it falls under articles 26 and 237 (2) (a) of the Constitution. The compensation provided for under section 73 (3) only applies where land has not been compulsorily acquired but damage has been caused to crops or buildings or materials taken from the land in the execution of public works on any land the authorised undertaker enters for purposes of executing public works. It is therefore a question of fact whether part of the land, the subject matter of the plaintiff's action was one where the executor of public works or authorised undertaker took out materials or destroyed crops or buildings without compensation under section 73 (3) of the Land Act or whether the land was actually compulsorily acquired pursuant to section 42 of the Land Act as well as articles 26 and 237 (2) of the Constitution. The middle issue is whether materials were taken out before compulsory acquisition of the land. Further, article 26 of the Constitution provides for prompt and adequate compensation prior to the compulsory acquisition of land by government or local authority. The controversy of fact will therefore be resolved in the resolution of ground 2 of the appeal.

As far as valuation of the land is concerned, the learned trial judge relied on certain valuation reports. The valuation reports which include exhibit P5 and P6 carried out by the Ministry of Energy and Mineral Development for compensation respect of plot 76 and the plot 77. The evidence on record includes exhibit P8 which is a valuation report by Lagoro Property Consultants entitled "Survey and Valuation Report on Plot 76 and Plot 77 Block 1 at Nora Village, Juma Parish, Kamdini Sub county, Oyam District". The instruction to the valuation surveyor was to inspect the plots referred to and advise on the current open market value for purposes of compensation. The valuation report categorised the subheadings of the valuation as the land, semi-permanent structures and crops. It came to a grand total of Uganda shillings 701,513,190/=. From the word go, the valuation is problematic because it purports to separate the semi-permanent structures from the land though the aggregate value of all items valued may be taken as compensation for loss of land. Either the structures are part of the land or not. However, for purposes of compensation, the rationale may have been to indicate what the plaintiffs were losing as a

consequence of the compulsory acquisition of the land. Compensation in that regard does not have to be on the basis of the bare value of the land only but on the loss. The date of inspection of the property was 24th of January 2014.

Exhibit P11 is another valuation report by Nyondo – Mugambe, Kyagulanyi David and Raymond Lubega. This is a valuation upon failure of negotiations with the officials of the GOU and disagreement on the government valuation exhibits P5 and P6 for purposes of compensation. The valuation included a reasonable and conservative figure to be attached to the rock resources of plot 77. The valuation report concluded *inter alia* that the rock materials of the 2 plots from which construction materials in the form of various products from rock and were assessed to be only economically possible to exploit from the area of plot 77 and that the rock in that area is of good quality and was already being used in the construction works. They found that the rock deposits conservative estimate would be about 658,039 tons. The valuation surveyors also assessed the potential value at current prices and found it to be a minimum of US$6,500,000 or Uganda shillings 16,000,000,000/=. They conclude that the rock could have been exploited for at least production of aggregates and possibly dimensional stone.

The controversy in this appeal relates to the separate valuation of rock apart from the agreed to compensation in ground 1 of the appeal. Issue number 2 from which ground 2 of the appeal emanates is an issue as to excavated or extracted stones that were used in construction. In fact, it dealt with whether the plaintiffs are entitled to the value of rock deposits on the suit properties which are excavated. The joint scheduling memorandum of the parties on record *inter alia* show that the plaintiffs are the registered proprietors of the suit property as joint tenants. On or around 2011/2012 the Ministry of energy and mineral development decided that the suit property among other properties should be the site for the new Karuma hydropower project. The government took over the suit properties from the plaintiffs and handed the same to the 2nd defendant Messrs Sino Hydro-Corporation Limited. Further it was agreed that there are rock deposits in the suit properties which the 2nd defendant is excavating and crashing into aggregates. This was for use in constructing the dam at Karuma. The plaintiffs had constructed dwelling houses on the suit properties and also

planted crops thereon such as oranges, bananas, portals, mangoes and pineapples. There were also natural wild trees that were growing on the suit property. This were removed by the officials of GOU without compensation to the plaintiffs and *inter alia* that the GOU denied the plaintiffs access to the fishponds by blocking the established access road to the fishponds. On the other hand, the 1st defendant (the GOU) as represented by the Attorney General indicated that through the relevant ministry assessed and established the compensation due to the plaintiffs in respect of the suit property which the plaintiff refused to accept. The issue framed inter alia was whether the plaintiffs are entitled to compensation for the rock deposits in the suit properties which are excavated, crushed, sold and/or used by the defendants for construction of the hydroelectric dam at Karuma. If so how much.

Issue number 2 as stated in the judgment of the learned trial judge is whether the plaintiffs are entitled to the value of the rock deposits of the suit properties which are excavated, crushed, sold and/or used by the defendant for construction of the hydroelectricity dam at Karuma. It is relevant that the plaintiffs averred that the government took over the suit property and handed it over to the 2nd defendant. It is after the government took over the suit properties that the excavation of rock commenced and continued at the time of filing the suit. The evidence of PW1 is that the land was taken over for purposes of constructing a dam in 2012. Further that the land had rocks, huge deposits of rocks that was mined by the contractors. Rocks were crashed into aggregates stones which were transported to the dam construction site. Further workers' quarters were constructed on the land and there were excavations and dumping of murram on the land. Negotiations were in force by August 2014 when there was an offer by the government pursuant to the valuation. The rest of the testimony deals with the damage to crops, other properties and the value of the rock deposits. PW2 Okello, John Livingston the consultant and the valuation surveyor of Lagoro Property Constructions testified about the valuation of plot 76 and 77 (the suit property). He noted that the valuation of the property showed that the total claim was Uganda shillings 701,513,190/=. PW3 David Kyagulanyi, a geologist also testified about plot 76 and 77 and his estimate of the rocks according to the tonnage was US$6,500,000. Subsequently the

court commissioned a joint valuation and the report of which is exhibited as D1.

DW1 Datta Gabriel testified that he visited plots 76 and 77, the site of the dispute and his valuation for the rock deposits is Uganda shillings 7,138,212,000/=

The learned trial judge found that by the time of filing the suit, the suit property had already been compulsorily acquired by the government. Secondly, on the principle of valuation, the learned trial judge held that the market value of the land is the basis upon which compensation ought to be premised. The market value denotes the price at which a willing vendor might be expected to obtain the property from a willing purchaser. Secondly, the learned trial judge on issue number 2 dealt with the issue of rock deposits and found that they had been valued by the geologist commissioned by both the plaintiff and the government and there is little dispute as to the valuation. In total the actual matter in controversy is whether it was erroneous to value the land separately from the rock deposits on the land. Finally, according to the respondent's counsel, the problem was that the government omitted rocks in the category of items to be compensated in their valuation report hence the suit. The learned trial judge agreed that rocks had been omitted when the value of the rocks was within the knowledge of the government when it carried out its valuation for purposes of compensation for the property. I would find that the narrower issue is whether it was erroneous to value rocks separately from the land and the answer to that is yes, it was erroneous to value land separately from the rock as defined above from the land. Rock just like sand and clay is part of the land. In assessing the value of the land, the rock, sand and clay whether it enhances or diminishes the value of the land should be taken into account.

The appellant's counsel relied on several authorities. Firstly, the appellants counsel relied on **Pyarali Abdul Esmail v Adrian Sibo; Constitutional Petition No 9 of 1997** for the proposition in the decision of Twinomujuni JA that the market value of the property in question is assessed at the time of judgment and is a reasonable measure of fair and adequate compensation under article 26 of the Constitution of the Republic of Uganda. Twinomujuni JA that

value depends on market forces and values rise and fall by market forces. He relied on **Webster's New 20th Century Dictionary of English Language 2nd Edition** definitions for the proposition that to compensate means to give equal value or to give the equivalent in value or to supply an equivalent.

Secondly, the appellants counsel relied on several authorities from the United States for the proposition that the courts in the United States of America have consistently rejected attempts by landowners to claim compensation for the value of deposits of rock and similar materials separately from the market value of the land on the ground that such components are components of the land (see **United States versus Miller; 317 U.S 369, 374 (1943)**.) Further in **United States versus land in the Dry Bed of Rosamond Lake; Cal. 143 F. Supp (S.D. Cal. 1956)** it was held that the existence of valuable mineral deposits in the land in question constitute an element which may be taken into consideration if it influences the market value of the land but there can be no recovery for both the value of the land and its mineral deposits as two separate items (see also **United States versus 179.26 acres of land in Douglas city; United States Court of Appeals, 10th circuit March 26, 1981 644F 2d 367.** (10th Cir. 1981) at page 9).

