# THE REPUBLIC OF UGANDA

## IN THE SUPREME COURT OF UGANDA, AT KAMPALA

***(CORAM: ODOKI, C.J., TSEKOOKO; KATUREEBE; TUMWESIGYE; KISAAKYE; JJ. SC).***

# CIVIL APPEAL NO. 17 OF 2010

**BETWEEN**

**NATIONAL FORESTRY AUTHORITY:::::::::::: APPELLANT**

**AND**

**SAM KIWANUKA::::::::::::::::::::::::::::::::::::RESPONDENT**

*10* ***[Appeal against decision of the Court of Appeal at Kampala, (Mpagi Bahigaine, DCJ., Twinomujuni, Kitumba, JJA)*** **in** ***Civil Appeal No.5 Of 2009, delivered at Kampala*** **on** ***29th April 2010]***

**JUDGMENT OF KATUREEBE,JSC.**

15 This appeal arises from a decision of the Court of Appeal dated the 29th April, 2010 whereby the Court of Appeal confirmed the decision of the High Court in favour of the Respondent who had been the plaintiff in the High Court, but reduced the quantum of damages awarded.

Dissatisfied with that decision the appellant now appeals both against the findings as to liability and quantum of damages. The respondent has also cross-appealed against the Court of Appeal's decision to reduce the damages awarded by the High Court.

The subject matter of the appeal is a piece of land over which the respondent has a certificate of Title, Leasehold Register Volume 2269

Folio 5, Plots 6 and 7 Block 447 at Kyewaga, Entebbe. This

land was initially Part of the gazetted Kyewaga Central Forest Reserve, last declared a forest reserve in 1968.

On 24th August 1994, the Uganda Land Commission executed a Lease Agreement whereby it leased the land to Sunshine Beach Properties Limited, for a term of 49 years, commencing on 1st March, 1983. Subsequently, the property went through several transfers to other parties. In 2005, the respondent bought the land for a sum of Shs.500,000,000j= (Five hundred million) and had the certificate of title transferred into his names. He proceeded to demarcate the land into 76 plots for sale to intending developers for purposes of building a Housing Estate.

On 31st December, 2005, the appellant's authorized officer served an eviction notice on the respondent, asserting that the respondent was illegally encroaching on Kyewaga Central Forest Reserve, and requiring him to vacate within 14 days. This was followed up in January 2006 when the appellant forcefully evicted the respondent from the suit land. The respondent then filed a suit in the High Court against the appellant for unlawful eviction, trespass, and a declaration that the suit land was not a Forest Reserve. The High Court decided in favour of the Respondent and awarded him substantial damages. The appellant appealed to the Court of Appeal where only one issue was framed for the court's determination, i.e. whether the learned trial judge erred in law and fact when she held that the suit land was degazzetted before the respondent procured it and that he was therefore a bona fide purchaser for value without notice. The

Court of Appeal decided that issue in the affirmative confirming that the suit land had been degazzetted and was not a forest reserve and that the respondent was a bona fide purchaser for value without notice. The Court, however, reduced on the damages awarded, hence this appeal and cross-appeal.

The appellant filed six grounds of appeal in this court as follows:-

**1.** ***"The learned Justices of Appeal erred in law when they pronounced judgment without full Coram.***

**2.** ***The learned Justices of Appeal erred in law and fact when they held that the suit land was degazzetted.***

**4.** ***The learned Justices of Appeal erred in law and fact when they held that the suit land was not a forest reserve.***

**4.** ***The learned Justices of Appeal erred in law and fact when they ignored the provisions of the Constitution and the Land Act regarding the preservation and protection of forests.***

**5.** ***The learned Justices of Appeal erred in law and fact when they held that the respondent had unimpeachable title to the suit land.***

**6.** ***The learned Justices of Appeal erred in law and fact when they awarded excessive damages."***

Both parties filed written submissions. The appellants abandoned ground 1 of the appeal. They argued ground 2, 3, and 4 together. The respondent also replied in similar manner and I intend to deal with the appeal in the same way.

At the hearing, the appellant were represented by Mr. Nerima Nelson, while the respondent was represented by Mr. Christopher Bwanika.

We allowed both counsel to make brief oral submissions whereby they affirmed and/ or clarified on matters already submitted on in their respective written submissions.

In his submissions on grounds 2, 3 and 4 the appellant submitted that these grounds revolved around the issue whether the suit land is in a forest reserve. If the land is in a forest reserve, he argued, then the appellant would be entitled to stop the respondent's developments. Counsel stated that there was no dispute that the suit land was part of 222.6 hectares declared as Kyewaga Central Forest Reserve under the Forest Reserves Declaration Orders of 1932, 1948 and 1968. Counsel contended however that the Forest Reserves (Declaration) order, 1998 (SI 146 - 1) which reduced the Kyewaga forest reserve from 222.6 hectares to 209 hectares was not valid as it was inconsistent with the Constitution, the Forests Act and the Land Act.

Counsel cited Article 237(2)(b) of the Constitution and Section 44(2) of the Land Act which establish the Public trust doctrine. According to counsel, the Public trust doctrine does not permit any reduction of an area once declared a central forest reserve.

He also cited objectives No. XIII and XXVII under the National Objectives and Directives of State Policy in the Constitution on the obligations of the State to protect natural resources and to

promote sustainable development, In further support of his argument that there was no valid degazettement of the forest reserve as any such degazettement would be ultra vires the Constitution, the Forest Act and the Land Act. He cited the case of ***ADVOCATES COALITION For DEVELOPMENT -Vs- AG, H.C. MISC. CAUSE NO.01 OF 2004*** where Opio Aweri J, discussed the Public Trust Doctrine. He also cited the Kenya case of ***WAWERU -Vs- REPUBLIC (2006)*** **2** ***EA*** **349** in that regard. He invited this court to apply the case of ***MAKULA INTERNATIONAL -Vs- HIS EMINENCE CARDINAL EMMANUEL NSUBUGA*** **(1981)** ***H.C.B 11*** as authority for the proposition that a court cannot condone an illegality.

