

**REPORT OF THE PROCEEDINGS OF THE
MAGISTRATES' TRAINING WORKSHOP
IN
ENVIRONMENTAL LAW AND PRACTICE IN UGANDA.**

**HELD AT THE
RIDAR HOTEL, SEETA – MUKONO.**

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We particularly acknowledge the efforts of the Greenwatch staff who worked tirelessly to ensure that the workshop was a success.

INTRODUCTION

Since 2000, Greenwatch has been closely working with the Environmental Law Institute (ELI) in the field of training lawyers and judicial officers in environmental law and access to justice. ELI has in the past provided assistance in form of funding to Greenwatch which has facilitate four trainings for judges including one for judges of the East African Court of Justice and two for magistrates.

As a result, many environmental cases have been successfully handled by the judges who have attended the trainings and land mark decisions made as contained in the Environmental Law Case book. A Handbook on Environmental Law has also been developed which provides good reference and guidance in environmental law, access to justice and issues of procedure and practice.

Greenwatch has also worked with the National Environment Management Authority (NEMA) on similar programmes to train judicial officers in environmental law with financial assistance from UNEP under the PADELIA programme.

Greenwatch has further worked with the World Resources Institute (WRI), based in Washington D.C., which provided initial funding for developing the training materials.

OPENING CEREMONY

Remarks by Mr. Kenneth Kakuru- Director, Greenwatch.

In his remarks, Mr. Kakuru started by mentioning when Greenwatch was established. He said that Greenwatch was established in 1995 and that unlike other tree planting NGOs, Greenwatch is an environmental law advocacy NGO. Its main objective is to promote and encourage public participation in matters to do with the environment. He said that environmental issues have become so wide that they basically relate to all aspects of human life socially, economically and politically. The environment has become so wide that issues such as federo, Kisanja etc. are linked. He also said Greenwatch has since 1998 been involved in training . In 2000 , lawyers were trained and it was realised that judicial officers needed to be trained. The funders of the training promised to support the training these included the World Resources Institute(WRI) and the Environmental Law Institute(ELI) of Washington, D.C. To date, almost all judges of the High Court have been trained and this is the third batch of magistrates to be trained.

He thanked the National Environment Management Authority(NEMA) for supporting the programme and the funders for providing the financial resources that made the training possible. He particularly thanked ELI for the support both morally and financially in this cause.

Remarks by Mr. John Pendergrass (Director, Judicial Training Programme, ELI)

In his remarks read for him by Mr. Kenneth Kakuru, Mr. Pendergrass said that as the Director of Judicial Education for the Environmental Law Institute (ELI), he was pleased to offer a warm welcome and thanks to The Honorable, The Principal Judge, Justice P. Ntabgoba, The Honorable Mr. Justice R. Opio Aweri, the honorable judicial officers, and his colleagues and friends of Greenwatch to the Judicial Training Workshop in environmental Law. He acknowledged the heavy workload judicial officers face and said that they at ELI are thankful that the officers have taken time from their busy schedules, including precious personal time, to participate in the Workshop. He said that this was the fourth such workshop that ELI has assisted the Judicial Training Committee and Greenwatch in organizing and that they are always impressed with the quality of the programmes and of the participants.

He also said that he has had the honor and privilege of participating in four of the prior workshops on Environmental Law for judicial officers in Uganda since 2001. He regretted that due to the extraordinarily high prices for air travel to Uganda, he was unable to attend the workshop this year.

He then gave a brief description of the Environmental Law Institute as a global leader in protecting the environment through law, policy and management which was incorporated as a not-for-profit research, education, and publishing organization in 1969. ELI provides information services, advice, publications, training courses, seminars, research programs, and policy recommendations to engage and empower environmental leaders the world over.

He further informed the participants that ELI provides training, policy research and publications that help in creating stronger programs at all levels of government.

He said that in 1991, ELI established its Judicial Education Program in response to a challenge by Judge James L. Oakes, Chief Judge of the U.S. Court of Appeals for the Second Circuit, to close a gap in judges' knowledge by educating them about environmental law. Supreme Court judges from more than fifty countries, including Uganda, who met at the Global Judges Symposium on Sustainable Development and the Role of Law in Johannesburg, South Africa(August, 2002) reiterated this challenge. They concluded that "the deficiency in the knowledge, relevant skills and information in regard to environmental law is one of the principal causes that contribute to the lack of effective implementation, development and enforcement of environmental law." He further noted that ELI's Judicial Education Program has for more than a decade now, been working with judges throughout the world to meet this need.

The participants were informed that ELI works closely with the judiciary to develop educational programs and materials that meet the specific needs of a particular jurisdiction. Since 1991, ELI has developed, presented, and participated in educational workshops on critical topics in environmental law for judges from fifteen states in the U.S. and thirteen countries.

In conclusion, he acknowledged with thanks, the assistance provided to ELI from the Conservation Food and Health Foundation of a grant in support of this Workshop.

Remarks by Dr. Sawula Musoke, Ag. Executive Director NEMA.

In his speech read for him by the Deputy Executive Director Dr. Sawula Musoke, the E.D NEMA said that NEMA appreciates the good work done by the judiciary relating to environmental management and thanked the JTC for including environmental law in their programme. He stated that the environmental sector finds it useful and beneficial to interact with the judiciary for it facilitates their learning of views by the judiciary on how the environment can be managed.

He emphasised that NEMA 's major concern is to ensure that our people enjoy a clean and healthy environment for the benefit of all and future generations. It is also their duty to ensure that development activities taking place in Uganda are carried out in a sustainable manner. Over the years, government has put in place policies and laws and they need to be implemented. It is the role of the judiciary to ensure that there is fairness in the implementation process and to ensure that those who violate the laws are brought back to order.

Dr. Sawula informed the participants that the government has made effort to simplify the process through enhanced public participation through education, public awareness,

gender balance, information exchange and compliance to environmental law and standards.

It has also embarked on strengthening the enforcement arm of the state by equipping them with the necessary knowledge and skills to enable them carry on their work. District local councils have been empowered to handle environmental issues but a gap still remains in translating empowerment into real action.

He pointed out that there is a need for the judiciary to actively participate in gauging environmental behavior or operations and maintaining them within the prescribed limits. Environmental law is the key intervention tool in sustainable development.

He also informed the participants that NEMA has designed programmes to assist industrialists and other private sector organizations, community – based organizations and civil society and ensure that they voluntarily comply with the law. Greenwatch is a testimony that NEMA collaborates with NGOS and government pledges to continue supporting organizations that are helping people to protect the environment.

Dr. Sawula recalled that during the judicial training workshop held in December 2003, NEMA recognized the fact that knowledge is one of the most important tools for the judiciary and promised to provide materials for the judiciary to enable them perform the impartial functions properly. He gladly informed participants that NEMA had compiled a volume of the most relevant environmental laws. This, he said, is intended to fill the gap of absence of the basic knowledge that is required to fairly and impartially adjudicate in environmental cases in courts of law. He stated that NEMA and Greenwatch would by the end of the year also release two other books on environmental law. A ‘casebook’ and ‘handbook’ on Environmental Law. He urged the participants to use the three days training to interact, share experiences and use the knowledge gained from the workshop in their activities.

He then handed over sixty (60) volumes of the Compendia of Environmental Legislation of Uganda and invited Her Lordship, Justice Stella Arach-Amoko, to officially open the workshop.

Official Opening: By Her Lordship Justice Stella Arach –Amoko, Justice of the High Court -Commercial Division.

Her Lordship, Justice Stella Arach-Amoko, Justice of the High Court, Commercial Division, representing the newly appointed Principal Judge, Hon. Justice James Ogoola officiated at the opening of the workshop.

She also gave remarks on behalf of the Chairman Judicial Training Committee(JTC) of which she is a member.

Justice Arach said that the judiciary recognizes the very important role played by magistrates who meet with a much wider spectrum of cases, hear disputes and interpret the laws of the land. People generally believe and trust in the rightness and fairness of the

judiciary and this must be reciprocated through a great sense of responsibility and integrity. In order to do this, it is imperative that magistrates be independent and courageous and maintain high standard of learning and knowledge for people to be judges justly and fairly.

Justice Arach commended the JTC, Greenwatch and ELI for making a decision to hold the training. She pointed out that there is rapidly changing legal trend, particularly Environmental Law, continued education is very important and is a mandatory requirement for the improvement of the judicial services, the development of jurisprudence and strengthening the rule of law.

She stressed that the importance of judicial training arises from the need to cope with the changing trend the world over and it is intended to equip the judicial officers with the most recent developments in the world. An independent judiciary is critical for a democratic society and judicial officers are called upon to be in possession of the requisite intellectual and moral strength to discharge their duties with competence and fairness. She expressed her view that there is increasing realization that judicial competence requires more than judge knowledge of the law and must by necessity develop skills to enable them serve the society and apply the law accurately. She pointed out that educational workshops such as this play a big role in improvement of judicial skills.

She noted that the purpose of the workshop was to enhance the judicial capacity and skills in the adjudication of environmental cases, raise awareness and to generate a common understanding of the environmental litigation process. She stressed that matters relating to the proper care of the environment is assuming a global concern.

She said she hoped that discussions would show participants how the courts can be a part in the protection of the environment. She also hoped that the skills and experiences gained at the workshop would help improve the participants' skills and enable them understand and conceptualise the legal framework governing environmental management in Uganda as well as the unique procedure aspects of environmental law.

She commended the planned programme noting that the workshop was highly interactive and participatory. She pointed out that the days of a judicial judge are gone and that these are days of judicial activism. She urged participants to use the materials given out so as to handle more complex environmental cases efficiently and expeditiously.

Her Lordship also thanked the organisers and the JTC and Greenwatch and ELI who provided funds for the training. She further thanked NEMA for the volumes of the Compendia of environmental legislation.

She then wished the participants fruitful deliberations and officially declared the workshop open.

Administering Justice without undue regard to Technicalities

By Hon. Mr. Justice J.H. Ntabgoba- Guest Speaker.

Justice Ntabgoba commended Greenwatch for the support given to NEMA and encouraged participants to interest themselves in environmental issues. He said they needed to read the materials distributed. Justice Ntabgoba said the topic was derived from art. 126(2)(e) of the 1995 Constitution.

He noted that the memorandum of the Minister of Justice and Constitutional Affairs introducing the Judicature(Amendment) Bill, 2001 paragraph 3 includes the phrase” *Administering Justice without undue regard to technicalities.*” He further said that the amendment is in particular intended to meet the requirements of articles 126(2)(a) and 126(2)(e) of the Constitution. Article 126(2)(e) also provides that substantial justice shall be administered without undue regard to technicalities. Consequently, section 19(2) of the Judicature Act was substituted with the following:

*“2) With regard to its own procedures and those of the Magistrate’s Courts, The High Court shall exercise its inherent powers to prevent abuse of process of the court by curtailing delays, including the power to limit and stay delayed prosecutions and see that **substantive justice shall be administered without undue regard to technicalities.**”*

Significance of the Provision

The existing principle of inherent powers of court are wide and therefore the provision neither adds nor subtracts to the inherent powers of court.

He quoted s. 101 CPA, s. 100 - on costs and taxation. He was of the view that there are even wider powers if courts to handle cases.

He also cited the need to understand the concepts and relate them to all aspects of life. Environmental matters are of greater importance than any other kind of matter. He further said that the courts are a constitutionally created ambit of government. They have authority to sustain and perform independently and with integrity. Courts therefore have power as is reasonably required to administer justice.

He concluded that the article neither adds nor subtracts from the powers of the courts.

Regarding environmental court matters, the courts have every power to adjudicate on them, paying particular attention to the fact that hitherto, the subject of environmental law has been a subject hidden and unfamiliar in the courts; and that environmental disputes will require special court’s attention to resolve. Thus environmental matters impact strongly on our lives and that they are human rights matters. He cited art.39 of the Constitution, which provides for a right to a clean and healthy environment. It states:

“Every Ugandan has a right to a clean and healthy environment.”

He said that courts must therefore handle environmental matters in the same way they handle human rights matters. **Manyindo DCJ** (as he then was) underscored the necessity of administering substantive justice without undue regard to technicalities when he said, in the case of **Attorney General –vs- Major General David Tinyefuza**(CA.1/1997) that:

“the case before us relates to the fundamental rights and freedoms of the individual like the petitioner which are enshrined in and protected by the Constitution. **In my opinion it would be highly improper to deny him a hearing on technical or procedural grounds.** I would even go further and say that even where the respondent objects to the petition as in this case, the matter should proceed to trial on merit unless it does not disclose a cause of action. This court should readily apply the provisions of article 126(2)(e) of the Constitution in a case like this one and administer justice without undue regard to technicalities.”