On the other hand, the respondents' counsel submitted that the United States authorities relied on by the appellant are not applicable to Uganda and are distinguishable in that none of them dealt with the issue of compensation for rock deposits. The cases were based on the United States legislation and do not apply to Uganda. He submitted that some of the cases cited dealt with mineral rights whereas rock deposits which form the subject matter of contention do not qualify as minerals under the Constitution of Uganda.

Having held that rock is part and parcel of land where it is found, it follows that the land, the subject matter of the suit ought to be valued as a complete whole. The value of the land should be the market value if it was to be sold. There are several alternative grounds for valuation of land. According to **Halsbury's laws of England 4th edition reissue volume 8 (1) paragraph 233**:

> The owner whose land is compulsorily acquired is entitled to compensation not less than the loss imposed on him but on the other hand no greater, since the purpose of compensation is to provide fair compensation for a claimant whose

land has been compulsorily taken from him. This is sometimes described as the principle of equivalence. Compensational purchase money is assessed upon the basis of the value of the land to the owner and in addition the owner is entitled to compensation for disturbance, for severance of his retained land for other injurious affection.

Further, in **Halsbury's laws of England** (supra) paragraph 234:

> The alternative basis for compensation is on the basis that the owner is entitled to the amount which the land if sold in the open market by a willing seller might be expected to realise, no allowance being made on account of the acquisition being compulsory and subject to specific assumption as to the valuation.

Further **Halsbury's laws of England** (supra) paragraph 278 market value means:

> In general. The market value is what will be paid by a willing purchaser to a willing seller in the market, and not the value which value things ought to be the market value. The invariable practice is however for the expert evidence of a value to be put before the land tribunal.

Last but not least it is further written that the owner is entitled to the amount which the land, if sold in the open market by a willing seller might be expected to realise.

In the **Toronto Sub Urban Railway Company versus Thomas H Everson Volume LIV 1917 Supreme Court of Canada page 395**; Duff J held at page 401 that the principle in the precedents (**Re Lucas and Chesterfield Gas and Water Board (1909) 1. K.B. 16**) is that:

> the owner receives for the land he gives up their equivalent, that is, that which they are worth to him in money. The property is therefore not diminished in amount but to that extent is "compulsorily changed in form."

The principles used for valuation which flow from the foregoing are as follows:

(a) The value of compensation should not be less than the loss imposed by the compulsory acquisition and not more. This includes loss of valuable items found on the land.

(b) It is assessed on the basis of the value of the land to the owner. I note that this includes the intended use by the owner and its potential.

(c) The other basis is what a willing seller is expected to realise upon a sale in the open market. This is the market value principle.

The authorities cited by the appellant's counsel are very persuasive for the proposition that land is valued as it is on the basis of its market value at the time of valuation. Secondly, the presence of minerals or other valuable items on the property may be a factor to be taken into account in assessing the value of the land. The presence of rock for purposes of quarry business of extracting stones for construction is a material factor. As to how enhances the value or diminishes the value of the land should be based on market forces. This is a question of evidence. It was not sufficient to estimate the tonnage of the rock that may be exploited from the site for purposes of valuation of the land. The valuation should be based on market forces. Imponderables such as the value of the intended use by the owner would have put it, is speculative and expert evidence may be the only way to assess the loss imposed by the compulsory acquisition.

Further, rock should not be valued separately from the land as it is part and parcel of the land. In the circumstances, it was erroneous to accept the valuation of the geologists based on the estimated tonnage of the rock that may be exploited or mined from the land. There are so many imponderables that can be considered if a willing buyer is willing to buy the property on the basis that he or she may profit from it, assessment of the value of the rock would be a disincentive in the market. The assessment is therefore on the basis of market forces reflected by the formula of a willing seller and a willing buyer. Another basis for valuation is the destruction of the property of the appellants and their replacement value as well as disturbance allowance. This included the crops, the semi-permanent houses and medicinal plants. These were valued and in addition a value was put on the land on the basis of market forces. Specifically put the value of the land at Uganda shillings 250,000,000/= together with the cost of our processing title at Uganda shillings 6,300,000/=. House and dwellings were valued as well as crops which could be compensated were valued. The total value of the land was assessed and the plaintiffs were paid a sum of Uganda shillings 813,078,140/= which sum is not in dispute and was paid. It was not an error to omit from the valuation report the estimated value of the tonnage of the rock that could be excavated or extracted from the land. Perhaps, the

valuation surveyor ought to have indicated that the value of the land included what was within the land such as sand (if any) or the rocks. That cannot be the subject matter of this appeal. The issue of extracted stones from rock cannot be assessed and was not the basis of the award in the trial court. In any case the time of compulsory acquisition is relevant and is presumed to be the time the GOU took over control and its agent started using the suit property which was before extraction of stones for construction. The GOU took the option of compulsory acquisition under section 42 of the Land Act Cap 227 and Article 237 of the Constitution and not the option of use and access to land for material for execution of public works by an authorised undertaker under section 73 of the Land Act. Further, the tort of breach of article 26 of the Constitution and inconveniences suffered by the plaintiffs can be conveniently considered in the award of general damages. The presumption is that the valuation of the land included everything that formed part of the land as at the time of its acquisition.

In the premises, ground 2 of the appeal has merit and is hereby allowed.

As far as grounds 5 and 6 are concerned, counsel submitted that the learned trial judge erred in law and fact to award the respondents general damages of Uganda shillings 1,000,000,000/= firstly because the respondents were joint owners and if the sum is apportioned among the joint owners it would be a disproportionate sum to their severable individual interests which would be higher than the market value of the suit property. In other words, the sum awarded as general damages was higher than the market value of the suit property. On the other hand, the respondents counsel supported the decision of the learned trial judge.

It should be noted that the learned trial judge disallowed punitive damages and therefore is presumed to have intended to award general damages which are compensatory in nature.

The award of general damages is generally an exercise of judicial discretion. The principle behind the award of general damages is that the plaintiff should be put in the same position he or she would have been at if the injury complained of had not occurred. It is the principle of *restitutio in integrum*. The basis for the award of general damages is that the GOU

violated the rights of the plaintiff under article 26 of the Constitution by failure to pay prompt and adequate compensation prior to the taking over of the suit property. Breach of statute is a tort that is actionable if one can prove damages suffered as a consequence. In **Dawson vs. Bingley Urban Council [1911] 2 KB 149,** Farwell L.J. at page 156 held that:

> "breach of a statutory duty created for the benefit of an individual or a class is a tortuous act, entitling anyone who suffers special advantages there from to recover such damages against the tortfeasor"

According to Kennedy L.J. at page 159 the proper remedy for breach of statute is an action for damages especially where the statute lays no rule for non-compliance or breach and in appropriate cases an action for injunction. The breach of article 26 and particularly the provisions relating to prompt and adequate compensation was a violation of a statutory provision made for the benefit of persons with property rights and it protected them against violation of that right. It commanded prompt and adequate compensation prior to compulsory acquisition of property. The rights of the plaintiffs were to receive the compensation prior to compulsory acquisition. The actionable breach or tort was not the compulsory acquisition of the property but the failure to pay fair and adequate compensation prior to the compulsory acquisition.

Article 26 of the Constitution provides that:

> 26. Protection from deprivation of property.
>
> (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 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

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

Article 26 of the Constitution allows the compulsory acquisition of property by the government for public use or in the interest of defence, public safety, public order, public morality or public health. It further provides that the compulsory taking of possession or acquisition of property should be made under a law which makes provision for prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property and it guarantees the right of access to a court of law by any person who has an interest or right over the property. In its context, the taking over compulsorily by the government has to be under a law which makes the necessary provisions for the payment of fair and adequate compensation prior to the taking over of possession or acquisition of the property. Secondly the law should provide for the right of access to a court of law by any person who has an interest or right over the property. Article 26 of the Constitution envisages a dispute after the compulsory acquisition of the property and gives a right of access to a court of law to any aggrieved person.

