THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CS-0011-2005

BITARINSHA BAVIS :: PLAINTIFF

VERSUS

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY :::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. LADY JUSTICE JOYCE KAVUMA

JUDGEMENT

Background

[1] The plaintiff brought this suit against the defendant for a declaration that the Environment Restoration Order Ref NEMA/ ERO/MBR/01/2004 dated 24th June 2004 issued by the defendant to the plaintiff is unreasonable, oppressive, bad in law and illegal, an order quashing the said Restoration Order, exemplary, special and general damages, a permanent injunction and costs of the suit.

The defendant in his defence denied the claims of the plaintiff stating that the National Environment Management Authority has the mandate to protect the wetlands in trust for the people of Uganda and therefore

the Restoration Order should be confirmed and prayed that the suit be dismissed.

Representation

[2] The plaintiff was represented by Ngaruye Ruhindi, Spencer & Co. Advocates and the defendant was represented by National Environment Management Authority legal department.

Plaintiff's evidence

[3] **PW1 Bitarinsha Bavis Bruno** a farmer testified that he owns the land in Mpunda, Bwenda, Rukiri, Ibanda District and has a certificate of title to the suit land comprised in Plot 2 Mitooma Block 32 and Plot 11 Mitooma Block 36 in Ibanda ***PExh2*** and ***PExh3***.

That he was issued a restoration order ***PExh1*** through his co-worker David Baryamujura, requiring him to comply with the order. He stated that he was not given a hearing before the order was issued and had not even received any complaint from anybody regarding an alleged degradation of a wetland on his land. That NEMA officials came onto his land with a truck full of prisoners and dug drainage channels, dug up his pasture, cut eucalyptus trees, chased his cattle off the farm leading to their death.

PW2 Dr. Aziku Louis a veterinary doctor, testified that he carried out post mortems on the cattle and established the cause of death as tick

borne diseases and fatigue. He stated that the cattle were healthy before the NEMA officials came onto the suitland.

PW3 Nsamba Herbert, a land surveyor testified that during the survey of the suit land there was clear grass and no papyrus or wetland. That as a surveyor he was not allowed to survey a wetland. That if there was a wetland on the suitland, the Entebbe office would have plotted it.

PW4 Gladys Bitarinsha, the plaintiff's wife testified that on 21st January 2005, NEMA officials entered the farm, cut the fence and the next day they found the whole farm flooded. That many cattle died due to the flooding. That on 24th February 2005 the NEMA officials returned to the farm with another group of people they blocked the stream on the land and uprooted the fence.

PW5 Ainea Beyeza a farmer and resident of Mpunda Village, testified that people came onto the farm and destroyed it. That the farm was surrounded by eucalyptus trees and has since birth had a stream called Kyangwahanda flowing through it.

Defendant's evidence

[4] **DW1 George Lubega Matovu** the Natural Resource Manager in area of Aquatics NEMA testified that he got instructions from the Executive director NEMA to go to Mbarara and Bushenyi District after reports of massive wetland degradation were made. He stated that in December 2003 they conducted meetings in in Mpunda Cell Subcounty.

That during the meeting it was reported that there were people in the area who had reclaimed wetlands for dairy farming. That the community members in areas with degraded wetlands complied but Mr. Bitarinsha was among those that refused to comply. That NEMA sent them back to forcefully restore the wetlands including where Mr. Bitarinsha's farm was.

DW2 Mwesigye Joseph an environmental officer at the time in Mbarara testified that the wetland was converted into farmland by Mr. Bitarinsha who degraded it by digging and developing drainage channels to facilitate speed of water. He stated that around 2003, there was an outcry from leaders of greater Mbarara and Bushenyi stating that wetlands in Ibanda were greatly encroached upon and degraded and requested NEMA to intervene.

DW3 Jakonis Musingwire testified that before 2003 he had visited Kyangwahanda wetland when conducting inventories of wetlands in the district. He saw a permanent stream which can be a tributary of a small river flowing through the farm on the suitland. He stated that it was evidence that the plaintiff had dug it deeper to ensure the wetland vegetation dries.