Counsel also cited ***UGANDA -VS- WANGUBO and*** **19** ***OTHERS (1977) HCN 220*** and ***KASULE -Vs- ATTORNEY GENERAL(1971) EA*** **423** in support of the proposition that a rule purported to be made by the Minister but outside the powers of the Parent Act is ultra vires that Act and cannot stand. Here, with regard to the Forests Act, counsel's contention is that whereas the Act also empowers the Minister to declare a forest reserve, the Act does not contain powers for the Minister to revoke, undeclare or degazette what has already been declared. He also cited ***AGGREY BWIRE -Vs-*** **1-** ***ATTORNEY GENERA;*** **2.** ***JUDICIAL SERVICE COMMISSION,*** **S. C.** ***C.A No.8 OF 2010,*** where this court cited with approval a dicta from ***COMMISSIONER for CUSTOMS & EXCISE -Vs- CURE AND DELEY LTD*** **(1962) 1** ***Q.B*** to the effect that when one is considering whether a regulation made is intra

VIres, one must look at the object and purpose of the legislation as a whole.

Counsel contended that the object of the above provisions of the Constitution, the Forests Act and the Land Act is to preserve forests and not to destroy or tamper with them in any way. Therefore, to him, any purported excision of a forest reserve IS ultra vires the said provisions and is therefore null and void. Consequently, the appellant was within its powers under the National Forestry and Tree Planting Act, 2003 to stop the respondent's activities in a forest reserve and evict him therefrom.

On ground¢ 5, counsel argued that even if the lease for the suit land was granted by the Uganda Land Commission under the Public Lands Act, section 48 of that Act subjected the land to the operation of the law relating to forests, i.e. The Forests' Act. Since that land was in a forest reserve, the respondent did not have "absolute" rights to use the land as he wished. His title was subject to the Forests Act and later to the National Forestry and Tree Planting Act, 2003. Counsel cited the case of ***AMOOTI GODFREY NYAKAANA -Vs- NEMA & OTHERS, CONSTITUTIONAL PETITION NO.3 OF 2005*** where a house which had been built in a wetland in defiance of a restoration order was demolished by the respondents in that case, and the Constitutional Court held that the Petitioner's proprietary rights were not infringed. It is only his misuse of the land that was taken away for purposes of protecting the environment.

On ground 6, the appellant criticized the Court of Appeal for awarding interest at the commercial rate of 20% per annum on the loan facility of *Shs.500,000,000j=* when in fact the interest had not been pleaded and strictly proved as special damages. He cited the case of ***MUSOKE -Vs- DEPARTED ASIANS PROPERTY CUSTODIAN BOARD & ANOTHER (1990-1994) 1 E.A 419*** to support his contention that special damages which is the loss presumed by law to be the direct consequence of the defendant's acts, must be explicitly pleaded and proved by evidence. This had not been done in this case.

Counsel further criticized the Court of Appeal for overlooking other sources from which the respondent could repay the loan. Evidence showed he had sold some 15 plots the proceeds of which could have reduced on the principal borrowed.

Furthermore, there was evidence to show that the Allied Bank expected the loan principal and interest to be paid by rental proceeds from the respondent's properties at Plot 5 Naguru Vale, Kampala. It was wrong for the court to assume that the whole loan principal of *Shs.500,000,000j=* had remained unpaid simply because the respondent had not sold all the plots. Counsel prayed that this head of claim be rejected as not having been specifically pleaded and proved.

Finally counsel prayed that this Court allows the appeal with costs both in this Court and the Courts below .

In answer to the appellant's submissions counsel for the respondent supported the findings and decisions of the Court of Appeal, save for the quantum of damages awarded. In answer to grounds 2, 3 and 4, counsel agreed with the submission of

counsel for the appellant that the appeal revolved around the issue "whether the suit land is in a forest reserve." Counsel contended that if the suit land was not in a forest reserve then the appeal had to fail. Counsel conceded that the suit land had indeed been part of 222.6 hectares of Kyewaga Forest Reserve as

last declared under the Forest Reserves Declaration Orders of 1968. However, counsel further contended, on the advice of the Chief Forest Officer to the Commissioner of Lands given by letter of 24th September, 1981, an area of the reserve measuring 13.6 hectares which the Chief Forestry Officer considered sandy,

swampy with poor soils that could not support forest crop production, was surveyed off and released to the Uganda Land Commission to lease to developers for other economic activities. A certificate of Title was duly issued by the Uganda Land Commission. That title underwent several transfers and

transactions until the respondent bought the land and had the title transferred into his names in 2005.

Counsel contended that the respondent was a bona fide purchaser for value without any notice of any fraud, illegality or

defect affecting the title. Furthermore, counsel contended that the suit land was in fact degazetted under the Forest Reserves (Declaration) order 1998 (SI 63/98) which reduced the Kyewaga forest reserve from 222.6 hectares to 209 hectares. An official

map made in 1998 showed that the suit land was outside the forest reserve. Counsel submitted that the Minister had power to declare a forest, and had power to amend that declaration if the national interest so demanded.

The S.I 63 of 1998 had in effect replaced the earlier one of 1968. The statutory Instrument had been duly gazetted, and therefore the Court of Appeal was right to regard it as valid law. The suit land was therefore not part of a forest reserve. Counsel

10 contended that ***MAKULA INTERNATIONAL*** and other cases cited above by the appellant were distinguishable froin this case and could not apply.

In answer to ground 5, counsel submitted that the lease had

15 been granted by the Uganda Land Commission which had power to do so under the Public Lands Act. That lease did not contain a condition reserving rights to "forest produce." He maintained that Section 48 of the Public Land Act must be read together with S.26 of the same Act. Counsel further submitted that in absence

20 of proved fraud, the respondent's title was unimpeachable. He cited section 59 of the Registration of Titles Act, and the cases of ***KAMPALA BOTTLERS LTD -Vs- DAMANICO (V) LTD SCCA NO.22 OF*** **1992, *WAIMIHA SAW MILLING* Co. *LTD -Vs- WAION TIMBER* Co. *LTD* (1926) *A.C*** and ***DAVID SEJJAAKA NALIMA -***

25 ***Vs- REBECCA MUSOKE, CIVIL APPEAL NO.12 OF*** **1985** in support of his contention that the respondent's title was unimpeachable save for fraud which must be proved. He supported the finding of the Court of Appeal that the

respondent's title was unimpeachable, and invited this court to uphold this finding.

