THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA.
MISC. CAUSE No. 268 OF 1999.

NATIONAL ASSOCIATION OF
PROFESSIONAL ENVIRONMENTALISTS }:::::::::::::::::::::::::: APPLICANT
VERSUS

AES NILE POWER LIMITED:: RESPONDENT

BEFORE: THE HON. JUSTICE RICHARD O. OKUMU WENGI.

RULING

This application by way of Notice of Motion was brought under Order 48 Rules 1 and 2 of the Civil Procedure Rules, section 101 of the Civil Procedure Act and Section 72 of the NEMA Statute which I take to refer to the National Environment Management Authority Statute 4 of 1995. It seeks a temporary injunction to stop the Respondent concluding a power purchase agreement with the Government of Uganda until the "National Environment Management Authority (NEMA)" has approved an Environmental Impact Assessment (EIA) on the project.

The motion further seeks declarations that such approval of the EIA is a legal pre-requisite and that any endorsement of the project by Parliament without this EIA approval would contravene the law. The end result is that the applicant is asking Court to stop signature of the agreement with the Executive and declare that its endorsement by Parliament without NEMA approval of the EIA would contravene a law and thus be illegal, null and void and of no effect. The motion was supported by the affidavit of Mr. Frank Muramuzi, the President of the applicant, a Non-Governmental Organization active in the area of environment protection. When the application came for hearing the Respondents were not represented nor were they in Court. There was no clue that the Respondents were contesting the claim. An affidavit of service was filed indicating that process was served on the Respondents' Chief Administrator Mr. Henry Kikoyo who signed and stamped on a copy of the motion on 29th March 1999. On an application by Counsel for the applicant this matter proceeded ex-parte.

Mr. Kenneth Kakuru learned Counsel for the applicants first tussled with the issue of procedure. He submitted that under the NEMA Law there was no prescribed procedure to be followed by an applicant who seeks a remedy under that law. Counsel submitted that under section 72 of the NEMA Statute any party who feels that the environment is being harmed or is under threat of being harmed may bring an action to prevent or stop such harm an d obtain an order from Court if the environment has been harmed to restore it. He urged this Court to hold that in the circumstances the main issue was that there was a danger of a law being violated and all that he needed was a declaration to this effect and an order to prohibit the infringement. Counsel submitted that there was no pecuniary claim against the Respondent or any injury claim as such but that whereas an Environmental Impact Study (EIS) has been submitted by the Respondent for consideration and approval by NEMA, the Respondent was in high gear of having the

Implementation Agreement and Power Purchase Agreement approved and executed before the NEMA approval. Learned Counsel referred this Court to Articles 2.8 (a) of the Implementation Agreement that states: -

> "(a) The Company shall prior to Financial closing conduct or cause to be conducted an Environmental Impact Study in accordance with the Laws of Uganda. Such Environmental Impact Study shall be subject to approval by the Government of Uganda,"

Learned Counsel further pointed out that under paragraph 3.2 of the same agreement the Government of Uganda would on signing the agreement proceed to compulsorily acquire the site, the staging area and the inundated land and the U.E.B shall acquire rights to the route, way leaves and easements. Mr. Kakuru contended that since signing these agreements would trigger all these activities, it would enable the Respondents circumvent the law in contravention of which the project would be endorsed. The NEMA approval which is progressing at its statutory pace would be rendered meaningless if not nugatory. The danger of acting in this way and getting Parliament to endorse the project and the Executive to sign the agreements prior to the approval by NEMA was that the NEMA law would have been contravened in the process. Mr. Kakuru argued that by-passing NEMA procedures, which was possible so long as Parliament and the Executive actions above had been concluded, was the bone of contention. He further contended that the NEMA procedure was a protective measure which the public who are concerned with the project would invoke as part and parcel of public protection of the environment and accessing the Constitutional guarantee of the right to a clean and healthy environment. He submitted that the NEMA procedure was a necessary ingredient of this right and that the short cut being adopted by the Respondent to avoid compliance was in effect directed at violating the NEMA Statute and ultimately the Constitutional regime of Environmental rights in Uganda.

Mr. Kakuru then referred to Order 37 of the Civil Procedure Rules and argued that the requirement therein for there to be a pending suit when seeking injunctions was inapplicable. He stated that this was a case of public interest litigation to protect a public right while Order 37 was restricted to property disputes, private law rights in contract and tort. Counsel argued that this was the reason why although he sought an order of a temporary injunction, he did not proceed under Order 37 of the Civil procedure Rules. He cited ***Nakito & Brothers Ltd. Vs. Katumba*** to support the view that under Section 2 of the Civil Procedure Act a Notice of Motion is a suit. He prayed that this Court accepts the motion and entertains it as such and grant the relief sought. He contended that Environmental Law has opened up new horizons for litigation and adjudication having codified common law especially in respect of locus standi and procedure that is required to take an urgent track. This complied with the new Constitutional Mandate on a clean and healthy environment which required that such matter be dealt with expeditiously by Notice of Motion rather than by way of a plaint. Counsel contended that this action was about breach of law whereby the respondent navigates his project around NEMA procedure and presses for Parliament to endorse it and the Executive to sign the deal.