Agreed Issues for determination

i. *Whether the property in dispute is a natural wetland protected by the law?*

ii. *Whether the plaintiff reclaimed and degraded the wetland in the property in the suit?*

iii. *Whether the formal Restoration Order was lawfully issued to the plaintiff?*

iv. *Whether the defendant was entitled to interfere with the flow of the stream in the plaintiff's registered property?*

v. *Remedies available to either party?*

Burden and Standard of Proof

[5] It is a settled principle of evidence that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts, must prove those facts exist. (**See Section 101 of the Evidence Act**). It is said that this person has the burden of proof. This is the person whose suit or proceeding would fail if no evidence at all were given on either side. (**See Section 102 of the Evidence Act**).

The standard of proof in cases like the instant one is on a balance of probabilities. (**See Miller vs Minister of Pensions [1972] 2 All ER 372**). The plaintiff being desirous of the court giving judgment as to legal rights or liability dependent on the existence of facts which he or she asserts, must prove that those facts exist.

In **Kirugi and another vs Kabiya and three others [1987] KLR 347**, it was held that:

"The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."

The standard of proof is a probabilistic threshold. The plaintiff will satisfy this standard and succeed in his or her claim only if there is, on all the evidence adduced in the case, more than a probability of his or her claim is true.

Analysis of Issues

Issue 1: Whether the property in dispute is a natural wetland protected by the law?

[6] This suit was filed in 2004, thus the law in place then is the now repealed National Environment Act Cap.153. A wetland is an area permanently or seasonally flooded by water where plants and animals have become adopted.

Counsel for the plaintiff submitted that the defendant failed to prove that the plaintiff's land falls in the above category of wetlands. That there is a stream that flows through the plaintiff's land and its natural flow was interrupted by the defendant's agents who blocked its flow at various points with barricades across the stream and digging channels to the plaintiff's farm. That the water left it's natural course and spread into the plaintiff's farm instead. That because of this, the property in dispute is not a natural wetland but an artificial one created by the defendants.

In response, Counsel for the defendant submitted that the suit land is found along the permanent stream of Kyangwahanda which falls within Rukiri wetland which is part of the greater river Rwizi catchment area, a natural outlet which discharges its water into Lake Victoria. He stated that at locus the court observed a swamp on the opposite side of the road where the stream comes from to enter into the plaintiff's farm but immediately into the plaintiff's farm there is no swamp. That this showed the plaintiff removed the swamp vegetation on his side.

Counsel for the defendant also relied on the testimony of DW1 George Lubega Matovu who stated that the suit land is in Rukiri wetland and they made a report which indicated it as one of the areas that had been degraded. Further that Mr. Bitarinsha was one of the people responsible for digging up the wetlands. He also relied on DW2 Mwesigye Joseph an environment officer in Mbarara who testified that there is a wetland in Ibanda called Kyaguhanda in Rukiri Sub County and it is part of the system that drains into River Mpanga.

Resolution

[7] It is not in dispute that Plaintiff owns property situate at Mpunda, Bwenda, Rukiri, Ibanda District and has a certificate of title to the suit land comprised in Plot 2 Mitooma Block 32 and Plot 11 Mitooma Block 36 in Ibanda ***PExh2*** and ***PExh3***.

Article 26 Constitution provides:

"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."

According to **Article 237(1)** of the 1995 Constitution, land in Uganda belongs to the citizens of Uganda and it vests in them in accordance with the tenure systems provided for in the Constitution. There are in place four tenure systems under which individuals in Uganda may own land. These are; customary, leasehold, freehold and Mailo land tenure systems. (**See Article 237 (3) of the Constitution**). That provision of the Constitution was enacted to protect the rights of those tenants in occupation of registered land.

(2) "Notwithstanding clause 10 of this Article

(b) the Government or a local government as determined by parliament by law shall hold in trust for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and tourist purposes for the common good of all citizens."

Article 242 of the Constitution provides that the Government may, under laws made by Parliament and policies made from time to time, regulate the use of land.

[8] PW1 Mr. Bitarinsha Bavis testified that he never received a complaint from anyone claiming that his farm was in a wetland. He stated that his farm always had a stream and he has never interfered with its use. He stated that he has never known that there is a protected wetland on his land. Mr. Bitarinsha also stated that if his land was located in a wetland he would have never received a certificate of title for the land. He maintained that the wetland was made on his farm by the National Environment Management Authority (NEMA) when they came on to his land. PW3 Nsambwa Herbert a surveyor testified that on 10th August 1990 he was given instructions to survey the suit land and that he found clear land with grass. He stated that he knew what a wetland was and that in his work he is not allowed to survey any wetland. He stated that he could not tell if it was a wetland because he found cows grazing there. He also stated that if there was a wetland on the suit land, then the Entebbe drawing offices would have detected it

and referred the file back to him. On cross examination, he stated that there are limitations as to what he can survey and that they are not allowed to survey wetlands. He however stated that he cannot be sure that all wetlands are plotted on the Map 8.