Overview of Environmental Problems in Uganda: *By Ms. Lynda Biribonwa, Environmental Audits and Inspection Officer- NEMA.*

Ms. Lynda Biribonwa began her presentation by defining the term “environment” as provided for under the Uganda National Environment Statute 1995. She illustrated the importance of natural resources to the development process, by highlighting the economic contribution of the agricultural and fisheries sectors. Ms. Biribonwa said Uganda is primarily an agrarian country with agriculture supporting over 80% of the population and contributing about 43% of the Gross Domestic Product (GDP). The fisheries sector, she noted was a major source of animal protein, contributing about 2% of the GDP.

Ms. Biribonwa however, observed that there were still environmental problems affecting the communities’ livelihood citing soil and land degradation, deforestation, water contamination and bio-diversity loss. She attributed these environmental problems to high population growth, poverty, lack of environmental awareness and lack of public participation in environment management.

The presenter concluded her paper by recommending several strategies for environmentally sustainable development including completion of the National Environment Action Planning Process and public awareness on environment management.

Overview of the Legal Framework in Uganda: By Robert Wabunoha, Senior Legal Counsel- NEMA.

Mr. Wabunoha began his presentation by highlighting the policies that had led to the establishment of the legal and institutional framework for environment management in Uganda. He said environmental legislation was triggered off in 1991 with the National Environmental Action Plan (NEAP) process that provided strategies for addressing environmental concerns in the areas of policy, legislation and institutional reforms. The Action Plan, He added, led to the subsequent adoption of the National Environment Management Policy 1994 which set out the overall policy goals and principles for environmental management.

The presenter said the National Environment Policy provided for the establishment of the National Environment Management Authority (NEMA) the principle agency that coordinates, monitors and supervises all activities relating to the environment and the Inter-Ministerial Policy Committee (IPC) that co-ordinates environmental issues for NEMA.

Mr. Wabunoha also highlighted several laws relating to the environment in Uganda and these included the Constitution of Uganda, 1995, the National Environment Statute, 1995 and the Water Statute 1995. He concluded her paper by calling for increased public awareness of environmental laws to improve environmental protection.

General Principles of Environmental Law: By Asa. Mugenyi, Lecturer, Uganda Christian University Mukono.

The presenter started by defining the environment. He described it as the physical and natural elements of the earth plus man's superstructures or improvements thereon including the interaction between natural elements and man's activities. S.1 of the National Environment Act defines the environment as

"the physical factor of the surroundings of the human being including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment: "

Environmental law regulates man's activities affecting natural resources and the environment. It ensures and facilitates the rational management of natural resources.

He also stated that as human activities continue to have an impact on the environment, a number of principles have evolved to protect the environment. These include the following, which are subject of our discussion today:

- 1) The Right to a clean and a healthy environment

- 2) The Precautionary principle
- 3) Inter generational equity
- 4) The doctrine of public trust

He also cited additional principles, which were not subject to discussion. These include;

- i) Common heritage of Mankind, terra communis and nullius communis
- ii) State sovereignty and state responsibility
- iii) Equitable apportionment of water resource
- iv) Equal right of access of justice
- v) Principle of polluter pay principle
- vi) Environment Impact Assessment

As environmental law and principles evolved a number of questions arose including the exhaustibility of nature, locus standi, etc.

1. THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT;.

The right to a clean and healthy environment is an emerging right. It was stated that at independence, Uganda adopted the colonial laws wholesale, which laws did not provide for the right to a clean and healthy environment. The laws, it was stated, were more interested in utilizing the environment than conserving and protecting the environment. The 1970s and 1980s saw no major development in environmental law because of the political turmoil Uganda was undergoing.

The presenter further noted that the 1990s ushered in the legal and institutional framework of environmental law in Uganda. In 1991 the government of Uganda launched the National Environmental Action Plan (NEAP) which intended to provide among other things a framework for integrating environmental considerations into the country's overall economic and social development. In 1994 the government endorsed the National Environment Management Policy (NEMP) with an overall of achieving sustainable and economic social development.

In October 1995 a new constitution came into force. Chapter 4 of the constitution sets out a detailed Bill of rights. For the first time in history the Bill contained the right to a clean and healthy environment which is a fundamental right. Article 39 of the constitution states that: "Every Ugandan has a right to a clean and healthy environment."

The scope of this right entails the right to a clean air, clean water, and conservation of resources, prevention of pollution and protection from diseases that result from sanitation and poor environmental conditions.

He cited the Philippine case *of Juan Antonia Opossa and others Vs Fulgencio Factorian* where the right to a clean and healthy environment was equated to the right of life. It was observed by the Supreme Court that.

"As a matter of fact these basic rights need not even be written under the constitution. For they are assumed to exist from the inception of human kind, if they are explicitly mentioned in the constitution, its because of the well founded fears of the framers that unless the rights to a balanced and healthy ecology are mandated as state policy by the constitution itself. "

The constitution in furtherance of its recognition of the right to a clean and healthy environment set out in its national objectives and directives principle of state policy provides under objective XXVII that

"ii),... .. the state shall take all possible measures to prevent or minimize damage and destruction to land, air and water resources resulting from pollution or other causes"

Mr. Mugenyi further said that the enforceability of directive principles of state policy in general has been addressed by Indian Courts. In summary, courts have held that: a) "the directive principles of state policy are not justifiable, but as the soul of the constitution provide the framework according to which governments of the future should act. In more than one sense, the directive principles constitute a social contract " b) That" the directive principles are the backbone of state action and planning and emphasize the social economic responsibility of the state toward its citizens." c) The Indian Supreme

court holds the opinion that "fundamental rights should be understood within the framework of directive principles".

The nature of Article 39 of the constitution is such that it imposes on the government an obligation to protect the environment. It is within these parameters that Parliament is empowered to make laws that ensure observance of this right. Article 245(a) reads that parliament shall by law, provide for measures intended "to protect and preserve the environment from abuse, pollution and degradation".

Article 50 provides that any person who claims that a fundamental right or other right has been infringed or threatened he is entitled to apply to a competent court for redress, which may include compensation.

Article 17(1) (ii) of the Constitution provides that it is the duty of every citizen of Uganda to create and protect a clean and healthy environment. This duty is participatory. As a duty it is difficult to enforce taking into consideration the fact that most Ugandans are seeking to obtain basic livelihood. Hence the enforcement of such a duty is an illusion.

Furthermore, the Constitution is reinforced by S.3 of the National Environment Act Cap. 153, which provides that "Every person has a right to healthy environment". This section encompasses every person including non-Ugandans hence it is more universal than the Constitutional one. However, S.3 of the Act does not provide for a clean environment making it a narrower than the constitution.

2. THE QUESTION OF LOCUS STANDI

In environmental litigation, a question arises as to who has locus standi to take an action in court? In the case of *Mtikila V AG* the court observed:

"... Whenever a private individual challenged the decision of an administrative body, the question always rises whether that individual has sufficient interest in

the decision to justify court's intervention.”

It is trite law that a party seeking to represent a case before a court of law must have the required legal standing. Locus standi has often been confused with 'capacity to sue' which relates to a party's capacity. The correct interpretation of locus standi is a party's competence to claim relief in a court of law as a result of a particular "interest" in the case. However in public interest litigation the plaintiff does not need to have an interest.

Today the test of locus standi in individual cases is whether the plaintiff enjoyed a right, the defendant violated the right and a remedy is available to the plaintiff. This test is mentioned in the case of Auto Garage v Motokov [1971] EA 514.

The presenter also discussed the tort of trespass. He defined trespass as the direct interference in the plaintiff's person, land or property. The aggrieved party has the locus standi to sue. Trespass can be the subject of an environment claim for example where soil or vegetation is removed from one's land, or where pollutants come into direct contact with the plaintiff's land.

**Access to Environmental Justice; The Role of the Judiciary and Legal Practitioners
By *Hon. Mr. Justice Ruby Opio-Aweri, Judge of the High Court.***

Justice Opio introduced his paper by observing that environmental protection was old as society itself. He said that the old society derived a number of benefits from the environment including food, security, tools, water, medicine and shelter and as a result they had to devise numerous strategies to protect the environment. These strategies, the judge said, included taboos and cultural restrictions to guarantee fraternity in environmental protection.

He observed that the role of the judiciary in protecting the environment in the 21st Century was enormous and was pleased to note that the Constitution of Uganda, 1995, provided a legal framework for the role of the judiciary as arbitrating machinery.

His Lordship also noted that there was an increase in environmental litigation particularly in the branch of public interest litigation but observed that there were still several bottlenecks being experienced in this new field of practice. The bottlenecks, he said, included lack of technical training in environmental law, poor public participation in the administration of justice and corruption attributed to enforcement agencies.

Justice Opio concluded his presentation by recommending that environmental education in law schools be made compulsory; environmental courts be created to strengthen judicial capacity in handling environmental cases and that judicial activism be forged and embraced.

Access to Information; By Mr. John Pendergrass, Director, Judicial Education Program, ELI.

In his paper read for him by Mr. Kakuru, Mr. Pendergrass started by stating that there has been a growing recognition that environmental protection and management should involve all sectors of civil society to be effective. He said that most environmental impacts are local, and citizens frequently know their particular local area more intimately than any government can. Also, members of the public can bring their experience, resources, and energy to bear on environmental problems, supplementing and improving governmental actions. He stressed that such public involvement enhances environmental decision-making, encourages sustainable business practices, and strengthens civil society. Furthermore, it was stressed that including civil society in the development, implementation, and enforcement of environmental norms educates the public and the regulated community and builds support for governmental actions.

Procedural rights of access to information, participation, and justice are found throughout human rights declarations, as well as in modern international environmental law and policy. The 1992 *Rio Declaration* crystallized emerging public participation norms in its Principle 10:

Environmental issues are best handled with *the participation of all concerned citizens*, at the relevant level. At the national level, each individual shall have appropriate *access to information* concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and *the opportunity to participate in decision-making* processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective *access to judicial and administrative proceedings*, including redress and remedy, shall be provided. [*Emphasis added.*]

Agenda 21, the “Blueprint for Sustainable Development,” was adopted at the U.N. Conference on Environment and Development, in Rio de Janeiro, June 1992, to implement the principles in the Rio Declaration. It has significantly shaped the activities of the United Nations Environment Programme and other international organizations. It is also intended as a blueprint for national governments in working toward sustainable development. Agenda 21 also relies heavily on the role of civil society in developing,

implementing, and enforcing environmental laws and policies. Access to information, public participation, and access to justice appear throughout Agenda 21, and particularly in Chapters 12, 19, 27, 36, 37, and 40.

He intimated that since Rio, there have been many declarations about the importance of transparency, public involvement, and accountability, and many regions and international institutions have started to implement and expand upon Principle 10, with the UN/ECE Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (Aarhus Convention) the most far-reaching treaty to date. Article 4 of the Aarhus Convention requires nations to provide a system to allow the public to request and receive environmental information from public authorities.

He further stated that national laws are the most important in providing people with the information they need to effectively participate in decisions that affect them. Information about the environment can also be critical to the public's ability to protect itself from risks to public health and safety. Environmental information may also be useful so the public may inform itself about the state of the environment as it affects them.

The presenter further informed the participants that states in the U.S. have a longer history of, and greater openness about, providing public access to information. He said that most states have long had policies and laws requiring public records to be open to the public. Such "open records laws" generally mandate that the public be allowed access to any records held by the state. There may be limited exceptions for information the state requires and that a business formally claims as trade secret, but such a claim is subject to administrative and judicial review. The advent of the Internet has led many states to actively provide more environmental information to the public. Unfortunately, many people still do not have easy access to the Internet, making this an incomplete method of providing information to the public.

Public access to environmental information also allows the public to correct mistakes and to provide new information. When the public sees the information that the government has it may realize that it actually knows far more about particular resources, such as water quality in rivers and lakes, or knows more about violations than the government agency. This may prompt members of the public to report violations, damage to natural resources, spills of toxic substances, or the existence of wildlife in places it was not officially known to exist.

The environmental impact assessment (EIA) and permitting processes are examples of how public access to information improves decisions. A key element of the EIA process is making environmental information related to a proposed project available to the public. This allows the public to become informed about the environmental impacts of the project and to make its views known about the relative importance of those impacts compared with the benefits of the project.

He also revealed that members of the public often are able to provide additional information about environmental impacts that can improve the design of the project, help

mitigate its impacts, or show that the impacts outweigh the benefits. Similar benefits can come from publicizing environmental information during the process of deciding on whether to grant a permit where, as is often the case in the U.S., a project requires an environmental permit but no EIA is required.

