

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO. 151 OF 2021

- 1. UGANDA LAW SOCIETY**
- 2. THE ENVIRONMENT SHIELD LTD**
- 3. RESOURCE RIGHTS AFRICA LTD ===== APPLICANTS**

VERSUS

- 1. HOIMA SUGAR LTD**
- 2. MARTIN ARYAGARUKA**
- 3. NATIONAL ENVIRONMENTAL ===== RESPONDENTS**
MANAGEMENT AUTHORITY
- 4. ATTORNEY GENERAL**

BEFORE: HON. JUSTICE EMMANUEL BAGUMA

RULING ON PRELIMINARY OBJECTIONS.

Background.

The Applicants filed this Misc. cause by way of Notice of Motion under Article 50(1) & (2) of the Constitution, Sections 3, 4, 6(3) and 10 of the Human Rights (Enforcement) Act, 2019, Section 3(3) of the National Environment Act, 2019, Section 33 of the Judicature Act, Cap 13, and Rules 3, 5(1) (a), and (d), 6(1) (d), (2), 7(1), 8, 9, 10 and 11(1)(a), and (d), (1) (d), (2), 7(1), 8, 9, 10 and 11(1)(a), (f), & (2) of the Judicature (Fundamental Rights and other Freedoms (Enforcement Procedure) Rules, 2019 seeking for orders that:-

- 1. A declaration that NEMA's omission and non-adherence to the mandatory principles of environment management prior to project*

approval vide NEMA/ESIA/13709 is threat to the right of Ugandans to a clean healthy, safe and decent environment.

- 2. A declaration that the 1st and 2nd respondents disregard of NEMA's pre-environmental and social impact assessment (ESIA) guidelines of 20th January, 2020 was a dereliction of duties and a threat to a decent, clean, healthy and sustainable environment.*
- 3. A declaration that the 1st & 2nd respondents' ESIA between 20th January, 2020 and 6th July 2020 without any meaningful public participation and/or consultation of such key stakeholders is a threat to and/ or violation of the right of Ugandans to a clean, healthy, safe and decent environment and the right of Ugandans to be fairly heard in environmental decision making and meaningful participation.*
- 4. A declaration that the 1st and 2nd respondents' denial of public participation in the pre-ESIA scoping and development of terms of reference (tors) for carrying out the ESIA threatens the right of Ugandans to civic participation as well as the right of Ugandans to a clean, healthy, and sustainable environment.*
- 5. A declaration that the 1st and 2nd respondents' conduct of the ESIA for land use change on land comprised in plot 216 block 2 Buhaguzi county of Kikuube district (the protected area) to primarily sugarcane growing is incompatible with their duties to create, maintain, enhance, respect, protect and promote the right to a clean, healthy, safe and decent environment.*
- 6. A declaration that the 1st and 2nd respondents ESIA overlooked adequate biodiversity analysis, lacked adequate and diverse expert input from foresters, taxonomists, hydrologists, agriculturalists,*

- economists and soil scientists among other experts thereby threatening the right of Ugandans to a clean, healthy, safe and decent environment.*
7. *A declaration that the 1st and 2nd respondents' ESIA omitted a climate change impact analysis thereby threatening the right of Ugandans to a clean, healthy, safe and decent environment.*
 8. *A declaration that the 1st and 2nd respondents' reliance on the repealed National Environment Act, Cap 153 instead of the National Environment Act, 2019 is a dereliction of their duties; and undermined the ESIA scope and quality hence threatening the right of Ugandans to a clean, healthy, safe and decent environment.*
 9. *A declaration that the 1st and 2nd Respondents' ESIA report is compromised by fraud, dishonesty and thereby threatening the right of Ugandans to a clean, health, safe and decent environment.*
 10. *A declaration that NEMA's project approval was based on a fundamentally flawed, deficient, inaccurate and inadequate ESIA bereft of sustainability, integrity and unity is a negation of NEMA's legal duties and or threatens the right of Ugandans to a clean, healthy, safe and decent environment.*
 11. *A declaration that NEMA's project approval contrary to the NEMA guidelines of 20th January, 2020 is a threat and /or violation of the right of Ugandans to a descent, clean, healthy and sustainable environment.*
 12. *A declaration that Hoima Sugar Ltd's ongoing deforestation, pollution, tree and vegetation clearing on and beyond the NEMA approved project are and other project activities threaten and or violate the right of Ugandans to a descent, clean and healthy environment.*
 13. *A declaration that the Respondents' impugned conduct and/or omissions threaten Uganda's sustainable development, biodiversity*

conservation and climate change obligations thereby threatening the right of Ugandans to a descent, clean and healthy environment.