The biggest issue that generates controversy under article 26 of the Constitution is its provision for provision to be made under a law that provides for prompt payment of fair and adequate compensation prior to the taking of possession or acquisition of the property by the government. Obviously, if article 26 of the Constitution is not properly applied, it could generate disputes and delay in public works and become an impediment to the public interest. It is necessary for fair valuation of the property to be made under a law that provides for it prior to the taking over of possession or acquisition thereof and for budgets for public works to include the compensation payable to affected land users prior to taking over of possession or acquisition of the land.

The existing law at the time of promulgation of the Constitution of the

Republic of Uganda in October 1995 is The Land Acquisition Act cap 226. Generally, the existing law provides for declaration to be made by the Minister upon satisfaction under section 3 thereof that the land is required by the government for a public purpose whereupon a declaration is made by statutory instrument specifying the location of the land it relates to and the approximate area of the land. The copy of the declaration is served on the registered proprietor or owner and notice is given to persons having an interest. Further the law under section 5 of the Land Acquisition Act enables the government to receive representations about the nature of the interest of the persons affected in the land and particulars of the claim for compensation and objections if any to the plan the government has for utility of the land. Thereafter section 6 of the Land Acquisition Act allows an inquiry to be made giving particulars that are relevant for assessment of the value of the land and allowing the assessment officer to make an award giving the quantum of compensation. The law *inter alia* allows for payments to be made after the award and in the event of objections or disputes for appeals to be lodged against an award to the High Court and on application of the Attorney General an order may be made for payment into court as is appropriate.

Finally, as far as I find relevant, section 7 (1) of the Land Acquisition Act provides that:

> (1) Where a declaration has been published in respect of any land, the assessment officer shall take possession of the land as soon as he or she has made his or her award under section 6; except that he or she may take possession at any time after the publication of the declaration if the Minister certifies that it is in the public interest for him or her to do so.

The section is silent about the payment of the award but envisages taking over possession of the land after an award has been made by the assessment officer. The law has to be construed with the necessary modification to bring it into conformity with the Constitution of the Republic of Uganda 1995.

Article 274 of the Constitution provides that:

274. Existing law.

(1) Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.

(2) For the purposes of this article, the expression "existing law" means the written and unwritten law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or Statute or statutory instrument enacted or made before that date which is to come into force on or after that date.

If section 7 of the Land Acquisition Act is read in conformity with article 26 of the Constitution, it shall be construed to allow the taking over of possession or acquisition of land after the award and prior payment of compensation.

Article 26 of the Constitution of the Republic of Uganda is explicitly clear in that it allows compulsory acquisition or deprivation of property on certain conditions. These conditions relate to the compulsory taking over of possession or acquisition of property made under a law. As noted the law is the Land Acquisition Act. Secondly, the first condition for acquisition or possession as noted above is the prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property. Fair and adequate compensation for land that is compulsorily acquired may generate controversy and disputes may arise which may be resolved through a statutory mechanism under sections 3, 4, 5, 6 and 7 as well as sections 13, 14, 15 and 16 of the Land Acquisition Act. These provisions include *inter alia* an appellate system. Because the law allows the Attorney General to apply for the deposit of the funds assessed as fair compensation into court on such conditions as the court may deem appropriate, for the government to be in conformity with the law, it should demonstrate that it has taken the necessary steps under the law to pay the person whose property has been compulsorily acquired and that the government has in the very least, where payment prior to possession or

acquisition after the award is impossible for on any valid grounds, deposited the amount assessed as the award into court.

Land can only be acquired in the Public interest, in that it has to be article in terms of Article 26 (2) (a) of the Constitution, where the acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health. On the ground that it is acquired in public interest, it may be argued that it falls under one of the exceptions in article 43 (1) of the Constitution which allows limitation on the enjoyment of the fundamental rights and freedoms prescribed in the chapter on the bill of rights, as enjoyment of those rights are on the condition that they shall not prejudice the fundamental or other human rights and freedoms of others or the *public interest*. Construction of a hydroelectric power dam may be considered as done in the public interest. However, Article 26 of the Constitution not only allows land to be acquired in the Public Interest but also expressly provides for adequate and prior compensation in addition to that requirement. In other words, the limitation to the rights to prior payment of compensation may not be justified on grounds of public interest except on limited grounds where payment to the person whose land is acquired cannot be made on any valid basis such as a dispute as to ownership or any other ground. Where such a scenario arises, there may be impediment to public works which are budgeted for and which have time lines for implementation. The onus is on the Government to demonstrate that the taking over of the property without the person whose right is to receive compensation prior to taking over receiving the prior payment is justifiable not only in the public interest but also as acceptable in a free and democratic society in terms of Article 43 (2) (c) of the Constitution which allows for:

> (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 not the Attorney General's case that the failure to pay prompt and adequate compensation prior to taking over possession or acquisition of the

suit property was justifiable in a free and democratic society or is provided for in the Constitution. The Constitution provides for prior payment of compensation before compulsory acquisition. The law envisages that a dispute may arise pursuant to the assessment of the assessment officer prior to the taking over of possession which dispute may lead to an appeal to the High Court challenging the assessment among other possible outcomes.

In the circumstances, the respondents were not compensated prior to taking over of possession or acquisition of the suit property by the government. The Attorney General which represented the Ministry of Energy did not advance or demonstrate any justification why there should be a limitation to the rights of the respondents under article 26 of the Constitution to receive compensation prior to the compulsory acquisition and possession of their property. The tort of breach of article 26 of the Constitution was committed against the respondents as disclosed from the record for which an award of general damages may be made.

As far as quantum of general damages is concerned, the East African Court of Appeal in **Dharamshi vs. Karsan [1974] 1 EA 41** held that general damages are awarded to achieve *restitutio in integrum* which principle is that the Plaintiff has to be restored as nearly as possible to a position he or she would have been at, had the injury complained of not occurred. This principle is also explained in **Halsbury's laws of England Fourth Edition Reissue Vol 12** (1) paragraph 812 as being compensation for damages, usually but not exclusively non-pecuniary, which are not capable of precise quantification in monetary terms. They are presumed to be the natural or probable consequence of the wrong complained of with the result that the Plaintiff is required to only assert that such damage has been suffered. The quantum of general damages is arrived at on the principle explained by Lord Wilberforce in **Johnson and another v Agnew [1979] 1 All ER 883** at page 896 that the award compensatory and is that:

> "the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed."

The amended grounds of appeal which are now renumbered has grounds 5 and 6 (formerly 7 and 8) complain about the award of Uganda shillings 1,000,000,000/=. Granted, the inconvenience suffered by the plaintiffs cannot exceed the value of the land because they are entitled to prompt and adequate compensation. The grounds of appeal are reproduced for ease of reference:

5. The learned trial Judge erred in law and fact in awarding the Plaintiffs general damages of Shs. 1,000,000,000/=, in disregard of the fact that the Plaintiffs are joint owners of the acquired suit land, and he thereby awarded an inordinately exorbitant sum of damages which is greater than the market value of the said land.

6. The learned trial Judge erred in law and fact when he awarded general damages in the absence of the Plaintiffs proving the circumstances to justify the award.

There was no basis to say that the principle of restitutio in integrum which would place plaintiffs in so far as money can do so in the same position they would have been as if they had been paid promptly would be the sum of Uganda shillings 1,000,000,000/=. Having set aside the award of the High Court of **Uganda shilling 8,327,919,600/=** that award of **Uganda shillings 1,000,000,000/- as general damages** which is higher than the compensation award of the acquired land cannot stand. It is erroneous to award the above sum as general damages and ground 5 of the appeal (formerly ground 7 of the appeal) is hereby allowed. Having allowed ground 7 of the appeal (ground 5 of the amended grounds of appeal), ground 6 of the appeal (formerly ground 8 of the appeal) is partly allowed in that it faults the learned trial judge for awarding general damages in the absence of the proof or basis to do so.

It is not true that the plaintiffs did not give the basis for the award of general damages because they proved that there was no prompt and adequate compensation prior to taking over of the land from which time, they had no access to it. However, the plaintiffs did not lead evidence to justify the quantum. In the premises, ground 5 is allowed and ground 6 partially

allowed. The judgment of the High Court as awarding the sum of Uganda shillings 1,000,000, 000/= is hereby set aside. The order finding the appellant liable to pay general damages is however not set aside.