In conclusion, he said that the concept of public access to environmental information has been taken to another forum in the U.S. The U.S. courts are now required to open their decisions in certain cases to comment by the public. He said that this procedure applies only to civil cases brought by the U.S. government seeking recovery of the cost of cleaning up contaminated sites where the parties seek to settle the case before trial.

The Criminal Aspects of Environmental Law By: Mr. Vincent Wagona, Senior Principal State Attorney, Directorate of Public Prosecutions.

Mr. Wagona's presentation centered on the criminal aspects of environmental law, including the legal technicalities relevant to the criminal prosecutions of environmental cases. The presenter observed that the traditional criminal law did not provide for environmental protection and that as a result, aggrieved citizens relied mainly on civil remedies under the Common Law of nuisance and trespass.

He noted however that there were a few provisions in the Penal Code Act relating to environmental protection citing Sections 156 on common nuisance, 166 on negligent act likely to spread infection, 171 on fouling water among others. The presenter said the effectiveness of these provisions was limited by several factors including difficulties in their interpretation.

Mr. Wagona observed that the National Environment Statute 1995 provided for a more comprehensive and effective legal framework for criminalisation of and sanctions against those who committed environmental law breaches. He said the main legislation under which charges would be brought is the National Environment Statute. The salient criminal offences under the environmental statute and the criminal penalties in environmental law, he added, related to Environment Impact Assessment, Environmental Standards, Environment Restoration Orders, Pollution, among others.

Mr. Wagona said the common offences likely to feature in Ugandan courts included setting up and operating a project without an EIA, discharging from an establishment without a permit and failure to comply with requirements of a restoration or improvement order. He also outlined legal technicalities and principles relevant to the prosecution of environmental crime cases and encouraged the magistrates to impose the most appropriate sentences when they are satisfied with the evidence produced in environmental cases.

Civil Aspects of Environmental Law, Practice and Procedure By: Mr. Kenneth Kakuru, Director, Greenwatch.

Mr. Kakuru said environmental law came into existence because other laws had failed to provide remedies necessary to protect the environment. He said tort was specific to protect private reputation and could not be used to protect public property. Mr. Kakuru noted that it was important to establish whether or not a particular case could be tried under environmental law by identifying specific issues. He said that once the issues were identified then several steps would have to be taken in bringing the case to court.

Mr. Kakuru explained that one could go by ordinary plaint as provided for under Section 72 of the NES. He said that the plaintiff needed to prove that the defendant was harming or likely to harm the environment but that the case would be proved on a balance of probabilities. Mr. Kakuru, however, observed that plaintiffs in environment cases did not seek damages but rather remedies such as restoration orders.

The presenter said that a plaintiff could also bring an environmental case to court under Article 50 of the Constitution of Uganda, 1995. The constitutional provision, he said, was widely used by public interest litigants since it provided for a very simple procedure. He said a plaintiff did not need to produce witnesses in court; he could use affidavits reducing delays in court. He noted that it was necessary to attach documents and reports to the affidavits as part of the evidence.

Mr. Kakuru was also pleased to note that a public interest litigant did not have to give statutory notices to the Attorney General or NEMA thereby hastening the process of giving remedies in environmental cases. A plaintiff, he observed, could also bring a case under representative action if there were a group of people who would have been aggrieved. Mr. Kakuru said such a case was simply intended to intimidate court. He advised the participants to use pleadings in civil cases and to show the court how they were going to proceed with the case.

Public Interest Litigation; By Mr. Phillip Karugaba, Advocate- Adriko-Karugaba Advocates

Mr. Karugaba began his presentation by defining the term “public interest litigation”. He described public interest litigation as legal actions brought to protect or enforce the rights enjoyed by members of the public. Mr. Karugaba said public interest litigation provided a strategic opportunity to engage the judiciary in ordinary societal issues and allowed civil society organizations to get involved in strategic, decisive and enforceable action.

He noted however, that public interest litigation in Uganda had been beset with technicalities, citing the case of *Rwanyarare vs. Attorney General* (Constitutional Court. Constitutional Petition No. 11 of 1997) in which court found it hard to accept that an action could be brought on behalf of an unnamed group of persons. The judge ruled that the implications on costs and the doctrine of *res judicata* would be too great.

The presenter noted that the potential of public interest litigation to force issues that the government is unwilling to legislate upon, will not be realized if the judiciary is unwilling to take bold steps.

He concluded his presentation by encouraging the judiciary to give life to the Constitution of Uganda, 1995, through judicial activism.

LIVE SIMULATION EXERCISE

MOOT :

NEW HORIZON (NH) is an International Company registered in Uganda. Its business is road and bridge construction. It has branches in South Africa, DRC, Egypt and Kenya. New Horizon has a big stone quarry in Seeta to provide stones for construction of the Trans-Africa Highway, from Mombasa to Lagos.

On 9th May 2004, the New Vision published a story that, NEW HORIZON is excessively blasting stones from the two hills and there is excessive dust emission prolonged blasting at night. The local communities have since stopped living a normal lifestyle. They sleep during the day and sit up all night. 4 nearby schools have been closed and could not conduct end of mid term examination due to noise and dust pollution. Socially, domestic violence is on the increase, cases of asthma have increased and it is believed that this is caused by exposure to dust and sharing shelter with animals. The New Vision further reported that NEMA had ‘passed’ the project as Uganda Investment Authority has issued an investors certificate.

MEDIA X is an NGO based in Mukono registered under the NGO Act and also incorporated under the Companies Act as a company limited by guarantee.

Its objectives among others; include:

- Promoting public awareness on the need to protect the environment.
- Using all possible avenues, to promote and expose dangers to the environment
- Protecting the environment from all harm and degradation.

In July 2004 , the Executive Director Media X Rachel Akello wrote to NEMA requesting for the project E.I.A. but NEMA has up to date refused to avail any documents relating to the project.

The Managing Director of New Horizon Mr. Patel Nehal, when visited by the Executive Director MEDIA X, was not happy with their intrusion. He stated that he has received complaints from the community and headmasters about the project. He stated that the project has an investment licence, was approved by NEMA and is hiring 500 people from the community, and they have offered the schools alternative areas. Warnings are given two hours before the blast. The local stone crushers support the project and say it is their source of income. Mr. Patel stressed that overall, at the end of the project; trees will be planted to restore the ecosystem.

Media X has mobilized all complainants and they have agreed to jointly sue NEMA, Mukono District Council and New Horizon. They have also obtained information that the project might be jointly owned by government and New Horizon.

‘FIRM A’ The complainants have come to you with strict instruction to file a suit, to stop the project and claim for loss suffered.

Proceed.

FIRM ‘B’ New Horizon has instructed you to defend the suit at the Complainant(s) cost and peril.

The Attorney General, Mukono District Council and NEMA have been briefed to be ready to defend suit in that they are sued jointly with New Horizon.

PROCEEDINGS:

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MUKONO
MISCELLANEOUS APPLICATION No. 007. OF 2004**

1. GODFREY ODUWA
2. MEDIA X ===== APPLICANT

VERSUS

1. NEW HORIZON
2. ATTORNEY GENERAL
3. NEMA
4. MUKONO DISTRICT COUNCIL=====RESPONDENTS

NOTICE OF MOTION

(Under Art. 50(2), Art 17 (1) (J), Art. 24, Art.39, Art 41 of the 1995 Constitution of the Republic of Uganda, S. 71(1) of the National Environment Act, S.I 26 of 1992)

TAKE NOTICE THAT, on the 11th day of August 2004 at 9:00 O'clock or in the forenoon, court shall be moved by the Applicants for the following Orders that ;

(a) Court declares the unregulated activities of the excessive blasting of stones from the two hills as constituting a violation to a right to a clean and healthy environment and education.

(b) An Order that the 4th Respondent takes the necessary steps to ensure the protection and enjoyment of a clean and healthy environment.

(c) An Order that NEMA avails any documents relating to project.

(d) An environment Restoration Order be issued against the first and second respondents directing them to restore the environment to its former state.

(e) An Order directing the 1st and 2nd Respondent to pay the costs of the Environmental Restoration.

(f) A permanent injunction restraining the 1st and 2nd Respondents, their agents, servants or any other person acting on their behalf from causing excessive noise, dust, pollution and blasting trans-night.

TAKE FURTHER NOTICE THAT the application is supported by the Affidavits of Mr. Godfrey Odua, and Rachel Akello but briefly the grounds are as follows;

- (1) The 1st and 2nd Respondents are excessively blasting stones from the two hills causing excessive dust emission and prolonged blasting at night.
- (2) That the four nearby schools as a result have been closed and were not able to conduct mid exams due to noise, dust and pollution.
- (3) That the prevalence of Asthma has increased a fact which is believed to be the direct exposure to dust and sharing shelter with Animals.
- 4) That NEMA has failed and or refused to carry out the Environmental Impact Assessment Report
- (5) That NEMA has failed to surrender the Report as stated in ground (4) above despite repeated demands by the 2nd applicant.
- 6) That the 4th Respondent has abdicated its statutory duties of protecting and preserving the environment within its jurisdiction.

DATED AT SEETA MUKONO this 10th day of August 2004.

.....
REGISTRAR HIGH COURT MUKONO

DRAWN AND FILED BY:
M/S FIRM A & Co. ADVOCATES
KAMPALA.

MULAGO HOSPITAL

5TH AUGUST 2004

MEDICAL REPORT

I have examined 10 pupils and 12 adults referred to Mulago Hospital by Media X all residents of Seeta.

John Mubo 12 yrs, Kizza Ben 15 yrs

Matsiko Ben 16yrs, Brian Tusiime 20yrs

Matsiko Fred 35yrs, Tindi Meddy 45yrs

Agnes Budu 10 yrs, Lydia Baire 65yrs

Martha Mulindwa 32yrs, Francis Kaggwa 25yrs

Ruth Buseka 10yrs, Betty Nambozo 35 yrs

Beti Odua 40 yrs, Godfrey Odua 45yrs

All the above are residents of Seeta with complications in breathing.

All X – Ray results reflect lung disfunctional related to exposure to stone dust.

In my opinion, it is one of the causes of Asthma.

.....
DR. KAIKOBA JOHN FRANCIS
SENIOR PHYSICIAN
MULAGO HOSPITAL

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MUKONO
MISCELLANEOUS APPLICATION No. 007. OF 2004**

1. GODFREY ODUWA
2. MEDIA X ===== APPLICANT

VERSUS

1. NEW HORIZON
2. ATTORNEY GENERAL
3. NEMA
4. MUKONO DISTRICT COUNCIL=====RESPONDENTS

AFFIDAVIT

I Rachel Akello, the Executive Director of Media X a Non Governmental Organisation situated at Mukono, swear and state as follows:-

1. That the 1st Respondent and 2nd respondent are the owners of the company New Horizon.
2. That the said company is excessively blasting stones from the two hills and this has led to excessive dust emission and prolonged blasting at night, yet the warning given is inadequate and the impact of the noise is great.
3. That the local communities have since stopped living a normal lifestyle in that they sleep during the day and sit all night.
4. That the four nearby schools have been closed as they could not conduct end of mid term examinations due to noise and dust pollution. Also the alternative schools are far and not easily accessible to the pupils.
5. That further to this, the cases of asthma are on the increase due to exposure to dust and sharing shelter with animals.
6. That some members of the community have been medically examined and have complications in breathing due to exposure to dust. Medical report is annexed and marked "A".
7. That it is the duty of all people of Uganda including me to uphold and defend the Constitution and this application is made in that spirit.
8. That I wrote to the 3rd respondent requesting for the project Environmental Impact Assessment report but to date they have refused to avail me with the documents relating to the project.
9. That the law empowers the respondents to protect and preserve the environment, promote the right to education, and ensure access to information by the public.
10. That I swear this affidavit in support of the application to declare the activities of the respondents as a violation of the right to a clean and healthy environment, right to education, right to access information and other Orders sought.

11. That what is stated herein above is true to the best of my knowledge, information and belief.

Signed by the said Rachel Akello thisday of2004.

.....
DEPONENT

BEFORE ME :

.....
A COMMISSIONER FOR OATHS

DRAWN AND FILED BY:
FIRM "A" & Co. ADVOCATES
KAMPALA.

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MUKONO (RIDAR HOTEL)
MISC.APP. No.007 Or 2004

GODFREY ODU----- **1ST APPLICANT**
MEDIA X----- **2ND APPLICANT**

VERSUS.