On ground 6, counsel treated it in his submission under the cross-appeal and I will also treat it so when considering that aspect of this appeal/ cross appeal.

In determining this appeal, one must consider both matters of fact and matters of law. I agree with both counsel that this appeal revolves on the issue whether this suit land is in a forest reserve. It is a fact that as per the Forest Reserve Declaration Order 1968, Kyewaga Forest Reserve was given as 222.6 hectares. It is also a fact that by the Forest Reserve Declaration Order, 1998, the same forest reserve is given 209 hectares, clearly showing that 13.6 hectares had been excised off. In its written statement of defence and counter claim, the appellant acknowledged this fact. It stated in paragraph 7(a) thereof as follows:-

> ***"That the Kyewaga Central Forest Reserve with Boundary Plan No. EBB/l*** **at a** ***scale of 1:10,000 was first gazetted*** **in 1932,** ***legal Notice No.*** **87 as a** ***production reserve with*** **an** ***area of*** **222.6** ***hectares/550 Acres}, then regazetted*** **in 1948** ***under Legal Notice No.41 with the same area and purpose, then statutory No.176 of*** **1968** ***with the same area*** ***and reduced*** **to** ***209 Hectares*** **to** ***integrate encroachment pressures by Statutory Instrument*** *No.* 63 **of 1998** ***and has since been maintained*** **at** ***that size.*** ***fA copy of the Boundary plan*** **is** ***hereto attached and marked "Dl*** **"}."** (emphasis added).

At this point the appellant did not raise the validity of the 1998 Statutory Instrument. It accepted the position that the forest

reserve had been reduced in SIze to "integrate encroachment pressures." It does not state what those encroachment pressures were. But if it were established as a matter of fact that the suit land is indeed that same piece which was excised from the original area in 1998, then it would follow that as of that date of the SI 63 of 1998, that land ceased to be a forest reserve. Both the High Court and the Court of Appeal made concurrent findings of fact that indeed the suit land was the land that was contained in the certificate of Title Leasehold Register Volume 2269 Folio 5 Plot 6 and 7 Block 447 Busiro County, Mpigi, measuring approximately 33.61 Acres. I have re-evaluated the evidence, and I find no reason why I should depart from that finding of fact by both the lower courts.

The appellant then came up with the argument that the Minister could not validly degazette the suit land as this would violate Section 4 of the Forest Act and the Public Trust Doctrine enshrined in Article 237 of the Constitution and the Land Act. Section 4 of the Forest Act states:

> ***"The Minister may, by statutory order, dec lare any area-***
> **a) To be a** *central forest* ***reserve;*** **or**
> **b) To be a *localforest reserve;* or**
> **c) To *have an adequate forest estate,***
> ***after instituting such inquiries* as *he shall deem necessary*."**
> (emphasis added).

Obviously, the Minister (Governor) in 1932 or 1948 while applying similar provisions must have instituted those inquires 30 and decided to keep the forest reserve at 222.6 hectares.

Similarly, the Minister must have made inquires in 1968 and found no reason to reduce the area of the forest reserve. But inquiries by the Minister in 1998 would have revealed that in 1981, the Chief Forest Officer had advised the Commissioner for Lands to excise that part of the forest reserve that did not have adequate forest cover, had poor soils, and was marshy so that it could be available for other activities in the national interest. The Minister would have been made aware of the process that had been commenced in 1981 resulting in the issuance of a certificate of Title, and certainly would have seen the advice of the Chief Forest Officer and the decision of the commissioner of Lands. The Minister would have considered Section **11** of the Forests Act about boundaries of forests and the finality of the decision of the Commissioner of Lands where there is a dispute as to whether any area is included in a forest reserve.

Section **11** states as follows:-

> ***11(1) "In any notices, rules or orders made under this Act, forest reserves and village forests and their boundaries shall be described in such manner as the person issuing such notices or making such rules or orders shall deem fit and expedient."***
>
> ***(2) "If any dispute shou ld arise as to whether or not any area is included in a forest reserve or village forest the decision of the Commissioner of Lands and Surveys shall be final, and a certificate under his hand recording such decision shall be admissible in evidence in any court of law."*** (emphasis added).

Although there may not have been a formal dispute, and this provision can only be applied by way of analogy, the fact that a

title had been issued based on a survey by the Commissioner of Lands and Surveys must have been taken into account by the Minister. The appellant fully acknowledged the fact that there were encroachment pressures, hence the reduction in area of the

I find it somewhat awkward that counsel for the appellant then argued that the Forest Act gave the Minister power to declare a forest reserve, but that the Minister had no power to undeclare, reduce or degazette a forest reserve. It is noteworthy that the same appellant in its written submissions to the High Court had acknowledged, quite rightly in my view, that by virtue of the Interpretation Act, the Minister had power to degazette.

The submissions state:-

> " ..... ***Purporting*** **to** ***authorize the granting of*** **a** ***lease over the Kyewaga Forest Reserve for the construction of*** **a** ***tourist hotel in the absence of*** **a** ***statutory instrument issued by the Minister responsible, who under the then Forests Act Cap.146 was the only one who had power to declare an area*** **a** ***forest reserve and by virtue*** **of** ***the Interpretation Act Cap.3 therefore had power*** **to** ***degazette, and also that*** **it** ***was in contravention of section*** **48** ***of the then Public Lands Act No.*** **13** ***of 1969 and*** **51** ***No.176 of*** **1968."** (emphasis added).

Once Statutory Instrument No. 63 of 1998 was gazetted, it became part of the law of Uganda.

Interpretation Act states as follows:-

> ***"Every statutory instrument shall*** **be** ***published in the Gazette and shall*** **be** ***judicially noticed."***

The High Court and Court of Appeal had to judicially notice the Statutory Instrument and it remained valid law until challenged successfully in court.