Exercising the powers of this court under section 11 of the Judicature Act, I would award the plaintiffs 25% of the amount valued as compensation as the general damages for breach of the rights of the plaintiffs enshrined in article 26 of the Constitution of the Republic of Uganda and for inconveniences suffered by the plaintiffs who were kept out of their property forcefully before compensation. I would on the basis award a sum of Uganda shillings 203,269,535/= as general damages. The award of general damages carries interest at the rate of 8% per annum from the date of the judgment of the High Court till payment in full. The judgment of the High Court is modified by this judgment.

The Attorney Generals appeal substantially succeeded in that a sum of **Uganda shilling 8,327,919,600/=** awarded as the value of rock and the award of **Uganda shillings 1,000,000,000/-** as general damages were set aside. Instead this court reduced general damages by over 76%. To award costs to the Attorney General on the basis of the colossal sums set aside would work injustice against the respondents who were entitled to prompt and adequate compensation prior to compulsory acquisition of their land. In the premises I would order that each party would bear its own costs.

As my learned sister Hon. Lady Justice Irene Mulyagonja, JA agrees and Hon. Lady Justice Monica Mugenyi, JA agrees on some points except on some issues as reflected in her separate judgment, the appeal substantially succeeds on the following terms:

1. The sum of **Uganda shilling 8,327,919,600/=** awarded as the value of rock by the High Court is hereby set aside.

2. The award of General damages in the sum of **Uganda shillings 1,000,000,000/-** is hereby set aside and substituted with a sum of Uganda shillings 203,269,535/= as general damages payable to the respondents.

3. The appeal substantially succeeds with each party to bear its own costs.

Dated at Kampala the 11th day of Jan 2022

Christopher Madrama

Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
Coram: Madrama, Mulyagonja & Mugenyi, JJA
CIVIL APPEAL NO. 144 OF 2018

BETWEEN

ATTORNEY GENERAL :::::::::::::::::::::::::::::::: **APPELLANT**

AND

1. ETOT PETER PAUL
2. OKELLO DEO
3. KIDEN SANTA
4. OMARA JOHN PAUL
5. CHIRA FRANCIS
6. OTIM ISAAC
7. ETOT STEVEN
8. ELWA ALBERT
9. RUTH ETOT

:::::::::::::::::: **RESPONDENTS**

(Appeal from the decision of Mr. Justice Andrew K. Bashaijja dated 15th September 2017, High Court Civil Suit No. 252 of 2015)

JUDGMENT OF IRENE ESTHER MULYAGONJA, JA

I have had the benefit of reading in draft the judgment of my learned brother Christopher Madrama, JA. I entirely agree with his findings and the conclusion that this appeal should partially succeed.

However, I have deemed it useful to add to the justification for the award of general damages in the quantum that he proposed, because of what I consider to be a gap present in the Land Acquisition Act that leads to may suits being filed in the courts seeking to enforce awards for compensation, similar to the respondents' suit in the trial court.

The principles that have been established by the courts in this land and elsewhere for the award of general damages were clearly laid down in the judgment of Madrama, JA. But it is my view that it needs to be emphasised that Article 26 (2) of our Constitution, in part, provides that,

> **(2) No person shall be compulsorily deprived of 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;***
>
> **(ii) ...**

Section 7 of the Land Acquisition Act provides for the taking of possession of land which has been compulsorily acquired in the following terms:

> **"(1) Where a declaration has been published in respect of any land, the assessment officer shall take possession of the land as soon as he or she has made his or her award under section 6; except that he or she may take possession at any time after the publication of the declaration if the Minister certifies that it is in the public interest for him or her to do so.**
>
> **(2) Where the assessment officer takes possession of land under subsection (1)—**
>
> **(a) the land shall immediately, by the operation of this Act, vest in the Land Commission free from all encumbrances; and**
>
> ***(b) the estate and interest of every person having an interest in the land immediately before the land so vested shall be deemed to have been converted into a claim for compensation under this Act.***

Ikon.

(3) ..."

In addition, section 15 of the same Act enables the assessment officer to use legal means to enforce possession of the land so acquired as follows:

> **"15. Enforcement of right to possession.**
>
> **(1) If the assessment officer or the appointed officer is opposed or impeded in taking possession of land in pursuance of this Act, he or she may apply ex parte to a magistrate grade I for relief.**
>
> **(2) If on an application made under subsection (1) the magistrate is satisfied that the assessment officer or the appointed officer, as the case may be, is entitled under this Act to take possession of the land to which the application relates, he or she shall make a declaration to that effect in whatever form he or she considers appropriate; *and any declaration so made may be enforced as if it were a decree of a magistrate's court made in the exercise of its civil jurisdiction."***

By virtue of this law therefore, the owner's right to property is transferred to the Uganda Land Commission and s(he) is left standing with a piece of paper that entitles him to demand for compensation for the value of the land. That is all very well because it complies with part of Article 26 (b) of the Constitution, in that s(he) has been deprived of the land with the hope that they will be compensated.

However, the same provision also means that without being heard, the land owner may be the subject of a decree of a civil nature pursuant to which (s)he can be evicted from the land prior to the receipt of compensation for his/her loss.

With regard to the entrenchment of the right to prompt compensation in our Constitution, section 41 of the Land Act which set up the Land Fund does not provide for compensation for land that is compulsorily acquired by Government under the Land Acquisition Act. However, the Land Act in section 41 (6) (a) and (b), provides that,

(6) Notwithstanding any provisions to the contrary in the Land Acquisition Act—

(a) any compulsory acquisition of land for purposes of implementing subsection (4)(b) shall be at a fair market valuation assessed on a willing seller willing buyer basis;

(b) *no person from whom land is to be acquired under this section shall be required to vacate that land until he or she has received the compensation awarded to, or agreed to, by him or her;*

Section 41 (4)(b) of the same Act specifically provides that government may use monies from the Land Fund to purchase or acquire registered land to enable tenants by occupancy to acquire registrable interests pursuant to the provisions of the Constitution of the Republic of Uganda. On the other hand, there appears to be no designated fund for compensation of persons whose land is compulsorily acquired under the Land Acquisition Act. If there is such a fund, it then seems that it takes a long time for persons whose land is compulsorily acquired to benefit from it, in spite of the involuntary measures that are taken to dispossess them of their land. A land owner with a court order for compensation in respect of such land therefore stands a better chance to receive it than other claimants, but it has a minimal effect on the promptness of payment of compensation by the Government.

In the case now before us, Isaac Otim Etot, the first respondent, testified that after the respondents' land was compulsorily acquired and occupied by the contractor, Sino Hydro Corporation Ltd., that company began to build the dam at Karuma. That in the process the contractor constructed worker's quarters on the respondent's land that was not gazetted and there were excavations and dumping of marram on the same ungazetted land. The contractor or her employees also planted crops and vegetables and the land was inaccessible to the owners, except with permission, for it was under the guard of security persons.

The witness explained that the gazetted land was about 25 acres, where 6 acres was outside the gazetted area but was inaccessible. He prayed that court orders that they are granted access to the 6 acres, part of which fell within Plots 76 and 77, the land that was compulsorily acquired. He further prayed for an award of damages.

The appellant's witness did not rebut the testimony of Mr Etot Paul. As a result of that the trial judge found that the respondents were entitled to recovery of the land that was neither gazetted nor compulsorily acquired for the project. He therefore ordered that the Registrar of Titles issues residue titles to the respondents in respect of parcels of land in Plot 76 and 77 not taken over by Government or affected by the construction of the Karuma Dam.

The trial judge found that the respondents proved the claim for damages for pain and suffering because they were prevented from using their land and compensation was not paid at all. He thus awarded a figure of UGX 1,000,000,000/= as general damages against the appellant, and disallowed the claim for UGX 500,000,000/= as punitive damages. The quantum of damages was found to be exceptionally high and unjustified in the lead judgement of my brother Madrama, JA, and I agree with his decision.

For the reasons given above, I find that in principle, the trial judge correctly granted the appellants general damages and that the amount of UGX 203,469,535 proposed by Madrama, JA., as such is sufficient to recompense them for their suffering as a result of delayed compensation. Damages are also very much in order because the respondents' rights were denigrated contrary to the mandatory provisions of the Constitution that compensation for the taking of their

land should be prompt, as well as for lack of access to the portions of land which were not compulsorily acquired by government.