NEW HORIZON (NH)----- **1ST RESPONDENT**
ATTORNEY GENERAL----- **2ND RESPONDENT**
NEMA----- **3RD RESPONDENT**
MUKONO DISTRICT COUNCIL----- **4TH RESPONDENT**

Summary of Evidence

The first Applicant **GODFREY ODU**A is a resident of Seeta, Media X while the 2nd applicant is an NGO and A Company Limited by guarantee operating in Seeta.

The Respondent New Horizon (NH) has a big stone quarry in Seeta blasting stones from two hills. The community around the area is suffering from noise and dust pollution, they developed health complications like asthma and have therefore applied to Court for permanent injunction and restoration.

LAWS APPLICABLE

The 1995 Constitution of Uganda

The Environment Act CAP

the National Environment (Noise Standard and Control) Regulations S 1 No.30/2003.

The National Environment (Hilly and Mountainous Area Management) Regulations S1 No. 2/2002.

The Mining Act 9/2003.

CPA & Civil Procedure Rules

Any other Laws with the leave of Court.

LIST OF AUTHORITIES

Rwanyarare Vs. AG (Misc. Ap. No.85 of 1993.

BAT Ltd. Vs. TEAN (Misc. Appl No.27 of 2003 arising from Misc. App. No. 70 of 2002.

Ismail Serugo Vs. KCC & Attorney General, Constitutional Appeal No.2 of 1998.

Mtikila Vs. AG Civil Case No.5 of 1993

Others with leave from Court.

LIST OF WITNESSES

1. GODFREY ODU

2. DIRECTOR MEDIA X

3.DR. KAIKOB

Others with leave of Court.

LIST OF DOCUMENTS

1. MEDICAL REPORT BY DR. KAIKOB

Others with leave of Court.

COUNSEL FOR APPLICANT

Drawn & Filed By.

FIRM "A" & Co.

Advocates

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MUKONO (RIDAR HOTEL)

MISC.APP. No.007 Or 2004

GODFREY ODUA----- **1ST APPLICANT**

MEDIA X----- **2ND APPLICANT**

VERSUS.

NEW HORIZON (NH)----- **1ST RESPONDENT**

ATTORNEY GENERAL----- **2ND RESPONDENT**

NEMA----- **3RD RESPONDENT**

MUKONO DISTRICT COUNCIL----- **4TH RESPONDENT**

AFFIDAVIT

I, GODFREY ODUA swear that am an adult of sound and therefore competent to state as follows:-

1. THAT am the 1st applicant in this matter and a resident of Seeta.
2. THAT the 1st Respondent owns a big stone quarry within Seeta.
3. THAT the 1st Respondent is excessively blasting stones from the two hills and there is excessive dust emission from prolonged blasting at night.
4. THAT as a result the applicant and other residents of the area have stopped living a normal life style in that they sleep during the day and sit up all night in contravention of their right to a clean and health environment as enshrined in the Constitution.
5. THAT cases of asthma are on the increase in the area because of the excessive emission of dust from the 1st Respondent.
6. THAT four nearby schools have been closed and could not conduct end of mid-term examinations due to noise and dust pollution thus breaching the citizen's right to education and a noise-free environment.
7. THAT what is stated herein above is true to the best of my knowledge and belief.

Signed by the said **GODFREY ODU**A this----- day of -----of 2004.

DEPONENT

BEFORE ME,

COMMISSIONER FOR OATHS

DRAWN & FILED BY
FIRM "A" & CO.
Advocates

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MUKONO (RIDAR HOTEL)

MISC.APP. No.007 Or 2004

GODFREY ODUU-----1ST APPLICANT

MEDIA X-----2ND APPLICANT

VERSUS.

NEW HORIZON (NH)-----1ST RESPONDENT

ATTORNEY GENERAL-----2ND RESPONDENT

NEMA-----3RD RESPONDENT

MUKONO DISTRICT COUNCIL-----4TH RESPONDENT

AFFIDAVIT IN REPLY FOR 1ST RESPONDENT

I Patel Nehal, a male adult of sound mind, and the Managing Director of the 1st Respondent and therefore entitled to reply to the application and affidavits of both applicants as follows:-

1. THAT I have been advised by the Counsel for the 1st Respondent that the applicants are not entitled to the prayers sought in the application as the same is frivolous, vexatious and bad in law and at the commencement of the trial, the 1st

Respondents Counsel shall raise a preliminary objection to struck out pleadings with costs.

2. WITHOUT PREJUDICE to the foregoing, the 1st Respondent denies each and every fact of allegation raised in both affidavits in support of this application.
3. The 1st Respondent denies in toto specifically paragraphs 2,3,4,5,6 & 7 of the affidavit sworn by Godfrey Odua the 1st Applicant.
4. The 1st Respondent denies in toto, specifically paragraphs 1-10 of the affidavit sworn by the 2nd Applicant.
5. IN ANY EVENT OR, AND WITHOUT PREJUDICE TO THE FOREGOING,I pray that the applicants do file or deposit with Court security for costs to the tune of 50 million shillings before the commencement of the trial.
6. WHATEVER, I have stated here in above is correct to the best of my knowledge and belief save for paragraph 1& 5 whose information has been sourced from the 1st Respondents' Counsel.

DEPONED BY the said PATEL NEHAL this-----day of -----2004.

DEPONENT

BEFORE ME:

COMMISSIONER FOR OATHS

**DRAWN & FILED BY:-
FIRM B & CO. ADVOCATES
MUKONO - UGANDA.**

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MUKONO (RIDAR HOTEL)

MISC.APP. No.007 Or 2004

GODFREY ODUA----- **1ST APPLICANT**

MEDIA X----- **2ND APPLICANT**

VERSUS.

NEW HORIZON (NH)----- **1ST RESPONDENT**

ATTORNEY GENERAL----- **2ND RESPONDENT**

NEMA----- **3RD RESPONDENT**

MUKONO DISTRICT COUNCIL----- **4TH RESPONDENT**

AFFIDAVIT IN REPLY FOR 2ND RESPONDENT

I AMAMA MBABAZI , a male adult of sound mind, and the Attorney General of Uganda and therefore entitled to reply to the application and affidavits of both applicants as follows:-

1. THAT as an Attorney General and 2nd Respondents, the applicants are not entitled to the prayers sought in the application as the same is frivolous, vexatious and bad in law and at the commencement of the trial, I shall raise a preliminary objection to struck out pleadings with costs.
2. WITHOUT PREJUDICE to the foregoing, I deny each and every fact of allegation raised in both affidavits in support of this application.
3. That I deny in toto specifically paragraphs 2,3,4,5,6 & 7 of the affidavit sworn by Godfrey Odua the 1st Applicant.
4. That I deny in toto, specifically paragraphs 1-10 of the affidavit sworn by the 2nd Applicant.
5. IN ANY EVENT OR, AND WITHOUT PREJUDICE TO THE FOREGOING,I pray that the applicants do file or deposit with Court security for costs to the tune of 50 million shillings before the commencement of the trial.
6. WHATEVER, I have stated here in above is correct to the best of my knowledge and belief.

DEPONED BY the said **AMAMA MBABAZI** this----- day of -----
----2004.

DEPONENT

BEFORE ME:-

COMMISSIONER FOR OATHS

**DRAWN & FILED BY:
FIRM B & CO.ADVOCATES
MUKONO UGANDA**

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MUKONO (RIDAR HOTEL)
MISC. APPLICATION. No.007 Or 2004

GODFREY ODUU----- **1ST APPLICANT**

MEDIA X----- **2ND APPLICANT**

VERSUS.

NEW HORIZON (NH)----- **1ST RESPONDENT**

ATTORNEY GENERAL----- **2ND RESPONDENT**

NEMA----- **3RD RESPONDENT**

MUKONO DISTRICT COUNCIL----- **4TH RESPONDENT**

AFFIDAVIT IN REPLY FOR 3RD RESPONDENT

I BWIRE AGGREY , a male adult of sound mind, and the Executive Director of the third respondent and therefore entitled to reply to the application and affidavits of both applicants as follows:-

1. THAT the applicants are not entitled to the prayers sought in the application as the same is frivolous, vexious and bad in law and at the commencement of the trial, the 3rd respondent shall raise a preliminary objection to struck out the pleadings with costs.
2. WITHOUT PREJUDICE to the foregoing, the 3rd respondent denies each and every fact of allegation raised in both affidavits in support of this application.
3. That the 3rd respondent denies in toto specifically paragraphs 2,3,4,5,6 & 7 of the affidavit sworn by Godfrey Odua the 1st Applicant.
4. That the 3rd respondent denies in toto, specifically paragraphs 1-10 of the affidavit sworn by the 2nd Applicant.
5. IN ANY EVENT OR, AND WITHOUT PREJUDICE TO THE FOREGOING, the 3rd respondent prays that the applicants do file or deposit with Court security for costs to the tune of 50 million shillings before the commencement of the trial.
6. WHATEVER, I have stated here in above is correct to the best of my knowledge and belief.

DEPONED BY the said BWIRE AGGREY this----- day of -----2004.

DEPONENT

BEFORE ME:-

COMMISSIONER FOR OATHS

DRAWN & FILED BY:
FIRM B & CO.ADVOCATES
MUKONO UGANDA

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MUKONO (RIDAR HOTEL)
MISC.APP. No.007 Or 2004

GODFREY ODUA----- **1ST APPLICANT**

MEDIA X----- **2ND APPLICANT**

VERSUS.

NEW HORIZON (NH)----- **1ST RESPONDENT**

ATTORNEY GENERAL----- **2ND RESPONDENT**

NEMA----- **3RD RESPONDENT**

MUKONO DISTRICT COUNCIL----- **4TH RESPONDENT**

AFFIDAVIT IN REPLY FOR 4th RESPONDENT

I NNALONGO LYDIA, a female adult of sound mind, and the Speaker of the 4th respondent and a lawyer by profession, therefore entitled to reply to the application and affidavits of both applicants as follows:-

1. THAT as a speaker of the 4th respondent, the applicants are not entitled to the prayers sought in the application as the same is frivolous, vexatious and bad in law and at the commencement of the trial, I shall raise a preliminary objection to struck out pleadings with costs.
2. WITHOUT PREJUDICE to the foregoing, I deny each and every fact of allegation raised in both affidavits in support of this application.
3. That I deny in toto specifically paragraphs 2,3,4,5,6 & 7 of the affidavit sworn by Godfrey Odua the 1st Applicant.
4. That I deny in toto, specifically paragraphs 1-10 of the affidavit sworn by the 2nd Applicant.
5. IN ANY EVENT OR, AND WITHOUT PREJUDICE TO THE FOREGOING,I pray that the applicants do file or deposit with Court security for costs to the tune of 50 million shillings before the commencement of the trial.
6. WHATEVER, I have stated here in above is correct to the best of my knowledge and belief.

DEPONED BY the said NALONGO LYDIA this----- day of -----2004.

DEPONENT

BEFORE ME:-

COMMISSIONER FOR OATHS

DRAWN & FILED BY:
FIRM B & CO.ADVOCATES
MUKONO UGANDA

MOOT RULING

Article 50(2), 17(1) j, 39, 41, S.71.

Applicants are seeking the following orders:

1. THAT Court declares the unregulated activities of the excessive blasting of stones from the two hills as constituting a violation to a right to a clean and healthy environment and education.
2. THAT the 4th Respondent takes the necessary steps to ensure the protection and enjoyment of a clean and healthy environment.
3. THAT NEMA avails any documents relating to project.
4. THAT an environment Restoration Order be issued against the first and second respondents directing them to restore the environment to its former state.
5. THAT the 1st and 2nd Respondent to pay the costs of the Environmental Restoration.
6. THAT a permanent injunction restraining the 1st and 2nd Respondents, their agents, servants or any other person acting on their behalf from causing excessive noise, dust, pollution and blasting trans-night.

The application is supported by the affidavit of Mr. Godfrey Odua and Rachel Akello.
The grounds for the application are:

- a) THAT the 1st and 2nd Respondents are excessively blasting stones from the two hills causing excessive dust emission and prolonged blasting at night.
- b) THAT the four nearby schools as a result have been closed and were not able to conduct mid exams due to noise, dust and pollution.
- c) THAT the prevalence of Asthma has increased a fact which is believed to be the direct exposure to dust and sharing shelter with Animals.
- d) THAT NEMA has failed and or refused to carry out the Environmental Impact Assessment Report
- e) THAT NEMA has failed to surrender the Report as stated in ground (4) above despite repeated demands by the 2nd applicant.
- f) THAT the 4th Respondent has abdicated its statutory duties of protecting and preserving the environment within its jurisdiction.

The respondents' affidavits in reply were sworn by Patel, Amanba, Bwire and Nnalongo.

In paragraph 4 of his affidavit, the 1st respondent averred that the applicant controversy of right.