As pointed out above the suit land was not a forest reserve once it was left out by the Statutory Instrument. It is true, that before it was degazetted in 1998, the suit land was technically, part of the Kyewaga Forest Reserve. But clearly the process had been put in motion by the Forestry Department, the Commissioner for Lands and Surveys, and the Uganda Land Commission to excise it from the Kyewaga forest reserve by issuing a certificate of title. The process could only be completed by the Minister who was empowered to issue the necessary order after he had made the necessary InquIries. Until the Minister did so, the land had to remain a forest reserve, even though it had a certificate of title.

The process which had commenced for its degazettement may be considered a pending matter in terms of Article 280 of the Constitution.

The foregoing also apply to the consideration of Ground 5 whether the respondent's title is impeachable. Bearing in mind that the respondent bought the land and had the title registered in his names in 2005, and bearing in mind that the Minister had followed up the process that had commenced in 1982 and degazetted the land in 1998, seven years before the respondent acquired it, it is difficult to see how one can impeach the respondent's title.

Both the High Court and Court of Appeal found that the respondent had not committed or been involved in any fraud. In fact both courts commended the respondent for carrying out a search in the Land Registry after the appellant had commenced eviction process against him and discovering all the documents that gave the genesis of the title.

Mpagi-Bahigeine, JA (as she then was) in her lead judgment after discussing the effect of S.I 63/98 states as follows at page 6 of her judgment:

> ***"However, that notwithstanding, at the respondent's own initiative, the respondent after being evicted by the appellant mounted a search in the land office where he found a letter dated 24/9/1981 Ex. Page 11.***
>
> ***This letter was written by a forest officer in 1983 to the Commissioner of Lands and Surveys, responding to an application by G. K. And Brothers Ltd for 13.6 hectares of the same land. He also found a letter from the Commissioner of Land and Surveys to the Senior Staff Surveyor, requesting for survey of 13.6 hectares at Kyewaga Forest Reserve dated 9.12.1982.***
>
> ***He tendered in evidence that actual lease offer dated 20.10.1982 from the Land Office to G.K. Brothers for Plot 6/7 Busiro North Block 447 and the actual lease document Ex. Page 5 & 16 respectively. He also tendered in the certificate of change of name from G. K. Brothers to Sunshine Beach Properties Ltd. Ex. Page 17. "***

The learned judge seems to have been im pressed by the respondent's honesty and diligence when she commented:

> ***"In addition to presenting the title/exhibit 2) as evidence of his interest in the land, Mr. Kiwanuka voluntarily and without hesitation presented to court***

*The Executive Director of NFA confessed in his testimony that he too was not aware of exhibits 11 - 18 and that NFA was working on old facilities and that they do not have the funds to update their information. "*

*This is a revealing self-indictment by the appellant and a confessed dereliction of duty. The appellant failed to follow the events concerning the suit land for all the years since 1983 when a lease was granted to Sunshine Beach Properties Ltd for a term of 49 years, till 2005 when the respondent bona fides bought the land. Yet they claimed to be supervisors of the said land. This is a little troubling.*

*I therefore think that in view of what I have stated above it is not possible for me to hold that 13.6 hectares excised from Kyewaga Forest Reserve was not degazetted. It was degazetted."*

Thereafter the learned Justice of Appeal proceeded to consider the law regarding impeachment of a title. She considered Section 59 of the Registration of Titles Act, this Court's decision in ***KAMPALA BOTTLERS LTD -Vs- DAMANICO (U) LTD*** (supra) and the Australian case of ***WAIMIHA SAW MILLING Co. LTD -VsWAION TIMBER Co. LTD*** (supra), and concluded that the respondent had acted bona fides throughout and had not participated in any fraud or collusion of fraud. Therefore his title was unimpeachable.

I fully agree with that finding and decision. In the circumstances, ground 2 and 3 must fail.

Counsel for the appellant further sought to impeach the respondent's title on the grounds of the Public Trust Doctrine based on Article 237(2) of the Constitution. Counsel argued that the state has a Constitutional duty to preserve and protect forests for and on behalf of the people of Uganda. To counsel therefore, the government or agency thereof could not degazette a forest. To do so would be ultra vires the Constitution.

Before considering this argument, I wish to make the following observations. The National Forestry Authority, like its predecessor the Forestry Department, is primarily charged with the development and protection of areas declared as forests. In execution of that primary function, it enforces the relevant law as made by Parliament or such subsidiary law as may be made under the authority of an Act of Parliament. In my view, the NFA cannot refuse to enforce a properly passed legislation because in its own opinion that law is inconsistent with the Constitution. It would be most unworkable were it to be that any person or body could refuse to obey the law because of what that person or body subjectively thinks of the law.

That is why the framers of the Constitution, In their wisdom, provided Article 137(3) of the Constitution, which states as follows:-

> *"A person who alleges that-*
> ***(a) an Act of Parliament* or *any other law* or *anything* in or *done under the authority of any law;* or**
> ***(b) any act* or omission *by any person* or *authority,***

**is *inconsistent with or in contravention of* a *provision of this Constitution, may petition the Constitutional court for* a *declaration* to *that effect, and for redress where appropriate."***

In this case, the NFA on its own assumed that the Forests (Declaration) Order, 1998, S.l 63 of 1998, duly made by the Minister under Section 4 of the Forests Act was inconsistent with the Constitution and, therefore, null and void. Without seeking the interpretation and requisite declaration by the Constitutional Court, it proceeded to evict the respondent from his property.

It is only after the respondent filed the case against the NFA that it conjured up these legal arguments and started looking up the file records to establish whether the respondent's land was indeed in the Forest Reserve.