In the end result, I agree that this appeal should partially succeed and that each of the parties bears their own costs.

Dated at Kampala this 11th day of Jan 2022.

Irene Mulyagonja

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: MADRAMA, MULYAGONJA AND MUGENYI, JJA

CIVIL APPEAL NO. 144 OF 2018

BETWEEN

ATTORNEY GENERAL ..... APPELLANT

AND

1. **ETOT PAUL PETER**
2. **OKELLO DEO**
3. **KIDEN SANTA**
4. **OMARA JOHN PAUL**
5. **CHIRA FRANCIS**
6. **OTIM ISAAC**
7. **ETOT STEVEN**
8. **ELWA ALBERT**
9. **RUTH ETOT ..... RESPONDENTS**

(Appeal from the Judgment of the High Court of Uganda (Bashaija, J) in Civil Suit No. 252 of 2015)

JUDGMENT OF MONICA K. MUGENYI, JA

A. Introduction

1. I have had the benefit of reading in draft the lead Judgment of my brother, Hon. Justice Christopher Madrama, JA. I am in agreement with his conclusions on *Ground 2, 5* and *6* of the Appeal but consider it necessary to highlight my reasons therefor. I do, however, respectfully depart from his conclusions on *Grounds 7* and *8* of the Appeal and would therefore interrogate those grounds of appeal further from the viewpoint of the intricacies of public construction works in Uganda.

2. The factual background to the Appeal, as well as the summation of the parties' respective cases and court representations are well articulated in the lead judgment, and shall not be reproduced herein. For parity, it will suffice to observe that whereas the Appeal was originally premised on nine grounds of appeal, an Amended Memorandum that was lodged in the Court on 22nd September 2021 abandoned *Grounds 3* and *4* thereof while *Ground 1* of the Appeal was conceded by the Respondents in submissions.

3. Having been so conceded by the Respondents, *Ground 1* of the Appeal shall not be considered on its merits and is hereby resolved in the affirmative. It is the conclusion, therefore, that the trial judge did err in law and fact in awarding the sum of Ushs. 1,204,063,640/= as compensation for the (suit) land and all the properties thereon which were taken over or destroyed during the acquisition by Government, which sum was not pleaded by the Respondents and is in excess of the total compensation sum of Ushs. 701,513,190 which was claimed in the Respondents' professional valuation report.

4. That being so, the following grounds of appeal remain for the Court's determination.

    (1) .....

    (2) The learned trial judge erred in law and fact in holding that compensation is payable for rock deposits on land and that rocks are compensated separately from the value of such land, while at the same time also holding that rocks are part of land.

    (3) .....

(4) .....

(5) The learned trial judge erred in law and fact in awarding the plaintiffs the sum of Shs. 8,327,919,600/= as the price of the rock deposits on the plaintiffs' two plots, in addition to the award of compensation for the plaintiffs' said land.

(6) The learned trial judge erred in law and fact in awarding the sum of Shs. 8,327,919,600/= as compensation for rock deposits in the suit land, which figure was based on speculation and conjecture, and in the absence of any evidence that the plaintiffs were engaged in the business of rock exploitation, extraction or quarrying on the said land.

(7) The learned trial judge erred in law and fact in awarding the plaintiffs general damages of Shs. 1,000,000,000/=, in disregard of the fact that the plaintiffs are joint owners of the acquired suit land, and he thereby awarded an inordinately exorbitant sum of damages which is greater than the market value of the said land.

(8) The learned trial judge erred in law and fact when he awarded general damages in the absence of the plaintiffs proving the circumstances to justify the award.

(9) The learned trial judge erred in law and fact in finding the 2nd defendant jointly liable for the suit claims, in disregard of the parties' pleadings and evidence which showed that the plaintiffs' suit land was compulsorily acquired by the Government for construction of the Karuma dam project, that the Ministry of Energy and Mineral Development was responsible for paying compensation for the acquired land, and that the 2nd (defendant) was a contractor employed by the Government to construct the dam.

B. **Determination**

5. This is a First Appeal against the judgment and orders of the High Court in **Civil Suit No. 252 of 2015**. The Office of the Attorney General ('the Appellant') contests, both on the principle and quantum, the trial court's award of separate compensation for rock deposits found on land comprised in FRV 1169 folios 22 and 23, plots 76 and 77 respectively ('the suit land'). The same party does also challenge the basis of the trial court's award of Ushs. 1,000,000,000/= as general damages, as well as its finding of joint liability in respect of both the present Appellant and a contractor retained by the Government of Uganda to effect construction works on the suit land.

6. The duty of a first appellate court has been enumerated in a litany of precedents to basically entail the re-evaluation of the evidence and applicable law with a view to arriving at its own conclusions as to the astuteness of the trial court's decision on the matters in controversy between the parties. See **Banco Arab Espanol v Bank of Uganda, Civil Appeal No. 8 of 1998** (Supreme Court), **Narsesio Begumisa & Others v Eric Tibegaga, Civil Appeal No. 17 of 2002** (Supreme Court) and **Peters v Sunday Post Limited (1958) 1 EA 424**. My consideration of the present Appeal shall be on the basis of the categorisation of grounds of appeal highlighted earlier in this judgment.

Grounds 2, 5 and 6: *The learned trial Judge erred in law and fact in holding that compensation is payable for rock deposits on land and that rocks are compensated separately from the value of such land, while at the same time also holding that rocks are part of land; and awarding the plaintiffs Shs. 8,327,919,600/= as the price of the rock deposits on the suit land, in addition to the award of compensation therefor, as well as awarding the same amount as compensation for rock deposits in the suit land, which figure was based on speculation and conjecture, and in the absence of any evidence that the plaintiffs were engaged in the business of rock exploitation, extraction or quarrying on the said land.*

7. In a nutshell, the Appellant challenges the separate award of compensation in respect of the suit land *per se*, as well as the rock deposits thereon and questions the basis for the monetary sum awarded in that regard for not being backed by proof. The impugned trial court decision on this issue reads as follows:

> *It is noted that while counsel correctly restated the definition of 'land' and the correctly cited provisions of the Constitution, with greatest respect, he arrived at erroneous conclusions that compensation would not be payable for rocks on the plaintiffs' land. Contrary to counsel's submissions, rocks are not included in definition of 'minerals' in the Constitution so as to put them out of reach of the owners of the land. In fact, Article 244(5) of the Constitution clearly provides as follows;*
>
> > ***'...mineral' does not include clay, murram, sand or any stone commonly used for building or similar purposes.'***

Therefore, the rocks on the plaintiffs' land fit within the provision of Article 244(5) (supra) which excludes any stones commonly used for building or similar purposes. Currently, the rocks are being crushed by the contractor and the aggregates are being used for the construction of the dam. Secondly, and most importantly, under Article 237(1) (supra) land belongs to the citizen of Uganda. Section 2 of the Mining Act must therefore be read together with Article 244(5) (supra). In this particular case, the overriding law is the Constitution and as such the position to be taken by court is that rocks are stones commonly used for building or similar purposes and are excluded from the definition of 'minerals'. Therefore, compensation would be payable for rock deposits on land belonging to land owners. Thirdly, in both reports, the geologists from both sides agree on the existence of rock deposits on the plaintiffs' land. ... According to the valuation reports of the Ministry of Energy & Mineral Development, Exhibits P5 and P6, Government listed the following categories of items for compensation: Category 1, land; Category 2, housing or dwelling houses, Category 3, compensatable crops. The report deliberately omits rocks from the category of items for compensation even when the Government was acutely alive or ought to have known or been advised that rocks are part of land. ... The argument that the value of exploited rocks should not be separated from the value of the land would only hold if the Ministry of Energy & Mineral Development has included the value of rocks in its valuation reports/ notices.