Paragraph ¾ of the 2nd applicant; effect of noise.

The issues that arise include:

- 1) whether applicant has locus standi

The application was brought under article 50(2) provides that any person or organisation may bring an action against the violation of rights of another person or groups.

In the case of *Greenwatch vs Attorney General & another*(140/2002, it was decided that the applicant is entitled to a clean and healthy environment. That the state had neglected its duty to provide a healthy environment and any concerned Ugandan had a right to bring an action.

The 1st applicant in my considered opinion had a right to bring an action under art.50 of the Constitution on his own behalf and on behalf of any other persons affected.

The second applicant also has locus.

The application was also brought under s. 71 of NEA. In the case of *Byabazaire vs Mukwano Industries, 09/2000*. It was held that NEMA is the only person vested with the power and duty to sue for the violations committed under the statute /Act. Thus, any person whose rights are violated should inform NEMA or the Local Environment Committee of such violation. It was further held that the plaintiff had no locus standi in violation under the statute.

In that matter, the plaintiff instituted a suit under s.4 of the statute. Paragraph 4 of the 2nd applicant stated that she to the 2nd respondent NEMA requesting for the project EIA report but was not availed to her.

In his affidavit in reply, Bwire Aggrey, the Director of the 3rd respondent did not specifically challenge the claim that the 3rd respondent had refused or failed to hand over an EIA report to the 2nd applicant.

The 1st applicant's facts of this case are that the project of the 1st respondent was "passed" by the 3rd respondent and Uganda Investment Authority had issued an investor certificate.

In the case of Greenwatch vs Attorney General above, it was held that NEMA had statutory duties and under the act to ensure that the principles of environmental management are observed.

In my opinion where NEMA fails or neglects its duty a party has a right to sue NEMA. In this case NEMA was rightfully sued since no evidence was adduced to show that environmental aspects of the project were considered.

I refer to the case of NAPE Vs AES. The main complainant of the applicants in this matter is that the 1st respondent is excessively blasting stones and there is excessive dust emissions and prolonged blasting at night.

Art. 39 provides that every Ugandan has a right to a clean and healthy environment under s.3 of the NEA, every person has a right to a healthy environment. S.67(1) NEA, the act prohibits pollution contrary to particular standards.

According S.67(2), a person may exceed the standards of the guidelines if authorised by a pollution permit issued under S.60 of the Act.

Part 6 of the Act provides for the establishment of standards, that is, air quality and the standards for the control of noise and vibrations. The standards for noise are provided for under the National Environment(Noise Standards) regulations 2003.

In the case of Byabazaire vs Mukwano Industries, **Justice Tinyinondi** made the following observation:

"S.4 of the Statute expressly vests a right to a healthy environment to every person including the plaintiff hereon. One needs to know what is meant by "healthy environment." It is my considered view, part VI and VII of the Statute provide, in technical terms, how a "healthy environment" can be described. Part VI describes standards in respect of "air quality", "water quality", "standards of discharge of effluent into water", "standards for the control of noxious smells", and many other standards. This part of the Statute goes a step further in stating that the authority, i.e NEMA, is the body entrusted with the duty of establishing these standards. In my considered view, it is only after the standards have been

established that one can gauge the totality of the right to a healthy environment. It is at this point that violation of the right can be described or pointed without any difficulty both by the victim of the violation and the arbiter in any dispute.”

OFFICIAL CLOSING CEREMONY

Mr. Roy Byaruhanga, Registrar Criminal Department officiated at the closing ceremony of the workshop. He said that he was honoured to do so and thanked the organisers- Greenwatch, ELI and JTC, the facilitators and other players who were involved in the preparation of the event for bringing awareness in environmental matters to the officers.

Mr. Byaruhanga also thanked the proprietors of the hotel for the good service they offered and appealed to the organisers to organise more such workshops to ensure that environmental issues are effectively handled by the judiciary.

He urged the magistrates to reflect and put into practice what they had learned during the workshop when they go back to their work stations.

On behalf of the Judicial Training Committee, Mr. Byaruhanga also thanked the organisers for their continued effort in training and equipping judicial officers with environmental law skills.

WORKSHOP EVALUATION

1. Comments on the materials distributed.

Most participants were of the view that the materials were very useful and comprehensive. They were enriched with a wealth of knowledge particularly on current decided cases. Some were however, of the view that the compendia of laws should have been distributed to them and not the High Courts.

2. Relevance of topics Discussed

The identified topics were all relevant as most participants had never been introduced to them.

3. Resourcefulness of the presenters

On the whole, the resource persons were useful and knowledgeable, in particular, Mr. Kenneth Kakuru and Mr. Phillip Karugaba were found very resourceful.

4. How useful were the Discussions?

The participants found the discussions informative and a wealthy forum of exchange of knowledge, ideas and experiences.

5. Duration of the Workshop

On the whole, the participants found three days not enough to cover the topics effectively. They suggested that one week would be enough time to cover the topics comprehensively.

6. How comfortable was the venue in terms of :

- i) **Meals?** Generally Good and of a variety
- ii) **Rooms?** Good and clean
- iii) **Recreation facilities?** Reasonably good

7. Relevance of the Moot

The moot was found relevant to all the topics that had been covered during the workshop.

8. Comment on the field trip

It was revealed that the field trip was relaxing and relevant to the workshop.

9. Areas recommended for Improvement

It was suggested that more relevant topics be added and discussions on current decided cases be held.

Further suggested was the issue of getting a proper field site, which would avail them the opportunity of discussing environmental abuses in depth.

10. How we can improve in our work

- Participants suggested that further research and review workshops for judicial officers be held often and that more facilitation in terms of reference materials be availed to them.
- They also recommended that this type of training be availed to the rural folk who relate environmental management issues to government ownership and also to raise awareness on the law as far as the environment is concerned.
- The participants further suggested that literature on environmental law be availed to them on a regular basis to keep abreast with emerging issues, on local, regional and international scenes.

**JUDICIAL SYMPOSIUM ON ENVIRONMENTAL LAW
AND PRACTICE IN UGANDA.**

**RIDAR HOTEL SEETA.
8TH AUG– 11TH AUGUST, 2004.**

LIST OF PARTICIPANTS.

1. Mr. G. Musoke Sawula
Ag. Executive Director
NEMA
P.O. Box 22255,
Kampala.
2. Mr. Byaruhanga Roy
Ag. Reg. Criminal Division
P.O. Box 7085,
High Court, Kampala
3. Mr. Serunkuma Isah
Magistrate Grade One
Makindye Court
P.O Box 7085,
Kampala.
4. Mr. Kasakya Muhammadi
Magistrate Grade One
Lugazi Court
Lugazi
5. Ms. Nkonge Agnes
Magistrate Grade One
Nakawa Court
P.O. Box 20191, Nakawa.
6. Mr. Byarugabha .J. Baptist
Magistrate Grade One
Nakawa Court
P.O. Box 20191, Nakawa.
7. Mr. Mugoya Gaster
Magistrate Grade One
Mwanga II Road Court
P.O. Box 7085,
Kampala.
8. Mr. Bwire Aggrey
Magistrate Grade One
Wakiso Court
Wakiso.
9. Ms. Kanyange Susan
Magistrate Grade One
Buganda Road Court
P.O. Box 7085,
Kampala.
10. Mr. Mugabo Emmy Vincent
Magistrate Grade One
Jinja Court.
11. Ms. Lydia Mugambe
Magistrate Grade One
Jinja High Court
P.O. Box 44,
Jinja.
12. Ms. Khainza Eleanor
Magistrate Grade One
Mukono Court
P.O. Box 32.
Mukono.
13. Mr. Karugaba Phillip
Advocate/ Spokesperson
TEAN
P.O. Box 9243
Kampala.
14. Mr. Robert Wabunoha
Senior Legal Counsel
NEMA
P.O. Box 22255,
Kampala.

15. Mr. Kagwa John Bosco
Magistrate Grade One
Buganda Road Court
P.O. Box 7085,
Kampala
 16. Mr. Komakech Robbins
Magistrate Grade One
P.O. Box 14168,
Mengo Court.
 17. Mr. Kenneth Kakuru
Director,
Greenwatch
P.O. Box 10120,
Kampala.
 18. Mr. Lawrence Gidudu
Registrar
High Court – Kampala.
 19. Mr. Valerian Tuhimbise
Senior Training Officer
Courts of Judicature,
P. O. Box 7085,
Kampala.
 20. Mwebembezi Julius
Grade One Magistrate
Masaka Court.
 21. Chemutai Tom
Grade One Magistrate
Gulu Court.
 22. Mr. Asa Mugenyi
Advocate / Lecturer
Uganda Christian University,
P.O. Box 5600,
Kampala.
 23. Ms. Lynda Biribonwa
Senior Inspection Officer,
NEMA.
P.O. Box 22255,
Kampala.
 24. Hon. Mr. Justice R. Opio- Aweri
Judge of the High Court,
P.O. Box 7085,
Kampala.
 25. Hon. Mr. Justice J.H. Ntabgoba
Retired Judge.
 26. Hon. Lady Justice Stella Arach
Judge of the Commercial Court,
Kampala.
- Secretariat:**
27. Ms. Sarah Naigaga
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P.O. Box 10120,
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 28. Ms. Irene K. Ssekyana
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Greenwatch,
P.O. Box 10120,
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 29. Ms. Kezaabu Harriet
Research Assistant
Greenwatch
P.O. Box 10120,
Kampala.
 30. Ms. Kirabo Rachel
Student intern,
Greenwatch

JUDICIAL TRAINING WORKSHOP IN ENVIRONMENTAL LAW

8TH –11TH AUGUST 2004

RIDAR HOTEL- SEETA, MUKONO.

PROGRAMME

Day one: Sunday the 8th of August, 2004

Timing	Activity	Description	Resource Person/Facilitator
4:00 – 5:00	Arrival of Participants	Check In	Greenwatch, Judiciary
7:00 – 8:00	Dinner		Greenwatch

Day Two: Monday the 9th of August, 2004

8:30 – 9:00	Registration of Participants	<i>Workshop Handouts Workshop Materials</i>	Greenwatch
9:00 – 9:40	Official opening Remarks by Greenwatch Remarks by ELI Remarks by E.D NEMA Official Opening	<i>-Welcome remarks- Greenwatch -Remarks- ELI -Remarks By JTC - Remarks by E.D NEMA Official Opening - PJ</i>	Guest of Honour: The Hon. The Principal Judge.
9:40 – 10:20	Administering Justice without undue regard to technicalities.	<i>Hon. Justice Ntabgoba</i>	
10:20–10:30		<i>Tea Break</i>	
10:30-11:10	Overview of Environmental Problems in Uganda	<i>- Land Degradation -Water and Air Quality - Biodiversity Loss -Wetlands Degradation</i>	Ms. Lynda Biribonwa, (NEMA)

11:10–11:20	Discussions		
11:20– 2:00	Introduction to National Environmental Law	<i>Overview of the Legal and Institutional Framework governing the Management of the Environment in Uganda</i>	Mr. Robert Wabunoha (Senior Legal Counsel-NEMA)
12:00 – 1:00	Discussions		
1:00 – 2:00	Lunch Break		
2:00 –2:40	General Principles of Environmental law	-Right to a Clean and Healthy environment - <i>The question of Locus standi</i> - <i>The Precautionary Principle</i> - <i>Intergenerational Equity</i> - <i>The Doctrine of Public Trust</i>	Mr. Asa Mugenyi
2:40 – 3:20	Discussions		
3:20 – 4:00	Access to Environmental Justice: The role of the judiciary and Legal practitioners	Experiences and Lessons Learned	Hon. Mr. Justice R. Opio- Aweri. (Judge of the High Court, Kampala)
4:00 – 4:30	Tea Break		
4:30– 5:00	Discussions		
7:00pm	Cocktail/Dinner and Dance		Greenwatch

Day Three: Tuesday the 10th of August, 2004

8:30 – 9:00	Registration of Participants		
9:00 – 9:40	Access to Information		<i>Mr.J. Pendergrass (Senior Attorney, ELI)</i>
9:40 – 10:20	Discussions		
10:20– 10:30	Tea Break		
10:30– 11:10	Criminal Aspects of Environmental Law	<i>Overview Legal Technicalities relevant to Criminal Prosecution</i>	Mr. Vincent Wagoona (Senior State Attorney,DPP
11:20– 11:50	Discussions		
11:50– 12:30	Civil aspects of Environmental Law, Practice and Procedure	<i>-The Civil Law and Procedure - Access to Justice and Information</i>	Mr. Kenneth Kakuru
12:30 – 1:00	Discussions		
1:00 – 2:00		Lunch Break	
2:00 – 2:40	Public Interest Litigation (Practice and Procedure)	<i>- Introduction to Public Interest Litigation</i>	Mr. Phillip Karugaba
2:40 –3:20	Discussions		
3:20 – 3:40	Introduction of the Moot exercise	<i>- Moot Question and explanation - Division into Groups</i>	Mr. Kakuru, Mr. Wabunoha
3:40 –4:10		Tea Break	
4:20 – 5:00	Moot Group Discussions	<i>Drafting papers</i>	All Participants
7:00	Dinner		

9:00 p.m.	Moot Exercise	Filing of papers by Groups	All Participants
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Day Four: 11th of August, 2004.