It is interesting to note, for example, that on 11 th April 2006, the Executive Director NFA wrote a letter to the Commissioner, Lands & surveys (Exb.D2) seeking for "certified copies" of the following documents to wit;

***"(a) Avail photographs for the Kyewaga Central Forest Reserve;***

***(b) Cadastre copy of Kyewaga Central Forest Reserve formerly registered C.L 803 on sheet 90.U.lr* 81 as *per Legal Notice No. 87/1932 (currently PL 803* as *per SI.* 63) 1998)."**

The reason given for requesting for the above documents is given as:-

***"We are currently embroiled in* a *legal dispute with one Sam Kiwanuka - Registered Proprietor of LRV 2285***

***Folio 5 Block 44) Plot 6 & 7 over a portion of the Kyewaga Central Forest Reserve in Entebbe."***

Although it is normal to look for evidence to support one's case, in a case like this one where the NFA took action and evicted a person from land, one would have expected the NFA first to ascertain the legal and factual position before acting. Indeed one of their witnesses testified in court that if they had had the information they would not have acted the way they did.

In her judgment, Mpagi-Bahigeine, JA (as she then was) found this conduct "troubling," and "lackadaisical approach to its work." I agree.

Be that as it may, the doctrine of Public Trust must be put in proper context. Article 237(2)(b) relied on by counsel for the appellant, states as follows:-

***"(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 touristic purposes for the common good of all citizens."*** A similar provision is found in the Land Act (section 44).

What is clear from this provision is that it is not self-executing. Parliament is left with the responsibility to pass a law that will operationalize this provision. It is envisaged that such law will determine which areas are to be protected and preserved, and whether, Government or a local government is to be responsible.

Parliament would have to set out the criteria upon which an area may be declared a protected area.

The law in force then was the Forests Act which was continued in force by Article 274 of the Constitution, albeit subject to any *((modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution."*

It is under Section 4 of the Forests Act that the Minister issued S 1. 63 of 1998. To make the determination to declare the area that he did a forest reserve, the Minister was required to carry out such inquiries as he deemed fit, and the boundaries of the forest reserve would have been determined in accordance with Section **11** of that Act. I have already considered this earlier. I do not see any inconsistency between the action of the Minister and the Constitutional provisions, nor do I see any inconsistency between the provisions of S1. 63/98 and the Constitution.

To argue that for the Government to hold in public trust a forest reserve means that the Government cannot ever amend the law either to increase or decrease on such forest is not tenable. The provIsIons of Article 237 would have to be read with other prOVISIons of the Constitution with regard to the duty of the State. For example, Objective XXVII on the environment provides for the duty of the State to *(promote sustainable development"* (paragraph (i). I t also provides in paragraph(ii) that ***"The utilisation of the national resources of Uganda shall be managed in such a way as to meet the development and environmental needs of present and future generations of Ugandans".***

One has to bear in mind that the National Objectives and Directive Principles of State Policy are themselves not justiciable, but meant to ***"guide all organs and agencies of the State, all citizens, organisations and other bodies and persons in applying*** **or** ***interpreting the Constitution*** **or** ***any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society."***

Article 242 provides for government to be able to regulate the use of land under laws made by Parliament.

In my view, this is as it should be. The State, in the protection of the public interest, must take into account such issues as sustainable development, the balance between development and environmental needs, etc so as to promote a wholesome public interest both for the present and for the future generations. Indeed even the Act that was made after the promulgation of the Constitution, I.e. The National Forestry and Tree Planting Act, 2003 under which the appellant purported to evict the respondent, does not state that once an area has been declared a forest reserve it cannot be amended. In fact Section 8 of that Act does provide for such amendments, albeit with stringent conditions including adhering to the provisions of Section 7 which the Minister must go through before declaring an area a forest reserve. It is important to note that section 7 requires that the Minister, before declaring an area a forest reserve, or amending the same, must notify the general public both in the

gazette and print media so that all interested persons have a chance to air their views. The local communities must be involved. This, in my view, has amplified on Section 4 of the Forests Act where the Minister was required to carry out

5 InquIries.

In any case once the declaration has been made, then these areas which are not included in the new declared forest reserve cannot be said to be a forest reserve simply because they had

10 been part of forest reserve before the new declaration was made.

If it were so, then the prOVISIons on amendment would be redundant. In my view, government In exercise of its duty to promote sustainable development while preservIng the environment, may degazette a part of a forest preserve provided

15 all the procedures laid down by law are followed.

In this case I have already found as did both the lower courts that the suit land was not part of the Kyewaga Forest Reserve as declared under S.l 63 of 1998. Therefore it was not open to the

20 appellant to evict the respondent in 2005. All that the appellant should have done was to ascertain that the area comprised in the certificate of Title was all part of the 13.6 hectares excised from the forest reserve in 1998.

In the circumstances, I find grounds 4 and 5 of the appeal not 25 tenable and they ought to fail.

The respondent filed a cross-appeal challenging the adequacy of damages awarded by the Court of Appeal. The cross-appeal is based on a single ground stated thus:-

> ***"That the Learned Justices of Appeal erred in law and fact when they held that an award of UG.Shs.1SO,OOO,OOOj= was adequate to atone for all the appellant's unlawful acts, thereby failing to compensate the respondent's loss of income opportunity to give full restitution to the respondent."***

In their written submissions to this court, counsel for the cross-appellant criticized the Court of Appeal for failing to consider loss of profit as a vital factor in considering an award of damages in this case, and further criticized the Court for finding that only "inconvenience and anguish suffered by the cross appellant resulting from inability to service the loan" should be considered. Counsel argued that the cross-appellant was a businessman dealing in real property, and the actions of the appellant had caused him financial loss since he could not sell the plots and realize the profits he had projected to get. He had not been able to service the loan, and to engage in other business he could have invested in. Counsel asserted therefore, that the court was wrong both in law and in fact to base its award only on inconvenience and anguish suffered by the cross-appellant.

As for the question of damages that should be awarded, counsel submitted that it should be based on the price of the plot of land at the time the cross-appellant was stopped. They argued that based on evidence, the cross-appellant was selling each plot at

Shs. *30,000,000j*= (thirty million) and he was selling 3 plots a month, making a total of Shs.90,000,000j= per month.

Counsel submitted that the respondent was entitled to equitable restitution which would only be achieved if he were awarded for lost income opportunity based on a calculation of interest on the sale proceeds that he had been made to forego since his eviction in January 2006. He invited this court to apply the commercial interest rate of 20% per annum for each of the instalments of Shs.90,000,000j= (ninety million) per month. In his calculation, this would be the sum of Shs.l,754,500,000j= which he invited this court to award as general damages.