8. The Appellant invoked sections 41 and 77 of the Land Act, Cap. 227, as the law applicable to compensation payable for the compulsory acquisition of land in Uganda, opining that the trial court's compensatory award to the Respondents under the conceded *Ground 1* of the Appeal duly complied with section 77 of the Act. The assertion here being that in so far as that legal provision makes no provision for the compensation of rock deposits, the compensation due to the Respondents would be the sum of Ushs. 813,078,146/= that was awarded to them by the trial court, and has since been duly paid by the Appellant. To augment this position, learned Counsel for the Appellant cited numerous definitions of land that would support the notion that rock or rock deposits are part of land and should not be compensated separately, as the trial court sought to do. I shall recite but a few. *Black's Law Dictionary, 9th Edition* defines land as '**immoveable and indestructible three dimensional area consisting of a portion of the earth's surface, the space above and below the surface and anything growing on or affixed on it.**'[1] Section 2 of the Registration of Titles Act (RTA), Cap. 205 defines

[1] Re-echoes the same definition in *Black's Law Dictionary, 8th Edition, p. 892*.

land to include '**messuages, tenements and hereditaments corporal and incorporeal**'; corporeal hereditaments being in turn defined in *Gray, Kevin, 'Elements of Land Law', 2nd Edition* to include '**not merely the physical clods of earth which make up the surface layer of land, but also all physical things which are attached to or are inherent in the ground. Thus the term 'corporeal hereditaments' comprehends such things as buildings, trees and subjacent minerals. ... Thus substances ranging from stone and mineral ores to gravel, sand and china clay comprise 'land' for legal purposes**.'

9. In addition, it is the Appellant's contention that the ownership of or other interests in land would be subject to other provisions of written laws that place limitations on the land proprietors' enjoyment of their interest in land. Thus, in so far as Article 244(1) of the Constitution vests the legal interest in minerals in the State, any proprietorship of the land where they are to be found would be subject to that constitutional provision. Similarly, section 77 of the Land Act dictates that buildings and crops that would ordinarily form part of the land are nonetheless compensated separately from the land on which they are found.

10. The Court was referred to judicial precedents from the United States of America (USA) that quite compellingly address the question of valuation of mineral, stone and other deposits on acquired land. The authorities underscore the principle that whereas the presence of valuable mineral deposits on private land that is acquired for public use is an element that may be take into account to the extent that it influences the market value of the land, nonetheless there can be no compensation for *both* the value of the land and its mineral deposits as two separate items. *See* ***United States v Land in Dry Bed of Rosamund Lake, Cal., 143 F. Supp 314 (S.D. Cal. 1956)***. In those circumstances (where stone or mineral deposits could have a bearing on the market value of the land), evidence as to the extent of those deposits would be required. Thus, it was held as follows in **Iske v Omaha Public Power District; 178 N.W.2d 633 (1970)**:

> The quality and quantity of the rock which may be quarried, or the sand and gravel which may be profitably removed from the land being condemned, are admissible to show that they are sufficient for and adaptable to commercial development. If so, they

will have an effect on the market value of the lands. However, the market value of the property is the value of the land with the materials in place and not the value of the materials if they were removed.

11. With regard to the computation of the market value of such land, in the latter case of **U. S v 179.26 Acres of Land in Douglas City; United States Court of Appeal, Tenth Circuit Mar 26 1981 644 F. 2d 367 (10th Cir. 1981)** it was categorically held:

> The value of the mineral deposit is to be considered only to the extent to which it goes into and affects the over-all market value of the property. And it is generally not permissible to determine the value of a mineral deposit by estimating the number of tons in place and then multiplying the tonnage by a unit price per ton.

12. That decision re-echoes the position advanced in **United States v 13.40 Acres of Land in City of Richmond, 56 F. Supp. 535 (N.D Cal. 1944)** where separate valuation of timber or rock attached to land, or valuations premised on the multiplication of rock or timber coverage with unit prices were discounted for being speculative in the following terms:

> Fixing just compensation for land by multiplying the number of cubic feet or yards or tons by a given price per unit has met with almost uniform disapproval of the courts. This is true because such valuation involves all the unknown and uncertain elements which enter into the operation of the business of producing and marketing the product. ... To the extent the valuation fixed by any witness contains this speculative element, to the same extent is its value as evidence reduced.

13. As quite rightly proposed by learned Counsel for the Respondents, the foregoing precedent are only persuasive. However, in the absence of a specific law that would negate their applicability and for as long as they do not violate Ugandan public policy, persuasive judicial precedents can be adopted by national courts and would thereby constitute the case law of that country. It is in that context that I will address the applicability of the cited case law to Ugandan courts.

14. First and foremost, the definition of corporeal hereditaments in *Gray, Kevin, 'Elements of Land Law'* (supra) to include '**all physical things which are attached to or are inherent in the ground**', as well as the inclusion of such corporeal hereditaments in the definition of land in section 2 of the RTA, would lend credence

to the US courts' approach on the unitary computation of land compensation in the Ugandan context. On that premise, there would be no legal basis for a separate valuation of rocks and other mineral deposits from the land on which they are found.

15. The US position does, nonetheless, propose that rock and mineral deposits may be taken into account in arriving at the valuation of the land. See **United States v Land in Dry Bed of Rosamund Lake** (supra). That position would, however, be subject to applicable Ugandan law. Section 77 of the Land Act is instructive on the computation of such compensation in Uganda. Where (as in the present case) the land in question is not held under customary tenure, section 77(1)(b) recommends the open market value for buildings on land in urban areas and depreciated replacement cost of the buildings for land in rural areas. In addition, section 77(1)(c) recommends due consideration of standing crops on the land except annual crops. More importantly, for present purposes, no mention whatsoever is made of rock deposits or rock as items that should be specifically taken into account in the computation of compensation arising from compulsory land acquisition. Therefore, not only does comparable international practice discount the separate computation and compensation of rock deposits found on compulsorily acquired land, under section 77 of the Land Act such deposits do not have to be taken into account in any valuation of land where they are found.

16. Consequently, it seems to me that Ugandan courts are not obliged to take into account rock deposits in computing compensation for land. They may take into account the presence of valuable mineral deposits to the extent that they influence the market value of the land (depending on the commercial viability of the deposits), but there can be no separate compensation for the value of the land and its mineral deposits as two separate items. Certainly, faced with the existence on our statute books of a legal provision that could have but does not include rock deposits among the items on land that may be taken into account for compensation purposes, I am unable to abide the decision in the Canadian case of **Alistair Fraser v Her Majesty the Queen (1963) SCR 455** (to which the Court was referred by learned Respondent Counsel) where compensation was awarded for the market value of a rock on compulsorily acquired land. In any event, as quite rightly opined by learned

Counsel for the Appellant, the land in that case had been specifically acquired for the purposes of stone quarrying quite apart from the present circumstances where the suit land was acquired for dam construction. There is no evidence on the record to suggest that the choice of the suit land by the Government of Uganda was informed by the quantity and quality of rock deposits thereon.

17. I am mindful of a long-standing principle in many jurisdictions that compensation should be informed by the objectives of 'equity' and 'equivalence' whereby the adequacy of compensation is measured against the goal of ensuring that the citizenry is neither impoverished nor unjustly enriched. See *Keith, S; McAuslan, P; Knight, R; Lindsay, P; Munro-Faure, P and Palmer, D, 'Compulsory Acquisition of Land and Compensation', FAO Land Tenure Series, 2008* and **Patrick Musimba v National Land Commission & 4 Others (2016) eKLR**. Thus, in *Lindsay, Jonathan Mills*[2], *'Compulsory Acquisition of Land and Compensation in Infrastructure Projects', PPP Insights, Vol. 1, Issue 3, 2012, p.7* it was opined:

> A common legislative approach is to define market value as the amount a willing buyer would pay a willing seller on the open market where some choice exists. There are several reasons this calculation might be difficult to make in a given setting (particularly when it comes to land values as opposed to other non-land assets). In some areas, formal land markets may be non-existent or extremely thin, especially in rural areas. ..... In some cases, active informal markets may exist that, if studied, could in theory reveal what land is selling for in the area, but governments are generally reluctant to acknowledge officially the existence of such markets. And even where formal land markets may exist, the absence of an established, independent valuation profession and the tendency of buyers and sellers to understate prices in order to minimize taxation can conspire to make the ascertainment of market value very difficult.