8.30 –9.00	Registration		
9:00- 9:40	Live Simulation Exercise	- <i>Moot Proceedings of the Simulation Exercise</i>	All Participants
9:40–10:20	Discussions		
10:20–10:40	Break		
10:50– 11:30		- <i>Judgment</i> - <i>Discussions</i> - <i>Recommendations and Way Forward</i>	
11:30- 1:00	Official Closing	<i>Closing Remarks and Official closing</i>	Chief Registrar.
1:00-2:00	Lunch Break		
2:00-3:00	Departure		

**SPEECH BY THE EXECUTIVE DIRECTOR, NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY**

My Lord, The Vice Chairperson of the Judicial Training Committee,
Your Worships,
Distinguished participants,
Ladies and Gentlemen.

It gives me great pleasure and honor to address you at this Judicial Symposium on Environmental Law and Practice in Uganda. We in NEMA appreciate the good work being done by the Judicial Training Programme especially as it relates to the environment management. We also thank the Judicial Training Committee for including environmental law in their training programmes.

We in the environment sector always find it useful and beneficial when we interact with the Judiciary for it is through such interactions that we can learn the perspective of the Judiciary's view on how best the environment can be managed.

NEMA's major concern is to ensure that our people enjoy a clean and healthy environment for the present and also for the future generations. We are called upon to ensure that development activities that are taking place in Uganda are carried out on a sustainable basis.

Over the year's, Government has put in place policies and laws relating to the environment management. These policies and laws need to be implemented. The Judiciary in this regard plays a key role in ensuring that there is fairness in our enforcement drive and also in ensuring that those who violate the laws are brought back to order.

Your Lordships and Worships,

Government's approach to ensuring a clean and healthy environment has been to enhance public participation by empowerment through education, public awareness, gender balance, information exchange and compliance with environmental law and standards. In addition, Government is now, after having carried out a lot of awareness, increasing her efforts in environmental enforcement. This we are doing by equipping the enforcement arm of the State with the necessary knowledge and skills to carry out their work.

Districts and local councils have been empowered to handle environmental issues but a gap still remains in translating empowerment into real action. Thus the need for the judiciary to actively participate in gauging environmental behavior or operations and maintain them within the prescribed limits.

The need for strategies and policies that will mitigate the impact on environmental damage on the available resources is one of the cardinal actions that Uganda needs to take. The involvement of the judiciary on this point of changing people's behaviors cannot be over emphasized. We need judicial intervention at all levels of environmental management and that is why environmental law is a key intervention in sustainable development. Sustainable development is NEMA's motto.

Your Lordships and Worships,

It is government's objective to ensure that all environmental laws are enforced and that the regulated community complies with the law. We have programmes to assist the industrialists and other private sector organizations to ensure that they voluntarily comply with the law.

The national environment policies are geared to ensuring that all the peoples of Uganda including the civil society, i.e., the Non-Governmental Organizations, community-based organizations and private sector are fully involved in the management of the environment. It is for this reason that NEMA engages the civil society not only in the delivery of its programmes but also in enforcement and compliance. The presence of Greenwatch in our enforcement drive is testimony that we do, in many instances collaborate with NGOs. Government will continue to support those civil society organisations that are helping our people to protect the environment.

In fact Greenwatch is one of our beneficiaries of funding and support because they have shown sufficient competence in delivering environmental law programmes in a partial manner.

Your Lordships and Worships,

During the last Judicial Training Workshop that was held in December 2003, NEMA promised to provide materials for the judiciary to enable you perform your impartial functions properly. We are aware that one of the most important tools for the judiciary is knowledge and this is usually found in law related book.

Your Lordships, I thank you for allowing the judicial officers to take time off to attend this symposium. I also thank the Judicial Training Committee for including environmental law in their training programmes. We are most grateful to Greenwatch for organizing this symposium and pledge to support and co-operate in training more judicial officers.

In that regard, am happy to inform you that NEMA has succeeded in compiling the most relevant environmental laws in Uganda into one volume. We are also aware that several laws exist on environmental law but are found diverse places and are not readily accessible to the judiciary among other stakeholders. Our humble role is to fill the gap of absence of the basic knowledge that is required to fairly and impartially adjudicate in

courts of law environmental cases. We believe that the books will benefit those judicial officers and libraries that are remote and lack materials.

NEMA and Greenwatch will by the end of this year also release two other books on environmental law, that is a **“Casebook on Environmental Law and the Handbook on Environmental Law.”**

It is now my pleasure to hand over to you, Your Lordship and Worships the volumes of the **“ENVIRONMENTAL LEGISLATION IN UGANDA.”**

For God and My Country.

**SPEECH BY HON. LADY JUSTICE ARACH - AMOKO AT THE OFFICIAL
OPENING OF THE WORKSHOP ON ENVIRONMENTAL LAW FOR
JUDICIAL OFFICERS, RIDAR HOTEL - SEETA; 9TH AUGUST, 2004**

My Lords,
Distinguished Guests,
Your Worships,
Ladies and Gentlemen.

I have been requested by the Acting Principal Judge, Mr. Justice James Ogoola, to represent him at the official opening ceremony of this workshop. I am sure you are all aware by now, that Hon. Mr. Justice Ntagoba has now retired from the service of the Judiciary and that the Hon. Mr. Justice James Ogoola has assumed the office as Acting Principal Judge.

The Acting Principal Judge is involved in a very important Constitutional Appeal before the Supreme Court which is scheduled to be heard with effect from today. He was therefore unable to be with you at this opening ceremony. He has however given me the following message to you.

I regard it as a great honour and responsibility to be asked by the organizers of this workshop to officiate at the official opening of yet another training workshop for Judicial Officers in the area of Environmental law.

The Judiciary recognizes the very important role Magistrates play in the administration of Justice. Magistrates meet with a much wider spectrum of the society than their counterparts of the higher calibre. They resolve disputes between people and apply and interpret the laws of the land. The people generally, have a fervent belief in the rightness and fairness of Judicial decisions. This trust and confidence of the society in our Judicial Officers must be reciprocated through a great sense of responsibility and integrity. In order to do this, it is imperative that not only must Judicial Officers be independent and courageous, but they must also maintain high standards of learning. These important attributes ensure that people will be Judged Justly in Courts and be able to enjoy adequate protection under the law.

I wish therefore to commend the Judicial Training Committee, Greenwatch and the Environmental Law Institute, Washington D.C. for their decision to organize this workshop.

In view of the rapidly changing legal trends in general, and in the area of environmental law in particular, continued Judicial education is extremely important. It needs to be underscored here that continued Judicial education is a mandatory requirement for the improvement of our Judicial services, the development of our Jurisprudence as well as the strengthening of the rule of law.

The importance of judicial training arises from the need to cope with the changing trends the world over. Training must be encouraged to equip Judicial Officers with the most current developments in the world, not only in Judicial matters, but also in other disciplines.

There can be no argument that an independent Judiciary is a critical element of a democratic society. It is a fact, which however, calls upon Judicial Officers to be in possession of the requisite intellectual and moral strength to discharge their duties with competence and fairness. And, it is my most considered view, that all this can be acquired only through Judicial education and training. There is increasing realization of the fact that Judicial competence requires more than just knowledge of the law. Judicial Officers (including me) must, by necessity, develop skills which enable them to effectively serve the society and apply the law with due dispatch and accuracy. Continued legal education and training workshops such as the one you are due to attend, play quite a crucial part in the development of Judicial skills and competence.

I understand the workshop is intended to inter alia, to enhance your capacity and skills in adjudication of environmental cases, to raise awareness and to generate a common understanding of the environmental litigation process. This is quite opportune, as we all know, that matters relating to the proper care of the environment in our country and everywhere else are assuming global concern. Judicial Officers will therefore require the necessary expertise to handle complex environmental cases that are bound to be brought to their Courts.

It is my hope that the discussions will be able to show you how our Courts can play their part in the protection of the environment, as well as how environmentally conscious citizens can be able to take lawful courses of action in arresting blatant destruction and degradation of the environment.

It is also my sincere hope, that the skills and experience, will you will no doubt, gain during this workshop will help to enhance your skills in this area generally as you are no doubt aware that environmental law is now clearly a permanent feature of the legal scene.

I am sure the workshop will also enable you to understand and to conceptualise the legal and institutional Framework governing the management of the Environment in Uganda, as well as the procedural aspects of the same.

Looking at the program, it is clear that the workshop is highly interactive and participatory in nature. I must say, I am particularly excited by the inclusion of a moot on the program. This is commendable since your role as Judicial Officers is mainly practical and not passive. The days of the passive Judge are long gone. These are days of Judicial activism. I therefore encourage you to take full advantage of the opportunity given to you by Greenwatch at this workshop. I also urge you to take back the material and the knowledge acquired through this workshop and to put them to good use; so that you are

able to handle complex environmental cases more efficiently and expeditiously as a result of your training.

By way of further reading, I would strongly recommend a paper present by Lord Woolf, Lord Chief Justice of England and Wales in a 1991 Garner Lecture, entitled "*Are the Judiciary Environmentally Myopic?*" (Reproduced in the *Journal of Environmental Law*, Vol. 4 No.1, Pg. 1)." (<http://www.dca.uk/judiciaf/speeches/24-05-01.htm>)

Let me conclude by again expressing my sincere appreciation and that of the Judiciary to the organizers of this workshop, namely the JTC, Greenwatch and the Environmental Law Institute of Washington DC for organizing the workshop.

I wish to thank Greenwatch for sponsoring yet another workshop for the Judiciary. We look forward to other similar workshops in the near future so that the entire Judiciary is sensitized in Environmental laws.

I also wish to extend my thanks to you the participants for being able to find time from your busy schedules to attend this important workshop.

Having said all this, and wishing you fruitful deliberations over the next two days, it is now my pleasant honour, to declare this workshop officially open.

I thank you all for your kind attention.

Lady Justice Stella Arach – Amoko.

**ADMINISTERING JUSTICE WITHOUT UNDUE REGARD TO
TECHNICALITIES.**

BY: HON. MR JUSTICE J. H. NTABGOBA - GUEST SPEAKER.

INTRODUCTION

The topic I was requested to discuss with you is "*Administering substantive Justice without undue Regard to Technicalities*". Needless to say this is uncompleted phrase from Article 126(2)(e) of the 1995 constitution, which states that:

"In adjudicating cases of both Civil and Criminal nature, the courts shall, subject to the law, apply the following principles:

(a).....

(b).....

(c).....

(d).....

(e) Substantive justice shall be administered without undue regard to technicalities"

In the memorandum of the Minister of Justice and Constitutional Affairs introducing the Judicature (Amendment) Bill, 2001, paragraph 3 includes the phrase "Administering justice without undue regard to technicalities"

"The amendment is in particular intended to meet the requirements of Articles 126(2)(a) and 126(2)(e) of the Constitution... Article 126(2)(e) also provides that substantial (sic) justice shall be administered without undue regard to technicalities"

Consequently, section 19(2) of the Judicature Act was substituted with the following:

"(2) With regard to its own procedures and those of the Magistrates Courts, the High Court shall exercise its inherent powers to prevent abuse of process of the court by curtailing delays, including the power to limit and stay delayed prosecutions and to see

that substantive justice shall be administered without undue regard to technicalities."

THE APPLICATION OF THE PHRASE "ADMINISTERING JUSTICE WITHOUT UNDUE REGARD TO TECHNICALITIES"

On a number of occasions after the passage of the 1995 Constitution, Courts have been asked by litigants' advocates to observe the above Constitutional provision. More often than not such advocates have been requesting the courts by citing Article 126(2)(e) of the Constitution out of context and have been overruled by courts. I have three cases in mind in which the

Supreme Court has had to overruled the out of context prayers of advocates and I do set them below.

1. STEPHEN MABOSI –VS-UGANDA REVENUE AUTHORITY SUPREME COURT CIVIL APPLICATION NO 16/1995

The Coram in this case was three justices: Manyindo DCJ, Odoki JSC and Tsekooko, JSC. However, I have been able to lay hands on the Rulings of Odoki, JSC and Tsekooko, JSC. They gave opposing rulings and one needs to know which side the Ruling of Manyindo DCJ, was. Be that as it may the facts of the application in that case and holdings therein are instructive, with regard to the directive "substantive justice shall be administered without undue regard to technicalities".