PW4 Gladys Bitarinsha testified that suit land is not a wetland and it's the NEMA officials who blocked it with trees. Further, that since they bought the suit land it had never flooded until the day the NEMA officials blocked the stream. PW5 Ainea Beyeza 81-year-old farmer and resident of Mpunda village Rukiri testified that she has known the plaintiff for about 40 years and that the permanent stream called Kyandwahanda has been there since he was born.

On the other hand, DW1 George Lubega testified that he got instructions from the Executive Director NEMA following reports that there was massive degradation of wetlands in Mbarara. On cross examination, he stated that the different times he went onto the suit land it was dry land and not a wetland. He also stated that DW2 Mwesigye Joseph testified that he saw a man-made channel developed on the land and not a natural stream.

[9] It's not disputed that the Plaintiff is the registered owner of the suit land comprised in Plot 2 Mitooma Block 32 and Plot 11 Mitooma Block 36 in Ibanda which has a stream flowing through it.

In the case of **Nyakaana v National Environment Management Authority and Ors (Constitutional Appeal No. 5 of 2011) [2015] UGSC**

14 (20 August 2015), CJ Bart Katureebe (as he then was) in considering whether the appellant's land was a wetland stated that;

> *"It is important to note that the appellant had notice that his property was being considered to be in a wetland. Thus he was invited to, and he did attend, a Community Sensitization meeting held at Lidia Marchi Youth Centre near Bugolobi on 26th July 2004 where all the residents were advised that they were in a wetland and that they should suspend all activities. He chose to ignore this advice and continued his construction. Environmental Inspectors from NEMA, Kampala City Council and the Wetlands inspection Division visited him several times and advised him accordingly. He refused..." (emphasis mine)*

In the instant case, the Bitarinsha Bavis, plainitff's claim is that he was never summoned to explain and that it was through the Restoration Order that he learned of the inspections done by the environmental inspector. He also stated that when he was issued a Restoration Order he then issued a notice of intention to sue the defendant and he could not comply with the orders.

[10] DW1George Lubega a NEMA official stated that inspections were carried out on the suit land and meetings were held in the community where they gave everyone 2 months to vacate the wetland before forceful enforcement could be done but the plaintiff was among the few that refused to comply. That a report was made to the Executive Director of NEMA and he decided to serve restoration orders on the

non-compliant individuals. That on 14th June 2004 he was guided by the sub county officials to the residency of Mr. Bitarinsha Bavis at around 4:00pm but the plaintiff Bitarinsha was not home but a one Byaramujura David gave him his phone number. That over the phone, Bitarinsha told DW1 Lubega George to leave the notice/restoration order with his worker David Baryamujura. That he left the order but the plaintiff Bitarinsha never responded to the same. In February 2005, the NEMA officials went to the suit land to restore the wetland, and found that channels had been re-opened. DW1 further stated that when they went for a 2nd restoration of the wetlands during routine inspection, they were almost assaulted by Mr. Bitarinsha. That Bitarinsha was given 6 months after the service of the notice to bring any complaint but he did not comply with that either. On cross examination, DW1 stated that no formal invitations were given to the individuals to attend the community meeting but the Local Government officials were to inform the people about the meeting. He also stated that he could not remember if Mr. Bitarinsha attended the meeting or not .

From the above evidence on record, DW1 received direct instructions from the Executive Director of NEMA to inspect the places reported to have degraded wetlands. That inspections were carried out, consultations and meetings with the district leaders in Mbarara, Bushenyi Local Government and Ibanda. That it was reported that there were persons who had reclaimed the wetland for dairy farming. It was

even agreed in the meetings that these people vacate the land in 2 months of which most people had complied.

The plaintiff Bitarinsha David in his testimony stated that the defendants were only specifically targeting him. The record shows that people complied with the restoration order except the plaintiff. I therefore find that the restoration exercise was directed to all persons degrading the wetlands and not only the plaintiff was targeted.