18. The limitations of the market value approach notwithstanding, it seems to me that even where stone or mineral deposits could have a bearing on the market value of the acquired land, the appropriate valuation would depend on available evidence as to the extent of those deposits; and the quality and quantity of rock that may be quarried (or the sand and gravel that may be profitably removed from the land) in order to assess their commercial viability. If they are sufficient for and adaptable

[2] Then Senior Counsel, Environmental and International Law, Legal Vice Presidency, World Bank.

to commercial development, they would have an effect on the market value of the land. *See* ***Iske v Omaha Public Power District*** *(supra)*. As was compellingly held in **U. S v 179.26 Acres of Land in Douglas City** (supra), '**the value of the mineral deposit is to be considered only to the extent to which it goes into and affects the over-all market value of the property**.'

19. In the matter before the Court presently, not only did the trial court venture beyond the confines of section 77 of the Land Act in taking account of matters not enlisted therein, it did so without sufficient evidence that the quality and quantity of rock deposits on the suit land warranted such recourse. In any case, I take the view that documented and tested practice on compensation in such eminent domain matters rightly points to the contrary. With the greatest respect, therefore, and in complete agreement with the lead judgment, I find that the trial court erred in awarding separate compensation for the value of the suit land and the rock deposits thereon. I would therefore allow *Grounds 2, 5* and *6* of this Appeal.

Grounds 7 and 8: *The learned trial Judge erred in law and fact in awarding the plaintiffs general damages of Shs. 1,000,000,000/=, in disregard of the fact that the plaintiffs are joint owners of the acquired suit land, and he thereby awarded an inordinately exorbitant sum of damages which is greater than the market value of the said land, and in awarding general damages in the absence of the plaintiffs proving the circumstances to justify the award.*

20. Learned Counsel for the Appellant faults the trial court for awarding a sum of general damages that was disproportionate to the market value of the suit land, which market value in her view was Ushs. 813,078,140/=. In her judgment, the learned trial judge disregarded established principles governing the award of damages. On the authority of **Annet Zimbiha vs Attorney General, Civil Suit No. 109 of 2011** (High Court), she cited the value of a suit's subject matter, economic inconvenience and the nature and extent of the breach as due considerations for the award of damages. Finally, learned Counsel faults the trial court for disregarding the fact that the suit land had been acquired in public interest therefore no general damages should have been awarded, questioning its reliance

on allegations by the Respondents that they were denied use of the property for six years yet the evidence purportedly bespoke to the contrary. In her view, the evidence on record was that in 2014 when offered Ushs. 703,389,747/= by the Government in compensation, the Respondents had rejected the offer and opted for court action hence delaying the payment of compensation on account of the protracted negotiations that ensued between the parties.

21. Conversely, it is argued for the Respondents that the trial court rightly made an award of general damages for the pain and suffering experienced by the Respondents for the six-year-period they had been deprived of the use of their land and their crops and construction thereon destroyed following its acquisition by the State without prompt compensate therefor. It is opined that the Respondents only obtained partial compensation of Ushs. 813,078,140/= following court intervention but were, nonetheless, denied access to the land by security operatives deployed on the suit land. Learned Counsel for the Respondents argued that the Appellant flouted section 73 of the Land Act by its occupation and utilisation of the suit land without prior compensation to the Respondents. For ease of reference, the cited section is reproduced below.

> **(1) Where it is necessary to execute public works on any land, an authorised undertaker shall enter into mutual agreement with the occupier or owner of the land in accordance with this Act; and where no agreement is reached, the Minister may, compulsorily acquire land in accordance with section 42.**
>
> **(2) Where under subsection (1), an authorised undertaker executes public works upon or takes stone, murram or similar material from the land, the authorised undertaker shall have over the land such rights of access and other rights as may be reasonably necessary for the execution, construction and maintenance of the works or, as the case maybe, the taking of the material; and the land shall be deemed to be subject to those rights whether or not they have been registered under the Registration of Titles Act.**
>
> **(3) An authorised undertaker executing public works on land under this section shall promptly pay compensation to any person having an interest in the land for any damage caused to crops or buildings and for the land and materials taken or used for the works.**

22. With respect, I am constrained to observe from the onset that the compensatory obligations encapsulated in section 73 pertain to 'an authorised undertaker', which may not necessarily correspond to the Appellant. Section 1(c) of the Act defines such authorised undertaker as '**a person or authority authorised or required by law to execute public works**.' Whereas some government entities such as the Uganda National Roads Authority (UNRA) are indeed authorised to execute public works, the Government is not always liable for their actions. In the instant case, there is no evidence on record to suggest that the Appellant would have been liable for the acts or omissions of the authorised undertaker in respect of the Karuma Dam Project. On the contrary, paragraph 3 of the Plaint clearly indicates the second defendant, Sino Hydro Corporation Limited, as the contractor responsible for the construction of the dam. In that case, as is typical of construction contracts, the contractor would be the authorised undertaker within the meaning of section 1(c) of the Land Act while the Government of Uganda (represented by the Appellant) is the client or employer. See *Bowmans: A Guide to Construction Contracts, p. 5.* In fact, in paragraph 16(d) of the Plaint the remedy sought by the Respondents in relation to quarrying activities on the suit land was specifically addressed to that defendant and not the Appellant. I would therefore disallow the argument by the Respondents that the Appellant flouted section 73 of the Land Act.

23. Be that as it may, the Respondents' contestations above do raise the question of the promptness of compensation paid to land owners. That element of the compensation process is illuminated in Article 26(2)(b), which requires compulsory land acquisition to take place within the confines of a law that *inter alia* makes provision for the prompt payment of adequate compensation. For ease of reference, Article 26(2) is reproduced in its entirety below.

> Article 26(2)
>
> **(1)** .....
>
> **(2) No person shall be compulsorily derived of 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 the 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.**

24. The land acquisition and compensation process in Uganda is delineated in the Land Acquisition Act, Cap. 226 (as amended). In broad terms the process is such that once the responsible Minister identifies land required by the Government for a public purpose, s/he will make a declaration to that effect by statutory instrument, with due notice to persons with an interest in the land.[3] Section 6 of the Act then provides for an inquiry into claims and objections made in respect of the land sought to be acquired and an award in respect thereof,[4] which would form the basis of the compensation payable by the Government.[5] Of particular significance to the present Appeal is the proviso to section 7(1) of the Land Acquisition Act, which mandates the Government to take possession of the property sought to be acquired immediately upon making the declaration identifying it as suitable for public purpose if the responsible Minister certifies that it is '*in the public interest.*' Such possession would legally transpire prior to the conclusion of an assessment of compensation under section 6(4)(b) of the Act. For ease of reference, section 7(1) of the Land Acquisition Act is reproduced below.

> **Where a declaration has been published in respect of any land, the assessment officer shall take possession of the land as soon as he or she has made his or her award under section 6, except that he or she may take possession at any time after the publication of the declaration if the Minister certifies that it is in the public interest for him or her to do so.**

[3] Sections 3 and 5 of the Land Acquisition Act.
[4] Section 6(1) of the Act.
[5] Section 6(4)(b) of the Act.

25. The trial judge in this case did make a finding that '*as at the time of filing the suit, Government had already acquired and taken over the suit land and handed it over to the Chinese contractor for purposes of the construction of the Karuma Dam.*' I might add that whereas the Respondents were the joint registered proprietors of two pieces of land at Nora Kamdini and Juma Kamdini, Oyam district measuring 15.054 hectares in total, the suit land measured 8.109 hectares, 3.705 hectares of which was compulsorily acquired by the State leaving 4.404 hectares unacquired but occupied by agents of the State. Having found that there is legal provision in section 7(1) of the Land Acquisition Act for the immediate possession of property identified for acquisition, pending completion of the compensation process, I am respectfully unable to abide the proposition that there was a breach of statute in this case. In my view, until section 7 of the Land Acquisition Act has been struck down by a court of competent jurisdiction, it remains on the statute books. Furthermore, I am mindful of the rationale behind section 7 of the Land Acquisition Act, which arguably is to avert the possibility of public development projects being stalled indefinitely as affected persons engage in drawn out contestations with regard to their compensation.

26. The Land Acquisition Act (as amended) was enacted by the Parliament of Uganda by dint of Articles 26(2)(b) and 237(2)(a) of the Constitution. The duty upon the Legislature under Article 26(2)(b)(i) was to enact a law that *inter alia* '**makes provision for prompt payment of fair and adequate compensation prior to the taking of possession or acquisition of the property**.' In my view, section 7(1) of the Land Acquisition seeks to address the general terms of that constitutional requirement when, in mandatory terms, it provides for an assessment officer (who would be an agent of the Government) to only take possession of the land sought to be acquired upon his/ her making a compensation award under section 6 of the Act. Certainly, that law could have been more explicit on the State effecting payment (as opposed to an award) prior to taking possession of land sought to be acquired as a matter of course, such prompt payment of compensation being the ideal. However, in my judgment, that ideal should be balanced with the dictates of public interest.