It was an application to strike out a notice of appeal on the main ground that the respondent had not instituted the appeal within sixty days of filing of the notice of appeal as required by rule 81 (1) of the Supreme Court Rules. The sub-rule provided that an appeal should be instituted by lodging a memorandum of appeal and a record of appeal within sixty days of the date when the notice of appeal was lodged. The proviso to the sub-rule states:

"Provided that where an application for a copy of the proceedings in the High Court has been made within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeals is instituted, be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery to the appellant of such a copy.

"(2) an appellant shall not be entitled to rely on the proviso to subrule (1) unless his application for such copy was sent in writing and a copy of it was sent to the respondent.

Counsel for the appellant did only send a notice of appeal in which he stated:

"The intended appellant intends to formulate its grounds of appeal on receipt of the record of proceedings and the ruling of the Court."

He did not send a written request for the copy of the proceedings but in another two letters, he stated to the High Court Registrar that:

"Further to our notice of appeal which was lodged with the Honourable Court, this is to request that work on the preparations of the record of proceedings in the above case be speeded up in order to enable us to file a memorandum of appeal. "

This letter was dated 20th March 1995, apparently beyond the time stipulated for applying for the record and sending a copy of the request to the respondent.

On 22nd June 1995, the Registrar issued his certificate which read:

"I P. K. K. Omega, Registrar of the High Court hereby certify that the copies of the proceedings, exhibits and judgement which were applied for by Counsel for

the defendant on in February 1995 were sent on 22nd June, 1995."

Learned Counsel for the respondent did, on receipt of the record of proceedings, promptly, lodge the appeal on 30th June 1995.

The main issue was whether the Notice of Appeal's second paragraph which stated on receipt of the record of proceedings and ruling of the Court" (appellant intends to formulate its grounds of appeal') amounted to a request for a record of proceedings 'since it was addressed to the Registrar who had custody of the proceedings.

The applicant submitted that it was not a request for the record of proceedings under rule 81 (2) of the Rules of the Supreme Court. Odoki (JSC, as he then was) held that the notice of appeal which indicated that on receipt of the record of proceedings also amounted to a request for the record. He had these words to justify his decision:

"I agree with learned Counsel for the applicant that an application normally refers to a request. However, rule 81 does not provide the form the application or request should take. The essentials of the application appear to be that:

(a) it should be in writing

(b) it should be addressed to the Registrar

(c) it should be made within 30 days from the date of judgement

(d) it should request for a copy of the proceedings

(e) a copy of it should be sent to the respondent."

Although the learned judge acknowledged the provision that a copy of the request for the record of proceedings should be sent to the respondent (applicant), and in spite of the wording of sub-rule (2) of rule 81 of the Court's Rules, he nevertheless upheld the argument of Counsel for the respondent (appellant). It is difficult to see why the learned judge held as he did. If he agreed with Counsel for the appellant that the application for striking out the appeal would contravene the constitutional provision that substantive

justice shall be administered without undue regard to technicalities, my humble submission is that since Counsel for the appellant had not followed sub-rule (2) of rules 81 of the Rules, he could not plead the Constitutional provision. What I am saying can easily be seen in the two other cases which I am about to discuss, namely, Utex Industries, Ltd. (SCCA No 52/95) and Kasirye, Byaruhanga & Co, Advocates - vs - Uganda Development Bank (SCC Appeal No 2 of 1997).

For the moment, I would like to quote the words of Sir Udo Udoma CJ in the case of Salume Namukasa - vs - Yozefu Bukya [1966] EA 433 at pp.435-436 regarding the importance of following the civil Procedure Rules of the Court. He said:

"Counsel must understand that the Rules of this Court were not made in vain. They are intended to regulate the practice of the Court. Of late a practice seems to have developed of Counsel instituting proceedings in this court without paying due regard to the Rules. Such a practice must be discouraged. In a matter of this kind, might the needs of justice not be better served by this defective, disorderly and incompetent application being struck out?"

If the learned judge's decision was made under his inherent powers, I would still refer to the same case of Salume Namukasa vs - Yozefu Bukya (supra) at p.443 where Sir Udo Udoma had this to say with regard to the Courts' inherent powers pursuant to section 101 of the Civil Procedure Act:

"It was submitted by Counsel... that despite this defect in that the application was not properly before the Court, the Court should invoke its inherent powers under section 101 of the Civil Procedure Act and treat the application as properly before it for the purpose of meeting the ends of justice.

It is difficult to appreciate the point of this submission, having regard to the provisions of section 101 of the Civil Procedure Act. It seems to me that before

the provisions of that section of the Act can be invoked the matter have been brought before the court, the proper way, in terms of the procedure prescribed by the Rules of this court. In the present case the application has not been brought before this court in the manner prescribed by law. "

At this juncture, I must point out that the learned Chief Justice in the Namukasa - vs - Bukya case was underscoring the saying often quoted that the Rules of the court are hand maidens of justice. I venture also to say that the Constitutional provision in Article 126(2)(e) does confirm unequivocally what Chief Justice Udo Udoma was saying in Namukasa - vs - Bukya. The emphasis is not on the phrase "Administering justice without undue regard to technicalities". The emphasis is on the entire provision of Article 126(2)(e) that:

"In adjudicating cases of both a Civil and Criminal nature, the Courts shall, subject to the law, apply the following principles:

(a)....

(b)....

(c)....

(d).....

” (e) Substantive justice shall be administered without undue regard to technicalities”,

The Courts inherent discretion cannot therefore be invoked unless the law has been complied with. This brings me to the second of the cases I said I will discuss.

2. KASIRYE, BYARUHANGA AND CO, ADVOCATES - VS - UGANDA

DEVELOPMENT BANK (See APPEAL NO 2 OF 1997)

An appeal from the orders of the Deputy Registrar on a bill of courts pursuant to section 61 of the Advocates Act, 1970, was lodged with the Principal Judge who dismissed the

appeal and upheld the decision of the Deputy Registrar. Although on 19th July, 1995 the Principal Judge rejected application for leave to appeal, the appellants filed in the High Court a notice of Appeal from the Principal Judge's judgement on 25th July 1995 and in the Supreme Court on 28th March, 1997, the appellants filed the appeal.

When on 22nd May 1997, the appeal was called for hearing, Counsel for the respondent challenged the competence of the appeal by way of a preliminary objection on two points.

1st point: Counsel submitted that since the Principal Judge gave his judgement on 19th July, 1995, the appeal should have been filed within sixty days thereafter i.e. by about 20th September, 1995. Counsel submitted, in effect, that the appellants could not rely on the proviso to rule 81 (1) because a letter alleged to have requested for proceedings before the Principal Judge was not served upon the respondent. Counsel said that, on this point, he sought a clarification from Counsel for the appellant, all in vain.

Counsel for the appellants erroneously contended that the preliminary objection was misconceived and that it intended to defeat justice. He later conceded that he had not copied the request for the record of proceedings to the respondent. But he invoked the provisions of Article 126(2)(e) of the Constitution arguing that since there was an application for proceedings, failure to serve a copy thereof to the respondent occasioned no injustice to the respondent.

Disagreeing with the learned Counsels' arguments, Court cited Article 126(2) and underlined the words "subject to the law". They then re-iterated their words in the case of *Utex Industries, Ltd - vs - Attorney General (S.C. Appl. No 52/1995)* that:

"We are not persuaded that the Constituent Assembly Delegates intended to wipe out the rules of Procedure of our Courts by enacting article 126(2)(e)."

They upheld the preliminary objection by quoting Rule 81 (1), which states:

"Subject to the provisions of rule 112, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged."

3. UTEX INDUSTRIES LTD - VS - ATTORNEY GENERAL (See APLL. NO. 52/95)

The third of the cases I said I will discuss is Utex Industries Ltd. vs - Attorney General. In that case the applicant brought an application in the Supreme Court by Notice of Motion under Rules 42(1) and (2), 76, 80 and 81 of that courts Rules of Procedure, seeking an order that the Notice of Appeal filed there by the Attorney General, the respondent, on 1st August, 1995, be struck out because the respondent failed to take certain essential steps within the prescribed time. The application was supported by two affidavits and also the response was supported by two affidavits.

The background to the application was that prior to the institution of High Court Civil Suit No 4 of 1993, the Managing Director of the applicant was involved in business deals with a certain Asian. There was a misunderstanding at some stage. The police was called upon to investigate the dispute. As a result, the Police handed over the shop goods to the Asian. The applicant filed the suit in the High Court against the respondent (Attorney General), seeking damages because of the Police action. An attempt by the respondent to join the Asian in the suit as a co-defendant were rejected by the High Court. Consequently, the High Court passed judgement in favour of the applicant against the respondent. The judgement was delivered on 4th August 1995. The affidavits filed on the appeal showed that on 18th August 1995 the respondent filed a notice of appeal in the

High Court and on 5th September 1995 it wrote a letter to the Deputy Registrar of the High Court requesting for proceedings to be typed. The letter was not copied to the applicant as is required by rule 81 (2) of the Supreme Court Rules which states:

"An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was sent to the respondent".

After applying on 5th September for the record of proceeding copy whereof he did not send to the applicant, the respondent did not file a memorandum of appeal until 3/12/1996. Even then the

Memorandum was filed in the Court of Appeal but not in the High Court. There was no evidence as to when the respondent received or collected the record of proceedings in the High Court, although from the affidavit in support of the respondent's appeal it was clear that the record of proceedings was in the respondents' office on 20/4/1996 which was a Saturday. This showed that clearly, the respondent was very late in filing the memorandum of appeal. The respondent gave the excuse for such late filing saying that the respondent could not raise in time the amount of Shs. 167,000= to enable him to prepare the record of appeal so as to file it in time.

The applicant therefore submitted that the Notice of Appeal be struck out because:

- (a) the respondent did not institute the appeal within the prescribed 60 days under rule 81 (1) and,
- (b) that the Notice of Appeal was served on the applicant out of time i.e. on 5/9/1995.

The Court found that the possibility was that the notice of appeal was served on the applicant on 18/8/1995, which was within the prescribed period. However, the court

found that the respondent could not rely on the proviso to rule 81 (1) of the Rules since he could not prove when he received the record of proceedings or when he applied for it, and also since he failed to give a copy of the Notice to the respondent.

To the reliance by the Attorney General on the provisions of Article 126(2)(e) of the Constitution, the court said:

"Mr. Cheborion relied on Article 126(2) of the Constitution of 1995 and the Ruling of Odoki, JSC in Stephen Mabosi - vs Uganda Revenue Authority (supra) for his view that we should not strike out the Notice of Appeal on the basis of technicalities. He argued that the Attorney General's inability to raise the fees of shillings 167,000/= for filing the appeal is excusable by virtue of rule 4 of the Rules of the Court. Other than citing rule 4, the learned Principal State Attorney was unable to cite any authority to support the last part of his arguments.

With respect, we think that rule 4 is wholly inapplicable to the facts of this application. We can't see how rule 4 can save the respondent's predicament since the respondent has not applied for leave to extend time. "

Most significantly, and relevant to our topic for discussion were the words of the court on the last page of its Ruling that:

"Regarding Article 126(2)(e) and the Mabosi case we are not persuaded that the Constituent Assembly Delegates intended to wipe out the rules of procedure of our courts by enacting Article 126(2)(e). Paragraph (e) contains a caution against undue regard to technicalities. We think that the article appears to be a reflection of the saying that rules of procedure are handmaids to justice - meaning that they should be applied with due regard to the circumstances of each case. We cannot

see how in this case Article 126(2)(e) or Mabosi case can assist the respondent who sat on his rights since 18/8/1995 without applying for leave to appeal out of time. It is perhaps pertinent here to quote paragraph (b) of the same clause (2) of Article 126. It states:

"justice shall not be delayed."

Thus to avoid delays rules of court provide a timetable within which certain steps ought to be taken. For any delay to be excused, it must be explained satisfactorily."

It is to be seen that this same expression was used by Sir Udo Udoma in *Salume Namukasa - vs - Bukya* (supra) at page 435 of [1966] E.A. 433, as follows:

*"Counsel must understand that Rules of this court were not made in vain. **They are intended to regulate the practice of the Court...**"*

Since this expression was made in 1966 long before the 1995 constitution was even not yet contemplated, what addition did article 126(2)(e) of the Constitution make to the pre-constitution

existing wide powers of the courts which still exist even after the passing of the Constitution?