14.A declaration that Hoima Sugar Ltd's commencement of project activities without obtaining express approval from NFA, UWA and Kikuube District as required by the project approval certificate vide NEMA/ESIA/13709 threaten the right of Ugandans to a descent, clean and healthy environment.

15.A declaration that Hoima Sugar Ltd's execution of project activities to date is in breach of the project approval certificate vide; NEMA/ESIA/13709 conditions; and threatens the right of Ugandans to a descent, clean and healthy environment.

16.A declaration that the Respondents' ESIA report is shallow, inaccurate and misleading in material respects thereby threatening the right of Ugandans to a descent, clean and healthy environment.

17. The 1st and 2nd Respondents' project activities carried out without the stipulated Section 25 of the National Forest and Tree Planting Act, 2003 directions of the Minister of Water and Environment on a purported private forest owned by a cultural leader/institution are illegal and a threat to the Ugandans' right to a safe, clean, healthy and sustainable environment.

18.The 1st and 2nd Respondents' failure to include a human rights assessment in ESIA and failure to include a human rights and risk assessment in the project design is illegal and a threat to the right of Ugandans to a safe, clean, healthy and sustainable environment.

19.A declaration that the 4th Respondent failed in her duties to respect, protect, promote and fulfill the rights of Ugandans to a health environment, civic participation, human dignity and the right to be

fairly heard in environmental decision making and natural resources governance concerning the project approval and project activities.

20. A declaration that the 1st and 2nd Respondents' ESIA report and the NEMA project approval certificate vide NEMA/ESIA/13709 are null and void.

21. An order halting Hoima Sugar Ltd's activities on the project area.

22. An order halting Hoima Sugar Ltd.'s environmental degradation and/or pollution on the project area.

23. An order for appropriate environmental restoration against Hoima Sugar Ltd.

The Misc. cause was supported by several affidavits and the Respondents also filed several affidavits in reply.

When this Misc. cause came up for hearing, counsel for the Respondents raised preliminary objections to the effect that;

- 1. The matter is Res judicata and an abuse of court process,*
- 2. The affidavits in support of the application are fatally defective,*
- 3. There was no effective service against the 1st and 2nd Respondents; and*
- 4. The application does not disclose a cause of action against the 4th Respondent.*

Legal Representation.

The Applicants were represented by Mr. Shafir Hakeem Yiga together with Mr. Eron Kiiza, the 1st and 2nd Respondents were represented by Mr. Peter Kauma together

with Mr. Esau Isingoma, M/S Sarah Naigaga represented the 3rd Respondent and Maureen Isang Senior State Attorney represented the 4th Respondent.

Submissions on preliminary objection 1 by counsel for the 1st & 2nd Respondents.

1. That the matter is Res judicata and an abuse of court process.

Counsel for the 1st & 2nd Respondents submitted that the applicants are estopped under law from bringing the present application because the issues raised in this application were conversely raised and determined by High Court in **Miscellaneous Cause No. 239 and 255 of 2020; Water & Environment Media Network (U) Limited & Others Versus NEMA & Hoima Sugar Limited and in National Forestry Authority Vs Omukama of Bunyoro & Hoima Sugar Limited HCCS No. 031 of 2016.**

Counsel referred to **section 7 of the CPA** which provides that:-

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

Counsel further reproduced all the explanations as hereby below;

Explanation 1.—*the expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior to it.*

Explanation 2.—for the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation 3.—the matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation 4.—any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit.

Explanation 5.—any relief claimed in a suit, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation 6.—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in that right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Counsel referred the case of **Boutiqua Shanim Ltd Vs Norathan Bhatia and Another CA No. 36 of 2007** where it was held that;-

“Essentially the test to be applied by court to determine the question of res judicata is this: Is the plaintiff in the second suit or subsequent

action trying to bring before the court, in another way and in the form of a new cause of action which he/she has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If the answer is in the affirmative, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which belonged to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the time”.