Counsel cited a number of authorities in support of his argument that the respondent was entitled to an award of general damages for lost opportunity and loss of profits.

It IS to be noted that the trial court had awarded Shs.2,160,000,000j= as loss of opportunity to sell 3 plots per month as special damages. The Court of Appeal overturned this award. In essence, the respondent invites this Court to revisit the decision of the Court of Appeal and reinstate the award by the trial Court, albeit with slightly less amount as calculated by counsel.

I consider it necessary to refer to the reasoning of the Court of Appeal on this point. In the lead judgment, Mpagi-Bahiegeine, JA (as she then was) stated thus at page 9:-

"The Learned Judge however, awarded the respondent Ug.Shs.2,160,000,000/= representing the sum the respondent would have realized from the sale of 72 plots over a period of 24 months. With respect this was erroneous in view of the fact that she had awarded the respondent the full value of the entire land. The respondent's evidence was that he was earning an average of Ug.Shs.90 million per month from the sale of plots from the suit property. It was on this basis that the Learned Judge awarded his Ug. Shs.2,160,000,000/= as general damages. It is not clear what principle the Learned trial Judge applied in awarding general damages of Ug.Shs.2, 160,000,000. I think this was too speculative.

The general rule is that general damages are such as the law presume to be the direct, natural or probable consequence of the act complained of see STROM -Vs- HUTCHINSON (1905) AC 515. Under the circumstances of the case this would only entail loss of opportunity to sell the plots as and when required so as to service the Bank loans. Nonetheless, since the land was adjudged to the respondent, he could not retain it and be granted its value as well. He could only have one of the two not both.

Since I have found the respondent's title to be indefeasible, it seems to me that I would be entitled to take judicial notice of the fact that land is an appreciating commodity rising in value each day that passes.

Therefore loss of profit would not be a vital factor to consider. I would only consider the inconvenience and anguish suffered by the respondent resulting from inability to service the loan." (emphasis added).

It was on the basis of these considerations, that the Lecfned Justice of Appeal awarded interest on the loan facility at 20% from the date of eviction till the respondent is put in possession.

This interest was based on the loan facility of Shs.500,000,000j= from a bank. The learned Justice further awarded the sum of Ug. Shs.150,000,000j= as adequate general damages to atone the appellant's unlawful acts. This sum would carry interest at

5 court rate from the date of judgment till payment in full.

It is these awards that counsel for the respondent so strongly attacks. But I must point out that it is not true, as argued by counsel, that the learned Justice of Appeal did not consider the

10 issues of loss of opportunity or the loss of profit. She did, but discounted them on the grounds she gave, namely that the respondent still retained possession of the plots which he could still sell at a profit since, on judicial notice, land was appreciating in value. Counsel himself, in his submissions also agrees that

15 land is indeed an appreciating commodity.

The Learned Justice did consider that the respondent had suffered anguish as a result of not servicing the loan, hence the award of 200/0 interest, which even counsel concedes is the

20 commercial interest. The Learned Justice did consider the effect of the unlawful acts of the appellant on the respondent's business, hence an award of general damages in the sum of Ug. Shs.150,000,000j=.

25 I have carefully studied the submissions of counsel and the authorities he has cited in support of awards for lost profits and opportunity. In my view those authorities are distinguishable from the present case.

For example in his cited case of ***SHELL UK Ltd -Vs- TOTAL U.K Ltd [2010J EWCA CIV 180: WLR*** **9 DO 69,** damages were awarded to SHELL for economic loss which resulted from Shell's inability to supply fuel to its customers because the defendant had damaged its tankers and pipelines. The court ruled that that loss was foreseeable. To me this is very different from this case where the respondent continues to have the property, which by common agreement, is appreciating in value.

The cited case of ***YOKA RUBBER INDUSTRIES LTD -Vs- THE DIAMOND TRUST PROPERTIES LTD HCCS NO.*** **367** ***OF 2001,*** where the damages related to consequential loss to goods and value of the goods, is in my view also distinguishable from the present case.

The only cited case with some relevancy is ***JUSTIN ALEXANDER WATTS -Vs- BELL SCOT W.S. SOLICITORS [2007J*** **C** ***SOH 108*** where solicitors for an investor failed to submit an offer to purchase property which also happened to be the highest offer.

The investor/plaintiff claimed that he had intended to redevelop the property into flats. By losing the opportunity to purchase the property, he had also lost the profits he would have made on the property. Again, to me this fact situation is different from the case before us. The cross-appellant has not indicated what profit he was making on the sale of each plot. The sum of Shs.30,OOO,OOO/= must have included the cost of the land, the costs incurred to subdivide the land, the services and then profit.

The cross-appellant is still in possession of the land, which could appreciate well beyond the Shs.30,OOO,OOO/=. In the WATTS case (supra) the court ruled that one would have to look at the ratio of sales to profit in determining damages. To award him Shs.30,OOO,OOO/= per plot would be to imagine that he had no costs at all. That is not tenable.

As the Learned Justice of Appeal put it; we must look at the peculiar circumstances of this case. In my view, the Learned Justice of Appeal correctly analysed the case, correctly stated the law and exercised her discretion in awarding the damages she did. I see no reason to interfere with that award.

The second claim under the cross-appeal IS In respect of exemplary and aggravated damages. Counsel for the respondent/ cross-appellant argued that the conduct of the appellant was not only unlawful but oppressive and arbitrary so as to deserve an award of aggravated or exemplary damages. He contended that the appellant's/ cross-respondent's Head of Legal Department and counsel had deliberately and fraudulently concealed evidence from other witnesses and led them to testify on outdated records. Counsel cited the decision of this court in fljf.:

***JFK ZAABAVE -Vs- ORIENT BANK LTD & OTHERS SCCA NO.4 OF 2006*** as well as others in support of his claim for exemplary or aggravated damages.