27. Drawn out compensation processes tend to disadvantage all parties to a land acquisition in terms of delayed compensation to land owners and a delayed public project for a country and its citizenry. Thus, the need for detailed procedures in the Land Acquisition Act that address the right of land owners to prompt and adequate compensation prior to deprivation of their land, while at the same time obviating the stalling of public projects on account of protracted negotiation and other related processes. With tremendous respect, I take the view that parties' rights must be balanced with the duty upon governments to stimulate national development[6] *inter alia* through public infrastructure projects. It would appear to be within that context that an exception is legislated in the proviso to section 7(1) of the Land Acquisition Act '*in the public interest*'. The effect of this legal provision is to make provision, in exceptional circumstances, for possession of identified property prior to the exhaustion of the compensation process and the appeals attendant thereto. The instant case, where the Respondents initially declined the compensation offered by the Government, presented one such exceptional circumstance.

28. The pertinent question, then, would be whether the circumstances of this case did fall within the ambit of *public interest* so as to warrant the immediate possession of the suit land. It is important to interrogate this question against the backdrop of the policy considerations that inform the practice of compulsory land acquisition. In *Lindsay, Jonathan Mills, 'Compulsory Acquisition of Land and Compensation in Infrastructure Projects'* (supra), compulsory acquisition is propounded as follows:

> Compulsory acquisition is the power of government to acquire private rights in land for a public purpose, without the willing consent of its owner or occupant. This power is known by a variety of names depending on a country's legal traditions, including *eminent domain, expropriation, takings* and *compulsory purchase*. Regardless of the label, compulsory acquisition is a critical development tool for governments, and for ensuring that land is available when needed for essential infrastructure – a contingency that land markets are not always able to meet.

[6] Objective XI(ii) of the National Objectives and Directive Policies of State Policy places an obligation upon the Government of Uganda to stimulate development. It re-echoes Uganda's obligation under Article 2(1) of the International Covenant on Economic, Social and Cultural Rights that obligates states parties to engender development.

29. On that premise, the same literature posits the following definition of the notion of public interest or public use:

> Despite the variations that exist on this point, an overarching principle in most cases is that a government's taking powers are extraordinary powers that are intended to meet public needs that are not well-addressed through the operation of the market. Hence, it is not typical for laws to allow governments to use compulsory acquisition as the normal means of assembling land for purposes that are clearly for commercial, industrial or other profitable private uses alone.

30. I must hasten to add here that in respect of the reference in the above text to '*profitable private uses*', a distinction must be drawn between such private for-profit ventures (which should not normally form the basis of compulsory land acquisitions) and public private partnerships (PPPs), which are a recognised tool for public project finance and may benefit from compulsory land acquisitions. On the other hand, a hydro-power facility, such as the Karuma Dam project in this case, certainly represents the sort of public utility that governments would typically provide for their citizens in the interest of national development. Undoubtedly, therefore, it is undertaken in the public interest and for public use. There is no evidence on record that the immediate possession of the suit land was for any other purpose. The Respondents bore the primary to establish their case against the Appellant. To that end, they bore the duty to prove that the occupation of their property by Government agents was not in the public interest and, therefore, illegal. I find no such proof on record.

31. To the extent that the Land Acquisition Act makes provision for possession of land pursuant to the gazetting of the declaration prescribed in section 3 but prior to completion of the compensation process, the occupation of the suit land by Sino Hydro Corporation Limited cannot be held to have constituted a breach of statute. Whereas there is no specific piece of evidence that proves that that contractor was permitted on the suit land by the Government of Uganda represented by the Appellant, there is ample material on record (as highlighted earlier herein) that the said contractor was so authorised to enter on the suit land as an authorised

undertaker within the precincts of section 73 of the Land Act. I therefore find no proof of breach as would warrant an award of general damages in this matter.

32. Be that as it may, the suit land in this land included land that had not been compulsorily acquired by the State. The material on record is that such land was used as dumping ground and an access route to the construction project. The trial court correctly ordered for the return of that residual land to the Respondents. Additionally, in my view, they would have been entitled to an award of damages for the State's deprivation of their use and enjoyment of that land.

33. Having so held, I now turn to a consideration of the damages awardable. I am aware that an appellate court will not interfere with an award of damages by a trial court unless it is satisfied that the lower court acted on a wrong principle(s) of law or the amount awarded is so high or so low as to render it an erroneous estimate of the damages to which the plaintiff was entitled. *See* ***Robert Coussens v Attorney General, Supreme Court Civil Appeal No. 8 of 1999***, ***Interfreight Forwarders (U) Ltd v EADB, Civil Appeal No. 33 of 1992*** *(Supreme Court) and* ***Traill v Booker (1947) 20 EACA 20***. In the case of **Uganda Breweries Ltd v Uganda Railways Corporation, Civil Appeal No. 6 of 2001**, the Supreme Court deemed it necessary to interfere with an award of damages that it adjudged to have been improperly assessed and made on the wrong principles. I would respectfully defer to the same approach and do hereby set aside the award of Ushs. 1,000,000,000/= in general damages by the trial court. Abiding the assessment of damages made in the lead judgment in respect of the entire 8.109-hectare strong suit land, I would on *pro rata* basis reduce the quantum of damages awardable in respect of the residual land that was not compulsorily acquired by the State but nonetheless unlawfully occupied by its agents. I do therefore award Ushs. 110,395,737/= to the Respondents as general damages payable at an interest of 8% from the date of the High Court judgment until payment in full.

34. In the result, in agreement with the lead judgment, I am satisfied that the award of Ushs. 1,000,000,000/= by the trial court was an erroneously exorbitant estimate of the damages due to the Respondents and would therefore resolve *Ground 7* in the affirmative. Having awarded damages for the State's unlawful occupation of the

unacquired part of the suit land, I am satisfied that the Respondents did partially establish circumstances to warrant the award of general damages therefor. Accordingly, *Ground 8* of this Appeal only partially succeeds.

35. Finally, no submissions were forthcoming from the Appellant with regard to *Ground 9* of the Appeal. That ground of appeal is therefore presumed to have been abandoned.

36. With regard to the doctrine of estoppel that was raised by the Respondents, with utmost respect, I am unable to appreciate how it comes into play in this Appeal. A party's acknowledgment of a debt would legally revive a debt that would otherwise have been time barred in so far as the opposite party's right of claim is deemed to have (re)accrued on the date of acknowledgment. This is the import of section 22(4) of the Limitation Act. I do not find it to have any bearing on this case as the question of time limitation is not in issue. In my considered view, therefore, the letter in issue here would not necessarily negate the Appellant's statutory right of appeal.

C. **Conclusion**

37. As I take leave of this matter, I am constrained to observe by way of *obiter dicta* that section 41 of the Land Act is inapplicable to the circumstances of this Appeal. That provision essentially sets up a Land Fund the functions of which are delineated in subsection (4) thereof. Section 41(4)(b) particularly mandates the Government to utilise the Land Fund to '**purchase or acquire registered land to enable *tenants by occupancy* to acquire registrable interests pursuant to the Constitution**.' It is in respect of land acquired for that purpose by the Government that section 41(6)(a) prescribes a '**fair market valuation assessed on a willing seller willing buyer basis**.' In the instant case, the Respondents are registered proprietors of the compulsorily acquired land, and not tenants by occupancy as envisaged in section 31 of the Land Act.

38. In the result, this Appeal substantially succeeds, save for *Ground 8* thereof that only fails in part. It is trite law that costs would follow the event unless a court for good reason decides otherwise. *See section 27(2) of the CPA*. In the instant

Appeal, I do abide the decision of my brother Justice Madrama on costs. The upshot of this judgment is that the Appeal is substantially allowed; each party to bear its own costs in this and the lower court.

It is so ordered.

Dated at Kampala this ..14th.... day of ..June....., 2022.

Hon. Lady Justice Monica K. Mugenyi
JUSTICE OF APPEAL