Counsel further referred to the case of **Musema Mudhathir Bruce Vs Abiriga Ibrahim & Electoral Commission Election Petition No.3 of 2016** where court held that;-

“This section embodies the doctrine of res judicata or the rule of conclusiveness of a Judgment. It is based partly on the maxim of Roman Jurisprudence interest reipublica utsit finis litium – it concerns the state that there should be an end to law suits and partly on the maxim Nemo debet bis vexari Pro una et eadem causa – no man should be vexed twice over for the same cause – see Mandaria vs Singh [1965] EA 118 at 121.

The rule is therefore intended not only to prevent a new decision but also to prevent a new investigation so that the same person cannot be harassed again and again in various proceedings upon the same question.”

Counsel submitted that the applicants in the instant application have the same issues that were determined in **Miscellaneous Causes Nos. 239 and 255 of 2020; water**

and Environment Media Network (U) Limited and other vs. NEMA and Hoima Sugar Limited. It is hinged on the fact that the 1st Respondent was illegally granted a certificate of Approval of Environmental and social impact Assessment No. NEMA/ESIA/13709.

Counsel further submitted that the issue of the land not being part of Bugoma Forest Reserve was conclusively handled in **High Court Civil Suit No. 031 of 2016; National Forestry Authority vs. Omukama of Bunyoro and Hoima Sugar Limited**, where in court held that the land is separate and distinct from the said Bugoma Central Forest Reserve.

Counsel submitted that the 1st applicant is Uganda's bar association an umbrella Organization of all lawyers in Uganda whereas the 2nd and 3rd Applicants purport to be environmental and human rights organizations. They have brought this suit under Article 50(1) and (2) of the constitution. That the applicants are not bringing the case in their personal capacity but in public interest. This was the same in **Water and environmental Media Network (U) Limited and others (Supra)**.

Counsel submitted that they adduced proof that **Water and Environmental Media Network (U) Limited and others (Supra)**, and **National Forestry Authority vs. Omukama of Bunyoro and Hoima Sugar Limited (Supra)** were conclusively heard and determined.

Counsel submitted that in Paragraph 8 of the 1st Respondent's affidavit in reply, a copy of the judgment of court in **National Forestry Authority vs. Omukama of Bunyoro and Hoima Sugar Limited (Supra)** attached as annexure "A" and in paragraph 10, the judgment in **Water Environmental Media Network (U) limited (Supra)** is attached as annexure "B"

Counsel further submitted that this amounted to abuse of court process. He defined abuse of court process according to **Black’s Law Dictionary 6th Edition**, which stated that;

“A malicious abuse of legal process occurs when the party employs it for some unlawful object, not the purpose which it is intended by the law to effect; in other words, a perversion of it”

Counsel concluded that the applicants are estopped from bringing this application on account of the doctrine of Res judicata.

Submissions on preliminary objection 1 by Counsel for the Applicants.

1. That the matter is res judicata and an abuse of court process.

Counsel for the Applicants submitted that the matter is not res judicata. That it is between different parties, different title and raises unique causes of action distinct from those stated in **Miscellaneous Causes No. 239 and 255 of 2020, Water & Environment Media Network (U) Limited & Others Versus NEMA & Hoima Sugar Limited**, a judicial review matter which does not implead the 2nd and 4th Respondents and in **HCCS No. 031 of 2016 National Forestry Authority Vs Omukama of Bunyoro & Hoima Sugar Limited**, the dispute was about ownership of land but the instant case does not concern any land dispute.

Counsel submitted that the applicants in the instant case seek 23 remedies for enforcement of the right to descent, clean and healthy environment as well as the right to be heard and just administrative treatment pursuant to **Article 20(2), 28, 39, 42(c) and 45 of the Constitution, Section 3, 5(2), 101(1) & (2) (c) and 111(3) of the National Environment Act, 2019.**

Counsel submitted that the issue of *res judicata* was ably discussed in the case of **Karia & Anor Vs Attorney General & Others [2005] 1 EA 83** where the following conditions must be satisfied:-

1. *There have to be a former suit or issue decided by a competent court.*
2. *The matter in dispute in the former suit between parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.*
3. *The parties in the former suit should be the same parties, or parties under whom they or any of them claim litigating under the same title*

Counsel for the Applicants submitted that the previous cases did not cover the right to a clean and health environment or other fundamental rights. That declarations in the Notice of motion in the instant suit have never been heard or resolved in any of the previous suit.