I must confess that I found it difficult diagnosing the claim and the remedy in this case. In the first place the proposed implementation agreement which has been initially stipulated, in article 2.8 cited earlier, that EIA shall be subject to approval by the Government of Uganda. The

respondent only undertook to conduct the study which it did and left the approval process to the Government. In other words, the respondent does not have to or want to subject himself to the process of getting the approval which the other party the government has the responsibility to do. If therefore the Government executes the agreement as it is, these terms would be binding and this Court cannot speculate that indeed the agreements would or would not be signed before the approval of the impact study by NEMA. It would however not be difficult to expect that such approval would be obtained after which the project can be considered environmentally viable and can be implemented. But the suspicions and concerns raised by the applicant that unfortunately have not been dispelled by hearing the respondents or reading any counter raised many issues.

The level of suspicious regard towards the Respondent was clearly brought out by the argument that the moment the agreements are signed major actions by the Government and UEB are set in motion rendering NEMA procedures superfluous. It was further brought out by Counsel for the applicants' reference to the brittle low capital base of the Respondents whose share capital was Shs.1,000,000/= only yet it was headed for a US $ 500 million project with massive civil works. This he argued could not promise much for the "Polluter-pays" principle of environmental law. Counsel contended that this unlikelihood of the respondent company passing through the eye of the needle placed in its way by NEMA process and criteria, made the alternative of the shortcut attractive to the respondents. In clause 3.2 of the implementation agreement, the respondent is specifically protected against environmental liabilities that may not encumber any land acquired by the Government and UEB besides NEMA approval being the responsibility of Government in the first place. Finally counsel for the applicants while praying for the orders and declarations sought in the motion, stated that no orders for costs were being sought in this matter which was brought as a public interest issue.

As correctly sensed by counsel for the applicant the issues raised by this application relate to whether there Is a cause of action, what the procedures should be and if the remedies sought are available to the applicant. I would rather approach it this way and as a result be able to determine if the matter is not frivolous. In his submission Counsel contended that the application was not frivolous as it was brought to address legal concerns. Violation of the law, he said, was not a frivolous matter. Counsel argued that the applicant being an NGO has come to Court seeking the enforcement of the law which was in danger of being violated in the process of which the public right to environmental protection was being infringed. He submitted that the alteration of the environment being planned by the Respondents could or could not be harmful. The impairment of the environment could only be determined by the process of approval of the EIA by NEMA.

As can be seen this application is canvassing wide environmental concerns. It is only in looking at the legal basis of these concerns that the issues can be determined. According to the National Objectives and Directive Principles in the Constitution of Uganda the state is empowered to promote sustainable development and to prevent or minimise damage and destruction to land, air and water resources resulting from pollution or other causes. The state and local governments are further enjoined in the Environmental Objectives (Objective No. XVII) to create and develop parks, reserves and recreation areas and ensure the conservation of Natural Resources. It shall also promote the rational use of natural resources so as to safeguard and protect the bio-diversity of Uganda. Article 245 of the Constitution mandated Parliament to provide by law, measures

intended to protect and preserve the environment from abuse, pollution and degradation; to manage the environment for sustainable development and to promote environmental awareness.

The NEMA Statute No. 4 of 1995 is for the purpose of this provision such a law being then the existing law. Now under this Statute environmental Impact Assessment studies are required before any development project such as the one pursued by the respondents is approved. The respondent has conducted the study having appointed W S Atkins International as the study Consultants. This is annexture B to the second supplementary affidavit of Mr. Muramuzi. In this affidavit the deponent states that the study as presented did not address the issue of the loss of the Bujagali Falls and the appropriateness of acquiring alternative cheaper and environmentally more friendly sources of power. The deponent states further that whatever information was provided in respect of this and in particular in respect of Karuma Falls was incomplete and misleading. The deponent then states that this together with the ambiguity in the name of the Respondent was likely to lead to rejection of the study by NEMA and to reflect on the capacity of the Respondent to carry on the proposed project without resort to an environmental disaster. The study was conducted for "AES Nile Power" a joint venture between AES Electric Ltd., a UK wholly owned subsidiary of the AES Corporation, a US Company and Madhvani International of Uganda – according to the W S Atkins Executive summary (annexture B). According to the first supplementary affidavit , Mr. Muramuzi averred that contrary to this statement the Respondent is not a foreign Company but a local company with only Shs.20,000/= paid up capital. He doubted the capacity of such an entity to execute a project of the magnitude proposed without causing great environmental destruction, massive flooding and elimination of the spectacular Bujagali Falls. He further deponed that a failed project would interfere with the natural flow of the River Nile and cause other environmental products without even producing Electric Power. He lastly deponed that the investment license held by the respondent had no capacity to demonstrate ability to mitigate environmental damage before signing any agreement as required by the law. In presenting its case the applicant relied on section 35 and 72 of the NEMA Statute and Regulations made under that law and suggested that the legal regime for environmental protection was a novel area with imprecise justifiability issues.