I have closely reviewed the evidence in this case. There appears to have been a genuine misunderstanding of the legal status of

the suit land. Physically, it remained a forested area within a gazetted forest. On paper, the land had been dealt with in the land office and a title issued to developers who had indicated that they wanted to build a hotel and poultry farm. None of these had ever been built, although the developers had been granted a full term lease. Although the title had been issued by the Land Office in 1984, the land had only been degazetted in 1998. The crossappellant had bought the land in 2005. It is only when he started clearing the site that the field officers, based on the information they had, tried to stop him from destroying what they knew to be a gazetted forest. Furthermore, both the crossappellant and the cross-respondent then made searches in the Land Office to ascertain the legal status of the land.

To my mind, at the time when the officers of the crossrespondent/ appellant evicted the cross-appellant, they genuinely thought the land was part of the forest. The cross-appellant himself in his evidence under cross examination stated thus:-

> ***"Part of the land was barren. Trees cut over years. X of the land forested. Some parts were heavily forested.***
> ***To make a road you have to remove trees so that you can see the plots. The soils: some of the soils were sandy, a lot of clay - much dug for bricks."***

On the other hand, DW 1, the forest supervisor who raised the alarm in the first place, testified thus:-

> ***"1 never knew anyone had claim in Kyewaga until September last year when Seven Kings came in and started claiming part of the estate that they had a title. They claimed part of Kyewaga Forest reserve 38.2 acres that they had lease title .....I called their foreman and told him "this is a forest reserve."***

***After telling him, he insisted. 1 have a map. There were corner stones, which were put a long time ago. They were there."***

These two witnesses lay the background to the confusion. I am satisfied that at the time when action commenced against the cross-appellant, the servants of the cross-respondent believed they were doing their duty to protect the forest. I cannot see any evidence that they were driven by malice or set out to make a financial gain for themselves or for the cross-respondent. They were, however, mistaken. It is clear it took a long time, including the adducing of evidence in court, before the full legal picture was clear to everyone.

In dealing with this matter and as to whether to award exemplary damages, the learned Justice of Appeal stated thus:

***"Exemplary damages were also sought by the cross-appellant; to this 1 say that courts should be slow to award this remedy which is penal in nature. This can be awarded for oppressive, arbitrary, harsh, and unconstitutional conduct or where there was a desire to make a profit. 1 must say, however, that the crossrespondent's conduct towards the cross-appellant was due to its lackadaisical approach to its work. See ROOKES -Vs- BARNARD (1964) ALL E R 367, at 410 and 411."***

I would agree with the Learned Justice on this. The action taken by the cross-respondent could have been avoided had they first studied the records in the Land Office, or indeed the records in the Forestry Department itself. It may well be that the crossrespondent was a new authority which contributed to the confusion. But I do not see that there was oppressive, arbitrary

and malicious conduct which would bring this case within the ambit of the ZAABWE case so as to warrant the award of aggravated damages, let alone exemplary damages. It is to be noted that in the ZAABWE case, the claim for exemplary damage was denied but the court found that the conduct of the officers of the bank warranted an award of aggravated damages.

I agree with the Learned Justice of Appeal that Courts should take great care in awarding exemplary damages. Indeed, there has been debate in this court whether exemplary damages should be awarded at all where aggravated damages would adequately compensate the plaintiff.

In the case of ***ESSO STANDARD (U) LTD -Vs- SEMU AMANU OPIO, SCCA NO.* 3/93,** this court fully reviewed the law relating to exemplary damages in Uganda and East Africa as a whole, and affirmed the decision in ***ROOKES -Vs- BARNARD* (1964) *A.C* 1129.** This court later re-affirmed the law in the Zaabwe case (supra). In the ESSO case, Platt, JSC, having fully explained the law and its background, had this to say (at page 9):-

> ***"Arising from this exp lanation,* is *the question which* is *one of the fundamental problems, why are exemplary damages really necessary? If the injuries* to a *plaintiff's feelings, the insults he has suffered, the indignities and the like, are all considered, can they really be separated from the cause of those injuries, insults and indignities, namely, the continuations and high-handed actions of the defendant?* Is it *not* a *case of the greater the high-handedness, of the defendant, the greater the injury, insult and indignity? The plaintiff and defendant are locked in battle, with***

> ***the defendant gaining the ascendancy. If this be a proper approach then in reality aggravated damages, if properly measured, should not only bring compensation to the plaintiff, but also make an example of the defendant.***
>
> ***In my view, apart from the precedents which the House (OF LORDS) felt constrained to honour, no doubt with an eye to Commonwealth practice, there is no reason or principle which should have persuaded the House to preserve exemplary damages. They are anomalous, and while logic is not the final arbital in legal analysis, it is satisfactory if an analysis, produces a reasonable and logical result. Without exemplary damages, the law of damages bears a logical compensatory face. For these reasons, I would hold that ROOKES -Vs- BARNARD need not have been followed and exemplary damages could have been expunged. But they have been accepted in East Africa through Obongo's case, and I would be content to allow such damages to be awarded without any further extension."***

Here the Learned Justice was referring to the decision of the East African Court of Appeal in ***OBONG -Vs- KISUMU COUNCIL (1971) EA* 91** which established in East Africa the principles upon which exemplary damages may be awarded. The above abita dicta are illustrative of the need for caution in awarding exemplary damages, even if currently the law allows them.

As already indicated above, it is my considered VIew that this case does not fall within that category where the conduct of the officials was such as to warrant an award of exemplary damages.

In his submissions, counsel for the cross-appellant seemed to dump together exemplary damages and aggravated damages. This court in the Zaabwe case, explained the difference. Exemplary damages are punitive. Aggravated damages are an

5 enhancement, due to the conduct of the defendant, of the compensatory damages awarded to the plaintiff. I do not think that the facts of this case warrant an award of aggravated damages.

10 In my considered VIew, the general damages awarded by the Court of Appeal are adequate compensation. I am also not persuaded that there is need in this case to award commercial interest on the general damages awarded. I would therefore, uphold the interest at the court rate as awarded by the Court of

15 Appeal.

In the circumstances I would dismiss both the appeal and cross-appeal. I would award costs to the respondent/ cross-appellant in this court and in the courts below.