[11] I further find that the plaintiff was aware of the meetings of residents where the NEMA officials briefed them about land being in wetlands. Therefore, it's not true that the plaintiff only got to know about the restoration order when it was served upon him. Furthermore, the plaintiff Bitarinsha Bavis had knowledge through his worker David Baryamujura that NEMA was considering his land to be a degraded wetland, he had two inspections on his suit land but he chose to ignore the advice and continued using the suit land. I therefore don't agree with Counsel for the plaintiff's submissions that the plaintiff was not given a hearing.

Wetlands are by law held in trust by the Government for the citizens of Uganda in general. Every owner of land whether registered or not must occupy or own it in accordance with the National Environment Act Cap 153.

<u>The suit land has a natural wetland protected by the law and is subject to the management of the Defendant.</u>

Issue 1 is therefore answered in the positive.

Issue 2: Whether the plaintiff reclaimed and degraded the wetland in the property in the suit?

[12] Counsel for the plaintiff submitted that neither did any of the defendant's witnesses give evidence that it was the plaintiff who degraded or reclaimed the wetland nor show court how the area was before its reclamation or degradation. Counsel also stated that the plaintiff has a certificate of title to the suit land.

In response Counsel for the defendant submitted that PW6 Beyeyza testified that there is a stream on the farm and that it had existed since creation of time. He submitted that the plaintiff cleared part of the stream surroundings to create a farm since the stream existed before the farm. He relied on the testimony of DW1 George Lubega that the plaintiff Bitarinsha is among the people that the community people complained of having reclaimed wetlands. He also argued that having a certificate of title to land with a wetland does not mean that you can carry out unregulated activities on it. He also relied on the plaintiff's testimony that he planted kikuyu grass in the wetland area.

[13] Court visited locus and NEMA officials showed the court the thick swamp with papyrus and a flowing stream running into the suit land. That the area where the stream flows to is covered with a different vegetation i.e kikuyu grass and is swampy. The plaintiff showed court that this is the area that is part of the suitland. Court was also shown the bridge constructed by the District Local Government that is adjacent to the suit land.

Resolution

[14] The plaintiff maintained during his testimony that he did not reclaim the swamp or degrade a wetland on the suit land. He stated that he bought the suit land from someone who was always using it as grazing land and that he found no papyrus on the land during the purchase unlike like the adjacent land that has a swampy vegetation. The Defendant also showed Court a big drainage channel in the middle of the mainland and other small channels feeding into the main channel.

The impugned National Environment Act Cap 153 provided for the restrictions on the use of wetlands. **Section 36(1) of the National Environment Act Cap 153** states that;

> *"No person shall—*
>
> *(a)reclaim or drain any wetland;*
>
> *(b)erect, construct, place, alter, extend, remove or demolish any structure that is fixed in, on, under or over any wetland;*
>
> *(c)disturb any wetland by drilling or tunneling in a manner that has or is likely to have an adverse effect on the wetland;*
>
> *(d)deposit in, on or under any wetland any substance in a manner that has or is likely to have an adverse effect on the wetland;*

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

(f)introduce or plant any exotic or introduced plant or animal in a wetland,

unless he or she has written approval from the authority given in consultation with the lead agency."

In the instant case, the plaintiff denies degrading or reclaiming the wetland on the suit land and instead claimed that it was the NEMA officials who dug on the land instead. According to the plaintiff he purchased grazing land that had no papyrus and not a wetland.

[15] DW1 Lubega George testified that the plaintiff Bitarinsha Bavis dug drainage channels on the wetland. He denied digging any drainage channels but testified that during restoration regulation channels to distribute water into the wetland were made. He also stated that he did not see Bitarinsha degrade the wetland or know when he allegedly did so.

DW2 Mwesigye Joseph testified that the plaintiff constructed a big drainage channel in the middle of the mainland and other small channels feeding into the main channel to ensure the place is dry for grazing. That wherever papyrus regenerates, there was an effort to remove it and make sure it remained farmland. However, he also stated that he did not see Bitarinsha digging the channel.

[16] According to the evidence on court record and the authorities above, it is my considered opinion that the plaintiff's continued use of part of the suit land as grazing land amounts to alienating the wetland. During the locus visit the defendant showed court the manner of degradation on the wetland. The plaintiff does not dispute the continued use of the suit land as a grazing land even after being notified that he had a wetland on part of his suit land. PW1 stated I quote;

> *"On 20th June 2004 I was issued a formal Restoration Order through my worker called David Baryamujura. The order was received by me. I could not comply with immeasurable and oppressive orders. For me I was told to restore the land to its original state within thirty days. The Order did not state the type of vegetation. I was supposed to replace. I was not given a hearing before the order was issued to me. I had received no complaint from anybody regarding the alleged wetland. No one asked me anything regarding wetland".*

The reluctance of the plaintiff to comply with NEMA directives amounted to continued alienation of the wetland found on his suit land. This was in contravention with the law on protection of the environment and use of the natural resource –wetland for sustainable development.