Section 35 of the NEMA Statute prohibits certain works on rivers and lakes that affect the flow or the bed and or divert or block a river or drain a river or lake. Section 72 of the Statute provides the parallel avenue for a person to apply to Court notwithstanding any action by the NEMA authority for an environmental restoration order against a person who has harmed, is harming or is likely to harm the environment. Sub section 2 of that section provides –

> "(2) For the avoidance of doubt it shall not be necessary for the Plaintiff under this section to show that he has a right of or interest in the property in the environment or land alleged to have been harmed or in the environment or land contiguous to such environment or land".

The environmental Impact Assessment is a study that is required to be conducted as the guiding environmental regulation model for implementation of certain projects. Dams on rivers is one such project as stated in the Third Schedule. Electrical Infrastructure is another. In section 97, it is a criminal offence for any person to fail to prepare an EIA contrary to section 20 of the Act. And a person who fraudulently makes a false statement in an environment Impact Statement

commits an offence. I have however not been able to pin point the consequence of proceeding with a project once one has placed an impact study with NEMA or no green light has come from NEMA. Section 20 (6) of the NEMA Statute requires that the environmental aspects of a project as spelt out in an Environment Evaluation be approved first.

The above describes briefly the general legal landscape where the applicants concerns are located. The first issue is whether the procedure adopted by him is proper and competent. There is no prescribed procedure to seek environmental relief under section 72 cited by Counsel. The reading of sub-section 2 of that section would however imply two things. Firstly it refers to a Plaintiff. This would in my mind directly refer to proceeding by way of plaint. Secondly this section appears to be the enactment of class actions and public interest litigation in environmental law issues. This is because it abolishes the restrictive standing to sue and locus standi doctrines by stating that a plaintiff need not show a right or interest in the action. There is also an administrative remedy available in section 69 of the Statute which empowers NEMA to issue environmental restoration orders. Section 71 empowers NEMA to enforce its own orders. The recourse to Court is however subjected to exhaustion of this remedy as the section 72 proceeding before Court is without prejudice to the powers of NEMA under section 69 of the Statute. But even then this application does not seek order under section 72 of the NEMA Statute.

Although the applicant cited the section and contended that the respondent is likely to harm the environment he has not prayed for an order to restore the environment. What he has sought is an injunction to stop the signing of the agreements and declarations. An injunction of this nature cannot be given in my view since the agreements per se do not alter the environment though the execution thereof places the respondent in a position so as to be able to alter the environment by commencing works. I would conclude here that if this is correct then the order sought relates to a matter that by itself is not proximate to environmental damage as such though the signed agreement could be evidence of a reasonable likelihood of possible harm about to be done to the environment.

Without going into the realm of freedom of contract, I would find it hard to prevent the act of signing the agreement as such. Partly I am aware of executive discretion in this matter, which I hope would be exercised with full awareness that a procedure such as the conduct of an acceptable EIA has to be complied with, and the government or its agency has to be satisfied that the works envisaged will not damage the environment. I think the executive is bound to follow the law and a remedy would be available if indeed a private party caused it to go into a hazardous project. There are many procedures available. For instance writs of certiorari, prohibition and mandamus are available.

Also proceedings under Article 50 of the Constitution on breaches of an environmental right or freedom would be available. In all these proceedings a notice of motion would be the correct pleading in my view to commence these actions. However, since the applicant did not move this Court for the above remedies, I would have difficulty reaching a decision that injunctive and declaratory relief could be secured by proceeding the way the applicant did without invoking Article 50 of the Constitution and the Fundamental Rights and Freedoms (Enforcement) Rules S.I 26 of 1992. The latter rules made under the repealed Judicature Act 1967 are applicable in

my view to proceedings under Article 50 of the Constitution as they were saved by the Judicature Act 1996.

Counsel for the applicant asked this Court to entertain this application on the ground that the applicant had come to Court for redress and could not be turned away. I have already stated that the applicant had a right to take action without having to show standing to sue on account of the clear provisions of the NEMA Statute. However, standing to sue is a procedural question not a substantive one like the issue of cause of action. But it is also true that a declaratory action is open to an individual without having to demonstrate a cause of action.