Counsel submitted that the right to a clean and health environment in issue in the present suit which were not covered in the previous suit include:

- i) *Conserving biological diversity;*
- ii) *Disregard of NEMA's pre-Environmental and Social Impact Assessment (ESAI) guidelines.*
- iii) *Public participation*
- iv) *The pre-ESIA scoping process and the terms of reference in the ESIA.*
- v) *Omission of the climate change Impact analysis;*
- vi) *Deception that the ESIA was conducted by the relevant team;*
- vii) *Non consultation of lead agencies and other stakeholders;*
- viii) *Post ESIA certificate legal obligation;*

- ix) *Post ESIA certificate none-compliance with the laws and the conditions of the project approval.*
- x) *Legal human and environmental violation and threats during project Implementation.*

Counsel referred to the case of **Onzia Vs Shaban Fadul HCCA No 19 of 2013** where it was held that;-

“The basic method in deciding the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of the previous suit and then to find out as to what was decided by the judgment which is said to trigger the res judicata plea. The plea has to be substantiated by producing the copies of the pleadings and judgment in the previous suit. In some cases only a copy of the judgment in the previous suit is filed in proof of a plea of res judicata and if the judgment contains exhaustive or the requisite details of the material averments made in the pleadings and the issues which were taken at the previous trial, it may be sufficient proof.

It cannot be determined by mere speculation or inferences by a process of deduction what the facts stated in the previous pleadings were. It cannot be determined without ascertaining what the matters in issue in the previous suit were and what was heard and decided.

It is not a pure question of law which could be resolved on basis of the submissions of counsel alone”

Counsel submitted that in the case of **Water & Environment Media Network (U) Ltd and others Vs NEMA (Supra)**, was a matter of judicial review which simply looks at the process and does not go to the merit of the case.

Counsel referred to the case of **Lt. David Kabarebe vs. Major Prossy Nalweyiso Civil Appeal No. 34 of 2003** where court held that;-

“To give effect to the plea of res judicata, the matter directly and substantially in issue must have been heard and finally disposed of in the former suit”.

Counsel also referred to the case of **MA No. 239 of 2017; Kercan Prosper Vs. The Attorney General and 3 others** where it was held that;

“Judicial review is concerned not with the private rights or merits of the decision being challenged but with the decision making process.”

Counsel concluded that such a matter of judicial review cannot be said to have determined the rights of Uganda relating to health and clean environment.

Counsel submitted that the parties in the current case are different from the parties in **Water & Environment Media Network (U) Limited & Others Versus NEMA (Supra)** and National Forestry Authority (*Supra*) and neither do they claim or litigate under the same title.

That the present application brings on board the 2nd and 4th Respondents who were not parties in the previous suits.

Counsel for the Applicants submitted that the instant matter is a Human and Environmental rights matter that has neither been heard nor decided by a competent court. It has different parties, different title and different cause of action.

Counsel concluded by referring to the case of **Bank of Africa (U) LTD vs. Abdul Rajab & Ors MA No. 126 of 2021** where it was held that;

“There was no Res Judicata in the matter because of the existence of new issues and new matters of controversy between the parties that were never resolved in the earlier suits between them”.

Analysis of Court.