Issue two is answered in affirmative.

Issue 3: Whether the formal Restoration Order was lawfully issued to the plaintiff?

[17] Counsel for the plaintiff submitted that a decision made by a person or authority or body cannot be made without giving the party a hearing. He stated that the restoration order was issued on 14th June 2004 without according the plaintiff a fair hearing before it was issued, thus being against the principles of natural justice and in contravention of **Article 44 and 28 of the 1995 Constitution of the Republic of Uganda.** He further submitted that by issuing an order condemning the plaintiff that he had reclaimed and degraded the wetland, ordering him to do certain things to restore the wetland, was contrary to the law and unreasonable. He also stated that the 30 days given to the plaintiff to restore the wetland to the state in which it was before a bridge constructed by the District Local Government was in place, was unreasonable and unlawful.

Counsel for the defendant however, insisted that the defendant followed the law in issuing the restoration order to the plaintiff.

Resolution

[18] Under the impugned National Environment Act Cap 153, an Environmental Restoration Order means an order provided for under **Section 67 of the Act.** It states;

> *"(1) Subject to the provisions of this Part, the authority may issue to any person in respect of any matter relating to the*

management of the environment and natural resources, an order in this Part referred to as an environment restoration order.

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

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

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

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

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

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

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

(Emphasis mine)

Section 68 of the same Act, deals with the service of the order and it states as follows;

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

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

(a)the activity to which it relates;

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

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

(d)the action which must be taken to remedy the harm to the environment and the time, being not less

than thirty days or such further period as may be prescribed in the order, within which the action must be taken...;

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

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

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

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

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

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

(Emphasis mine)

From the above sections of the law, in issuing a restoration order, the order ought to require the person to restore the environment as near as possible to how it was before the degradation, impose obligations on the recipient to achieve that purpose. The restoration order must specify the activity, the person it is addressed to, the time in which it goes into effect and the action which must be taken to remedy the harm to the environment. The authority is allowed to inspect any activity to determine whether it is harmful to the environment or not. The recipient of the restoration order must comply with the conditions of the order and is not entitled to a hearing before the order is sent out.

[19] In the case of **Nyakaana v National Environment Management Authority and Ors (supra)** it was held that;

> *"In my view, it is these restrictions which gave the first respondent power to carry out inspection on the petitioner's property to ascertain whether the activities he was carrying out on the land was in conformity with the provisions of the section – hence the service of the restoration order. The restoration order is like a charge sheet that commences the prosecution of a person who is charged with a criminal offence. Normally a police officer does not give a hearing to a suspect before charging him or her. The purpose of the Act is to give the first respondent power to deal with and protect the environment for the benefit of all including the Petitioner. The impugned sections in my view have in built mechanisms for fair hearing as enshrined in Article 28."*

In agreement with the Hon. Justice Byamugisha, CJ Bart Katureebe (as he then was) noted that the appellant in his case was entitled to be heard orally before the final decision was made had he chosen to challenge the restoration order. He also noted that in **Section 67(5)(b)** the appellant had a right to appeal to court against the decision and that this was another in-built protection within the law to ensure protection of his rights.

[20] In the instant case, DW1 told court that there was a sensitization meeting held in Ibanda regarding the degradation of Rukiri wetland area. That they gave the community 2 months to vacate the wetlands. DW1 testified that on return they found some people had complied and others including the plaintiff had not. As earlier discussed, the plaintiff was aware of the intended restoration. It's important to note that the plaintiff never responded to the order. DW1 testified and I quote;

> *"We gave him over 6 months after service of the Notice to bring up any complaint but he did not".*

According to the defendant evidence the plaintiff was issued a restoration order after inspections were carried out between 19th and 24th April 2004. The order stated that Bitarinsha Bavis continuously degraded the environment in an illegal manner and listed the different methods the plaintiff degraded the environment. He was then ordered to comply with all the orders like removing the fence erected around the drainage channel, refill the drainage, level the area and allow free movement of the water and flooding the wetland and use the soil around the constructed channel. The plaintiff was then given 30 days to comply but he still did not comply.