In other cases a cause of action needs to be raised in the pleadings and where the cause of action is obviously and almost incontestably bad, the Court would not entertain the matter. Otherwise a party would not be driven from the judgment seat without having his right to be heard. In deciding whether there is a cause of action one looks ordinarily only at the plaint (or pleadings). The case of ***The Attorney-General Vs. Olwoch*** - (1972)EA 392 is authority for this point, and has been followed in other cases after it. This is the position which obtains in other jurisdictions on this question in respect of civil actions and even public interest law suits which the applicant claims his own to be. In the Canadian case of *Operation Dismantle & Others Vs. The Queen and Others* (1983) ICF 429 the motion sought to bar the testing of Cruise Missiles in Canada which the Plaintiff contended violated the Canadian Charter of Rights. The Court stated that beyond the statement of claim it could not admit any further evidence and the statement stands and falls on the allegations of fact contained in it, so long as they were susceptible to constituting a scintilla of a cause of action. The test to be applied was whether the germ of a cause of action was alleged in the claim. The Court further held that if the statement contained sufficient allegations to raise a justifiable issue then even the claim cannot be corrected by amendment and there was no compliance with rules of practice this does not render the proceedings void in which an irregularity occurs which can be corrected by an amendment. The Supreme Court of Nigeria in ***Thomas & Others Vs. Olufusoye***(1987) LRC (Const.) 659 defined cause of action to:

> "*Comprise every fact (though not every piece of evidence) which it would be necessary for the plaintiff to prove if traversed to support his right to the judgment of the Court … every fact which is material to be proved to enable the plaintiff to succeed. The words, have been defined as meaning simply a factual situation the existence of which entitled one person to obtain from the Court a remedy against another person and it is the subject matter or grievance founding the action, not merely the technical cause of action*."

The Nigerian Supreme Court in that case cited the dictum of Lord Pearson in Drummond – ***Jackson Vs. British Medical Association*** (1970) 1 WLR 688 (C.A.) where it was held:

> *"Where the statement of claim discloses no cause of action and if the Court is satisfied that no amendment however ingenuous will cure the defect the statement of claim will be struck out and the action dismissed. Where no question as to the civil rights and obligations of the plaintiff is raised in the statement of claim for determination the statement of claim will be struck out and the action dismissed."*

I have discussed these issues because the arguments raised by Counsel for the applicants claim beyond just the ordinary private law rights litigation to the wider issues relating to public interest

law and a situation where a party merely seeks declaratory orders relating to compliance with the law failure of which has potential danger for the environment.

I am satisfied that in the circumstances of this case the applicant has reason to seek the intervention of this Court in so far as no approval of the environmental aspects of the study has been brought in evidence to satisfy the requirements of section 20 (6) of the NEMA Statute. To this extent he is entitled to bring this action. As a public spirited body, the applicant is espousing the public interest although I must say he ahs done so rather too quickly, almost prematurely. To this extent I accept to entertain the application which though procedurally faulty could be cured by amendment. In any case there was no challenge put forward by the respondents and the applicant would be at liberty to pursue further his substantive claims by filing amended pleadings in place of the motion filed in Court. I am able to declare though not in terms of the declaration sought that the EIAs presented by the Respondent's consultant in this project must be approved by the Lead Agency and the National Environment Management Authority. This is the distance I can go in this matter. It has already been stated earlier that it is the view of the Court and I restate it that the signing of the protested agreements are the subject of the law. It is however not for this Court to stop the signing of agreements by injunction or otherwise since signing agreements per se does not cause environmental disasters. If an agreement is signed and it is in contravention of any law, then it can be challenged. Any action based on it can also be challenged. Therefore it is in the interest of the parties to it to conform to the law.

The declarations sought by the applicant relating to the Parliamentary approval is unnecessary to consider since Parliament would equally be advised and is capable of knowing their power. Since no approval has been given by Parliament this Court cannot inquire as to whether it will or will not grant the approval in contravention of the law. In the circumstances the declarations sought in the Motion are not granted; save that this Court declares that approval of the EIA by NEMA is required under Section 20 of the NEMA Statute. The injunction is also refused. This matter proceeded ex-parte. I am surprised why this was the case. I must say that a party must come to the Court to be heard. In Court matters epistolary proceedings have not taken root in this Country. No amount of media action, or reaction though effective can be substitute to going to Court to challenge ones adversary. To ignore Court Summons is itself fool hardy and places the party so summoned in a desert. However, no costs were asked for this action and I order none.

Signed

RICHARD O. OKUMU WENGI
Ag. JUDGE
19/04/.99

23/04/99: Kakuru for Applicants
Henry Kikoyo representing the respondents.

Court; - Ruling delivered in the presence of the above parties.

Signed

GODFREY NAMUNDI
DEPUTY REGISTRAR, CIVIL.