1. Whether the matter is res judicata and an abuse of court process.

According to **Section 7 of the Civil Procedure Act**;-

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

The court of appeal of Uganda in the case of **Ponsiano Semakula Vs Susane Magala & Others, 1993 KALR P.213** had this to say on the doctrine of res judicata;

*“The doctrine of res-judicata, embodied in **S.7 of the Civil Procedure Act**, is a fundamental doctrine of all courts that there must be an end of litigation. The spirit of the doctrine succinctly expressed in the well-known maxim: ‘**nemo debet bis vexari pro una et eada causa**’ (No one should be vexed twice for the same cause). Justice requires that every matter should be once fairly tried and having been tried once, all litigation about it should be concluded forever between the parties. The test whether or not a suit is barred by **res-judicata** appears to be that*

*the plaintiff in the second suit trying to bring before the court in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of **res-judicata** applied not only to points upon which the first court was actually required to adjudicate but to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time”.*

In the case of **Maniraguha Gashumba v Sam Nkundiye CACA No. 23 of 2005** court of appeal stated that;

“Res judicata is a plea of jurisdiction, in that Section 7 of Civil Procedure Act (supra) bars any court from trying a suit or even an issue that is res judicata”.

In this instant application, the applicants filed this application seeking several declarations that the Environmental Social Impact Assessment, Prayers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 16 and 18 contest the procedure and grant of the Environmental Social Impact Assessment. The rest of the prayers contest violation of a right to health and a clean environment.

In consolidated **Misc. Cause No. 239 and 255 of 2020; Water and Environment Media Network (U) Ltd & 2 others Vs National Environment Management Authority & Another**, the issuance of the Environmental Social Impact Assessment was investigated and determined by court.

In the affidavits in support of **Misc. Cause No. 239 and 255 of 2020; Water and Environment Media Network (U) Ltd & 2 others Vs National Environment Management Authority & Another**, paragraphs 1, 5 and 7 related to protection of a right to clean and health environment.

I find that the Applicants are raising the same issues that were raised and adjudicated upon in the case of **Misc. Cause No. 239 and 255 of 2020; Water and Environment Media Network (U) Ltd & 2 others Vs National Environment Management Authority & Another**

Furthermore, the Applicants also in prayer No. 17 raised issues of land dispute which issues were clearly handled and determined by court in **HCCS No. 31 of 2016 National Forestry Authority Vs Omukama of Bunyoro and 2 others.**

Res judicata for this purpose is not confined to the issues which the Court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process for the Court to allow a new proceeding to be started in respect of them. The binding character of judgments or rulings pronounced by courts of competent jurisdiction is itself an essential part of the rule of law.

This court will not accept the semantics of judicial review versus human rights enforcement as a dichotomy of allowing parties to re-litigate matters already determined by the same court as this will lead to endless litigation and cause confusion to the public. Otherwise, every lawyer or NGO will turn a matter litigated under judicial review into a human rights enforcement case or constitutional matter like in the present case.

Whatever human rights violations the applicants are trying to put up in this instant application are matters that belonged to **Misc. Cause 239 and 255 of 2020; Water & Environment Media Network (U) Ltd & 2 ors Vs National Environmental Management Authority & Anor.** If the above matter had been dismissed on a technicality without court delving into the merits of the case, then the principle of *res judicata* would not have been applicable. It would not be clear if the application was dismissed because of lack of merits or some technical ground. *See Daryao Vs State of U.P AIR 1961 SC 1457.* Since court heard the above application on merit, there is nothing to re-litigate. The speaking order and the question decided in that

application would operate as *res judicata*. See *SMT Pujari Bai Vs Madn Gopal [1989]3 SCC 433*;

It is in the interest of the public at large that finality should attach to the binding decisions pronounced by the courts of competent jurisdiction. Further, it is also in public interest that parties should not be vexed twice over the same kind of litigation. Even an erroneous judgment or ruling on question of fact would operate as *res judicata* for a subsequent suit or proceedings. See **Supreme Court Employees Welfare Association Vs Union of India [1990] AIR SC 334**.

Accordingly, I find that this matter is *res judicata* and this objection is upheld.

Having found that the matter is *res judicata*, I don't find it prudent to deliberate on the rest of the objections raised as doing so will be superfluous and a moot.

Conclusion.

In the final result, I uphold the preliminary objection raised by Counsel for the Respondents with the following orders that; -

1. Miscellaneous Cause No. 151 of 2021 is *Res Judicata*
2. Miscellaneous Cause No. 151 of 2021 is hereby dismissed.
3. Given the nature of this matter, being a matter of public interest, no orders as to costs.

Dated, signed, sealed and delivered by email at Kampala this 12th day of **July 2022**.

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Emmanuel Baguma

Judge