[21] According to PW1 he stated that he could not comply with oppressive orders. According to the record, I note that the PW1 did not take any steps to challenge the issuance of the Restoration order as provided by Section 69 of the NEMA Act Cap 153. Following the noncompliance, the defendant went ahead to enforce the restoration

order in accordance with NEMA Act Cap 153. **Section 69 of the Act** provides a remedy for the plaintiff within 21 days of receiving the order to write to the NEMA giving reasons for them to reconsider the same. The plaintiff did not do this either.

Therefore, in light of the above and the evidence on record, I find no reason to fault the defendant NEMA who were carrying out their duty in accordance with the law. I therefore find that the restoration order was issued lawfully to the plaintiff.

Issue 3 is answered in the affirmative.

Issue 4: Whether the defendant was entitled to interfere with the flow of the stream in the plaintiff's registered property?

[22] The Constitution of the Republic of Uganda obligates the State or its agencies to protect such wetlands. **Article 245 of the Constitution** obliges Parliament to pass a law providing for measures.

> *(a) "to protect and preserve the environment from abuse, pollution and degradation;*
>
> *(b) "to manage the environment for sustainable development; and*
>
> *(c) "to promote environmental awareness."*

The impugned National Environment Act Cap 153 was enacted for that very purpose. The plaintiff however, contends that the actions of the

NEMA officials in restoring the wetland on his registered land was unlawful.

[23] Counsel for the plaintiff submitted that the plaintiff never interfered with the natural flow of the stream on the suit land and that it was the defendants agents who interfered with the flow of the stream by blocking it using logs to divert the water from its course so that it spreads onto the farm land. He stated that the defendants knew that by doing so they could cause damage to the plaintiff's pasture by creating an artificial floods over the farm which led to flooding of the grazing land and his cattle getting stuck in the mud. That they did this without the consent of the plaintiff.

Counsel for the defendant on the other had submitted that since the plaintiff had dug drainage channels thus deepening the stream, the defendant's agents had every right to interfere with the flow of the stream to restore the environment. That the activities complained against by the plaintiff were done in a wetland and thus falls within the jurisdiction of the defendant's mandate by law.

Resolution

[24] **Article 26 of the Constitution** gives every person in Uganda, the right to own their own property and that no one shall be compulsorily deprived of their property unless it is necessary for public use, interest or health. **Article 237(2)(b) of the Constitution** also provides that;

"the Government or a local government as determined by Parliament by law shall hold in trust for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and tourist purposes for the common good of all citizens." (emphasis added)."

Section 70 of the National Environment Act Cap 153 states that;

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

Section 44(1) of the Land Act states that:

"The Government or a local government shall hold in trust for the people and protect natural lakes, rivers, ground water, natural ponds, natural streams, wetlands, forest reserves, national parks and any other land reserved for ecological and touristic purposes for the common good of the citizens of Uganda."

The above section of the law is clear that the NEMA and its workers are given the power under the Constitution and Environment laws to enter land of any person whom a restoration order has been served on and take the necessary steps to enforce it.

[25] The above authorities all spell out one thing, that although one has the right to own land in Uganda, there are situations in which it will be necessary for the government to take over that land or regulate its use for the purpose of protecting the environment.

As observed in case: **Nyakaana v National Environment Management Authority and Ors (supra)** above stated that;

> *"A person cannot degrade a wetland and cause pollution to other citizens simply because he owns the land. This would defeat the whole purpose of the Constitution which requires that citizens may own land, but not cause pollution or degradation of the environment which may affect other people and the country as a whole..."*
>
> *"The appellant's certificate of title, physical land and house constructed thereon did constitute property with rights guaranteed and protected by or under the Constitution. But the property was also affected by other provisions of the Constitution which must be read together. Whether the land was leased to him by the Kampala City Council or any other authority is beside the point. Even the Kampala City*

Council ownership would be subject to the Constitutional provisions regarding protection of the environment.

With respect, the appellant's counsel failed to appreciate that Article 26 of the Constitution has to be read together with Article 237(1) and 237(2) (b) as well as with articles 242 and 245. The facts of this case clearly show that the appellant was advised on the improper use to which he was putting the land, i.e. constructing a house in an area said to be a wetland. He was not being deprived of his property."