. ~ O -tt:: **kc.**

Dated at Kampala thIS .....day of ..... 2012 .

... ~4 ..... ~ ...

B M KATUREEBE JUSTICE
OF THE SUPREME COURT

# THE REPUBLIC OF UGANDA IN THE SUPREME COURT OF WANDA ATKWPALA

*[Coram: Odoki, CJ., Tselwolw, Katureebe, Tumwesigye & Kisaakye, JJSc.]*

## QVilAppealNo.170[2010

*Between*

15 NATIONAL FOREST AUfHORTIY =- ═══ APPELLANT

*And*

*{Appeal against the decision of the Court of Appeal at Kampala (Mpagi-Eahigeine,*
20 *Twinol1JUjuni & KitUInba, JJA) dated 0[Jh April, 2010 in Civil Appeal No. 05 of 2009}*

**JUDGMENT OF J.W.N. TSEKOOKO, JSC.**

I have had the advantage of reading in draft the judgment prepared by
25 my learned brother, the Hon. Justice B.M. Katureebe, JSC.

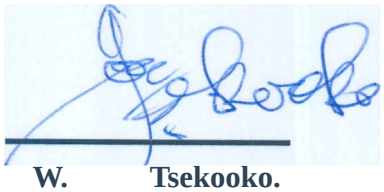
I agree with his reasoning and the conclusions that both the apPeal and the cross-apPeal should be dismissed. I agree that the respondent / cross apPellant gets costs in this court and the two courts below.

I would however like to make a brief observation about practice and procedure in Court of APPeal. I note from the lead judgment that a third Justice of APPeal dissented. According to Article 135(1) the Court of APPeal shall be duly constituted at any sitting if it consists of
35 an uneven number not being less than three Members of the Court.
According to Rule 33(5) of the Rules of the Court of APPeal: *'Tn oivil appeals, separate judgments shall be given by the :me:mbers of the Court unless the decision being unan.iInous, the presiding judge otherwise direots."* The record of appeal shows that the hearing of the
40 apPeal was by three Justices of APPeal. Yet there are only two judgments on the record. In her lead judgment, Mpagi-Bahigeine, JA., (as she then was), indicated that the third Justice of ApPeal dissented. In that case according to Rule 33(5) the dissenting judge ought to have given her written reasons for dissenting unless the

presiding Judge gave direction for the learned Justice not to say anything. There is nothing on the record to indicate there was such a direction. The practice and procedure is different from Criminal Appeals because under Rule 33(3) in criminal appeals, the dissenting judge need not sign the majority judgment nor write a separate judgment.

In my opinion, it is necessary to give written reasons in support of a judge's disagreement with the rest of the panel firstly because this helps in the development of the law. A dissenting minority opinion may in future turn out to be the best approach in a particular area and can be turned into the desired law. The Rules of the Court of Appeal were made under 8.41 of the Judicature Act to regulate the practice and procedure in the Court of Appeal. They have statutory effect and, therefore, unless there is overwhelming lawful excuse to disobey any of them, each judge, advocate or litigant must follow these Rules. If any stakeholder in the judicial process decides to act contrary to the prescribed Rules of Procedure, there would be chaos and therefore all stakeholders ought to follow the prescribed procedures. Judges should follow the rules of their courts so as to provide consistence in practice.

**Delivered at Kampala** this .. ~g~ay of ~f: **2012.**



**W. Tsekooko.**
**Justice of the Supreme Court.**

# REPUBLIC OF UGANDA

**(CORAM: ODOKI, C.J.; TSEKOOKO; KATUREEBE; TUMWESIGYE; KISAAKYE; JJ.SC)**

**CIVIL APPEAL NO: 17 OF 2010**

**NATIONAL FORESTRY AUTHORITY:::::::::: APPELLANT**

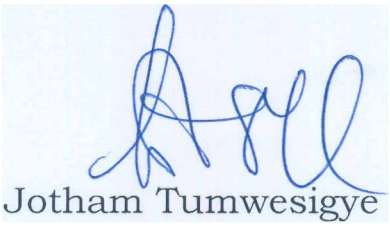
**VS**

**SAnI** I{I~ANU~:::::::::::::::::::::::::::::::::::::::RESPONI>ENT

[Appeal from the decision of the Court of Appeal (Mpagi-Bahigaine, DCJ., Twinomujuni, Kitumba, JJA) in Civil Appeal No.5 of 2009, delivered at Kampala on 29th April 2010)

I have had the benefit of reading in draft the judgment of my learned brother Katureebe, JSC, and I entirely agree with him that this appeal should be dismissed. I also agree with the orders he has proposed.

Delivered at Kampala this ... ~~~day Of .. :~.~ .... 2012.



*(CORAM: TSEKOOKO, KATUREEBE, KITUMBA, TUMWESIGYE, AND KISAAKYE, JJ.S.C.)*

*[Appeal from the judgment and orders of the Court of Appeal at Kampala (MpagiBahigeine, Twinomujuni, and Kitumba, JJ.A) dated 9th April, 2010 in Civil Appeal No. 050f2009J*

I have had the benefit of reading in draft the lead judgment of my learned brother, Justice Katureebe, JSC.

Dated at Kampala this.~.Q~y of ... k~ ... 2012.

DR. ESTHER KISAAKYE JUSTICE
OF THE SUPREME COURT

**5.**

# THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ODOKI CJ, TSEKOOKO, KATUREEBE, TUMWESIGYE AND KISAAKYE, JJ.SC)

CIVIL APPEAL NO 17 OF 2010

*[Appeal against the decision of the Court of Appeal at Kampala (Mpagi-Bahigeine DCJ, Twinomujuni and Kitumba JJA) in Civil Appeal No 5 of 2009 delivered at Kampala on 29th April 20121*

I have had the benefit of reading in draft the judgment prepared by my learned brother, Katureebe JSC, and I agree with it and the orders he has proposed.

As the other members of the Court also agree, both the appeal and the cross appeal are dismissed with costs to the respondent/cross appellant in this Court and the Courts below.

Dated at Mengo this day of *.. 2012.*

B J
CHIEF JUSTICE