Furthermore, **Section 43 of the Land Act** particularly requires the owner of any land to manage or utilize land in accordance with the National Environment Act. Section 43 states as follows: -

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

[26] In the instant case, the plaintiff Bitarinsha was not deprived of his proprietary rights. While he is a title holder of land comprised in …., he has exclusive ownership rights and usage over his property but his rights are subject to the conservation of the environment as provided for in the laws cited above. It is an agreed fact that a stream exists on the plaintiff's registered land. PW1 stated and I quote;

"…I got a title when my farm was in place. There was a swamp and eucalyptus were put there.There is no wetland on my land. The embankment of the stream are held firmly by kikuyu grass I planted. I go up to the stream where my cattle were watered on either side. I don't have a license and there is no need for me because my area is not a wetland… "

"They blocked Kyagwehinda stream and its tributary which run through my farm. They dug drainage channels across the stream. They dug up my pasture. They cut the trees I had planted as shade for my cows. They cut eucalyptus trees which they used to block the river. They also chased my cattle from the farm. They did all these things without my consent".

Clearly the Plaintiff is responsible for degrading the suit land, by changing the vegetation, planting kikuyu grass pasture, eucalyptus trees. He stated;

"…I acquired my land through purchase. There was freehold and another leasehold . I improved on the grass by removing the thorny trees and plants. I planted kikuyu grass to improve on quality of pasture…"

The fact that the plaintiff owns the suit land does not automatically mean he can continue to use his land in complete disregard of the

Kyagwehinda stream that flows through part of the suit land. It is important to note that the suit land is found along the permanent stream of Kyangwahanda which falls within Rukiri wetland which is part of the greater river Rwizi catchment area, a natural outlet which discharges its water into Lake Victoria.

[27] It's incumbent upon all persons to ensure that the environment is not degraded or polluted. **(See: Odando & another (Suing on their Own Behalf and as the Registered Officials of Ufanisi Centre) v National Environmental Management Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties) (Constitutional Petition 43 of 2019) [2021]).**

In the instant case the plaintiff is in full knowledge that part of his suit land has the Kyagwehinda stream following through it and is therefore a wetland. According to plaintiff his farm is on both sides of the stream, with one part being hilly and dry and has no water .

The defendant is charged with a duty to restore degraded part of the suitland environment. The plaintiff's claim that his cows got stuck in the flooded area when they came to drink water at the stream and that his fence was broken leading to cattle straying away and getting infected with disease. I find the claim far fetched since the plaintiff had been given ample time to restore the wetland but he deliberately ignored the order and continued grazing his cattle. The common law principle of *volenti non fit injuria* also comes into play. It means that no injury can be done to a willing person i.e. voluntary assumption of risk). If

someone willingly places themselves in a position where harm might result, knowing that some degree of harm might result, they are not able to bring a claim against the other party. The Plaintiff in this matter voluntarily assumed the risk of damage to his land and cattle when he continued to use the wetland in an illegal manner.

[28] The NEMA officers are absolved of any actions done on the suit land, in an effort to restore the wetland. The continued use of the wetland as grazing land, planting eucalyptus trees, digging channels and changing of the vegetation are all activities that are likely to impact on the environment and any activities on the wetland should have to be approved by the defendant NEMA in accordance with the law. According to the evidence on record, all wetlands are held in trust and are protected by the government or local government for the common good of the citizens of Uganda. In furtherance of the public trust doctrine the law prohibits alienation of wetlands. Being mindful of the important role that wetlands play in protecting and improving water quality, providing fish and wildlife habitats, storing floodwaters and maintaining surface water flow during dry periods, etc., Article 237(b) of the Constitution and Section 44 (1) of the Land Act (cap 227) Laws of Uganda seeks to conserve and protect them

The plaintiff should therefore use his land in accordance with the National Environment Act Cap.153.

Issue 4 is therefore answered in the positive.

Issue 5: Remedies available to either party?

[29] Given that I have found Issues 1, 2, 3 and 4 in favor of the defendant, the plaintiff is not entitled to any of the remedies he sought for.

I therefore order ;

a) The suit CS-0011-2005 is dismissed.
b) The Restoration Order Ref NEMA/ ERO/MBR/01/2004 by the National Environment Management Authority against Bitarinsha Bavis is therefore confirmed.
c) No order is made as to costs.

Dated at Mbarara this 19th day of November 2023

Joyce Kavuma

Judge