THE INHERENT POWERS OF COURTS

Statements of "inherent powers" of courts abound, but they are usually phrased rather broadly to cover powers thought essential to the existence, dignity, and functions of the court because it is a court or for an orderly, efficient, and effective administration of justice. In this regard, I refer to section 101 of the Civil Procedure Act, which is a statement of the inherent powers of our courts. It provides:

"Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

In my view, the inherent powers stated in Section 101 of the Civil Procedure Act are restricted to courts' judicial powers. However, and this may be of great importance in the adjudication of environmental disputes, it is a universal recognition that besides wide judicial powers of courts, there are even wider powers which courts must have if they must exert their independence. Below I court from Felix F. Stumpf's "Inherent Powers of the Courts (sword and Shield of the Judiciary)"

"The definitional statements that appear below are illustrative and have been chosen for being frequently quoted or expressing differently worded formulations of the doctrine.

1. The doctrine of inherent power runs essentially as follows:

The courts are a constitutionally created branch of government whose continued effective functioning is indispensable; performance of that Constitutional function is a responsibility committed to the courts; this responsibility implies the authority necessary to carry it out; therefore the courts have the authority to raise money to sustain their essential functions" (81 Yale L.J. 1286, 1287(1972).

2. "Inherent powers consist of all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective. These powers are inherent in the sense that they exist because the court exists; the court is, therefore vested with powers reasonably required to act as an efficient court." (Carrigan, "Inherent Powers and Finance" 7 Trial Magazine 22 (1971).
3. "The 'term inherent Powers of the Judiciary' means that power which is essential to the existence, dignity and functions of the court from the very fact that it is a court" (Inre- Integration of the Nebrasks State Bar Ass'n, 275 N.W. 265, 267(Neb. 1937).

4. "[A] Court's inherent power is its 'authority to do all things that are reasonably necessary for the proper administration of justice.'" (Matter of Alamance County Court Facilities, 405 E.E.2 d 125(NC1991).
5. The term inherent powers have been employed in three general fashions. The first use of inherent powers, which might be termed irreducible inherent authority, encompasses an extremely narrow range of authority involving activity so fundamental to the essence of a court as a constitutional tribunal that to divest the court of absolute command within this sphere is really to render practically meaningless the terms 'Court' 'judicial power' ... The second, and most common, use of the term 'inherent power' encompasses those powers sometimes said to arise from the nature of the court.. but more often thought to be the powers 'necessary to the exercise of all others' . Here courts are referring to powers implied from strict functional necessity Historically, (the Supreme Court] have viewed this particular power as 'essential to the administration of justice' and 'absolutely essential' for the functioning of the Judiciary... The third form of authority subsumed under the general term inherent power implicates powers necessary only in the practical sense of being useful in the pursuit of a just result" (Eash - vs - Riggins Trucking Inc. 757 G.2d 557, 562-563(3d Cir.1985, Omitting Cases cited).
6. State courts claim as inherent in them': those powers which, though neither granted to, nor withheld from them by the state constitution and not found in another source of law, must nonetheless be conceded to the Judiciary as a separate department of government because their exercise is deemed absolutely essential for the performance of the court's constitutionally mandated mission." (Winters - vs City of Oklahoma City, 740P.724, 728 n.1 (Okla .1987).

CONCLUSION

In my view Article 126(2)(e), not merely the expression "*administering justice without undue technicality*," which itself is meaningless, is a statement of the existing irreducible

inherent power of the courts. The Article neither adds to nor subtracts from that power. The inherent power in Section 101 of the Civil Procedure Act, is only limited to that Act but it is also a statement of the irreducible power of the courts in Civil Procedure Matters, as many other provisions all throughout our legislation.

ENVIRONMENTAL LAW AND PROCEDURE

Regarding environmental Court matters, the courts have every power to adjudicate on them, paying particular attention to the fact that hitherto, the subject of environmental law has been a subject hidden and unfamiliar in the courts; and that environmental disputes will require special court's attention to resolve. Thus environmental matters impact strongly on our lives. Environmental matters are human rights matters. Article 39 of the Constitution provides for a right to clean and healthy environment. It states:

"Every Ugandan has a right to a clean and healthy environment."

Therefore Courts must handle environmental matters in the same way they should handle human rights matters. **Manyindo DCJ** (as he then was) underscored the necessity of administering substantive justice without undue regard to technicalities when he said, in the case of Attorney General - vs - Major General David Tinyefuza (CA. 1/1997) that:

*"the case before us relates to the fundamental rights and freedoms of the individual like the petitioner which are enshrined in and protected by the Constitution. **In my opinion it would be highly improper to deny him a hearing on technical or procedural grounds.** I would even go further and say that even where the respondent objects to the petition as in this case, the matter should proceed to trial on merit unless it does not disclose a cause of action. This court should readily apply the provisions of Article 126(2)(e) of the Constitution in a case like this one and administer justice without undue regard to technicalities. "*

You will meet so many objections in environmental cases, which will tend to use rules of procedure to frustrate cases, which have substance. It will be necessary for the courts,

bearing in mind the importance of protecting the environment as a human right, to come out and reject such preliminary objections. In this regard, I would refer to the unanimous decision of the Supreme Court in the Election Petition No.1 of 2001 (Dr. Kiiza-Besigye - vs – Yoweri Kaguta Museveni) in which the court decided that Order 7 Rule 3 of the Civil Procedure Rules was a procedural technicality.

The Rule provides that:

"Affidavits shall be confined to such facts as the deponent is able on his own knowledge to prove, except in interlocutory applications, on which statements of his belief may be admitted provided that the grounds thereof are stated."

Chief Justice Odoki specifically referred to Article 126(2)(e) of the Constitution that:

*"from the authorities I have cited there is a general trend towards taking a liberal approach in dealing with defective affidavits. This is in line with the Constitutional directive enacted in Article 126 of the Constitution that **the Courts should administer substantive justice** without undue regard to technicalities. Rules of procedure should be used as hand maidens of justice but not defeat it. "*

I must emphasize, of course, the phrase "but not defeat it" That means that where the rules of procedure will not defeat justice, they should be observed as Chief Justice Udo Udoma would say in *Namukasa - vs - Buky* (supra). In other words, the statement that rules of procedure are handmaidens of justice must be quoted in context. But it would be commonly resorted to in human rights, environmental and Constitutional or election petitions. It is for this reason that I agree with C. K. Byamugisha, JA, when she said that not all technicalities are bad. I venture to say that where rules of procedure are couched in a mandatory language, the proper way to treat them is to obey them and respect them, and only brand them technicalities for compelling reasons, which should be clearly explained.

Lastly, I would emphasize the importance of collective and concerted court actions in environmental litigation. This is because it is usually too expensive for an individual aggrieved poor person to prosecute an environmental case. This is also because, in a majority of cases, the persons environmentally wronged are the poor. I would encourage Public Interest Litigation in environmental litigations.

AN OVERVIEW OF ENVIRONMENTAL PROBLEMS IN UGANDA.

BY: MS.LYNDA BIRIBONWA, SENIOR ENVIRONMENTAL INSPECTOR - NEMA.

1.0 Introduction

Environment as defined by the Uganda National Environment Act Cap. 153, means “the physical factors of the surroundings of the human beings including; and, water, atmosphere, climate, odor, taste, the biological factors of animals and plants and the social factors of aesthetics and includes both the natural and the built environment. The state of environment is a major worldwide concern because environmental assets provide three main types of services to the human society:

- i) The natural resource base provides essential raw materials and inputs, which support human livelihood;
- ii) Environment serves as a sink to absorb and recycle (often at little or not cost to society) the waste products of economic activity;
- iii) Environment provides generalized services ranging from simple amenities to irreplaceable life support functions e.g. stabilization of global climate or filtering out harmful ultra-violet rays by stratospheric ozone layer.

In Uganda, the concept of environment protection is very much linked to the need to eliminate or reduce the risk of jeopardizing people’s well being in the current and future generations.

Vital to the livelihood of millions of Ugandans are the country’s diverse peoples and cultures, agricultural lands, lakes and rivers, fish and wildlife, pasture, woods and construction material. The importance of these resources for development in Uganda is demonstrated by the following:

- i) Uganda is primarily an agrarian country with agriculture supporting over 80% of the population most of which is rural based. In addition, the agricultural sector, which is mainly based on the natural state of the environment, contributes highest to the GDP (about 43% of the GDP)
- ii) Energy is critical for the well being of the Ugandan community. Ninety-six percent of energy used in Uganda is woody biomass-based gathered from forests, woodlots and agricultural fields.
- iii) The fisheries resources are a major source of animal protein as well as income for the people of Uganda. The fisheries sector contributes about 2% of the GDP.
- iv) Eighty percent of Uganda’s estimated 24 million today live in the rural areas. Sixty percent of these rely on lakes, rivers, wells and wetlands to meet their water needs, so do 25% of the people living in urban areas of Uganda.

The above few examples illustrate the important role environmental resources play in the development process in Uganda.

2.0 Key Underlying Concerns of Environmental Management in Uganda

Despite the above-demonstrated importance of environment in the development of the country, there are already signs of unsustainability of Uganda's development process. This evidenced by the wide array of environmental problems, which reflect loss of quality, stability, diversity and productivity of environmental resources. These environmental problems pose constraints to the people to earn income and have better standards of living. The underlying factors that have led to environmental degradation are:

i) Population growth

Following the last national population census, the population of Uganda is estimated at about 24.5 million having risen from about 2.5 million in 1911. This is an increase of about 1000%. This rate of population growth has led to sudden rise in demand of natural resources to meet the human basic needs.

ii) Lack of Public Participation of the local people in Environmental Management and Development Programs.

Until recently, most of the decisions and required actions for improved environment conditions and development were not targeted at the participation of the local community. This led to the alienation of people from these resources, loss of capacity and incentive for sound environmental management. Under these circumstances capacity in environment management deteriorated, benefits were not equitable shared and where opportunity arose, resources were misused/exploited by the local people (who were the supposed beneficiaries), leading to their degradation or depletion.

iii) Poverty

Poverty is both a cause and a result of environment degradation. Poverty stricken communities will harvest any available resources, including cultivating in marginal or fragile ecosystems. This accelerates environmental degradation, yet the victims of environment degradation are normally the poor families and individuals in both urban and rural areas. While the wealthier individuals may cause environmental degradation, they may not be victims of degradation because they can afford the costly alternatives.

iv) Lack of Environmental Awareness

For meaningful interaction between the community and the environment, the communities need a good understanding and appreciation of the environment. This can only be developed through formal and non-formal environment education programs so as to build upon their indigenous knowledge. In the past environment educational and public awareness programs were lacking and

therefore the community was not adequately guided in prudent resources use and management.

- v) The other underlying factors for environmental degradation are:
- Poor planning of urban and rural settlements
 - Lack of management and technical capacity at local government levels
 - Inadequate enforcement of regulations;
 - Lack of access to appropriate /efficient technology
 - Inadequate private sector participation

Main Environmental Problems in Uganda

The above factors among others, have resulted into severe stress on the environment and development, leading into the environmental problems including the following:

3.1 Soil and Land Degradation:

Soil erosion and land degradation are highly pronounced in the country particularly in the hilly areas of South Western, Eastern and North Eastern Uganda. This is caused by deforestation and inappropriate farming methods. This has led to loss of soil fertility and hence decline in agricultural productivity. In addition, soil erosion leads to pollution and siltation of water bodies. Overgrazing, bush burning and deforestation among others are the causes of this problem. It is estimated that soil erosion accounts for 80% of total cost of environmental degradation in Uganda. Conservative estimates indicate that, soil erosions causes a loss of 4-12% of the Gross National product (GNP) per annum.

3.2 Deforestation and Loss of Wood Cover:

This is widespread in the country. Forest and woodland cover has declined from 45% in 1800s to the current estimated 21%. This is as a result of agricultural encroachment and uncontrolled charcoal burning and vegetation clearance. This has resulted into accelerated soil erosion and shortage of wood fuel and other wood products. There is evidence to show that people's diets and shelter has deteriorated as a result of shortage of firewood and building poles respectively.

3.3 Water Contamination and Pollution:

This affects Lake Victoria and other lakes, rivers and wetlands, which provide water for domestic, livestock as well as industrial purposes. These water bodies are however uses as receptacles for untreated effluent and other waster particularly from industries and urban settlements.

The main polluting industries are located in the major towns of Kampala, Jinja, Mbale, Mbarara, Kasese and Lugazi. The key industries are breweries, soft drinks, textiles, sugar, leather tanning and mining.

In addition, in the rural areas, the rise in the use of agro-chemicals and the poor farming practices are responsible for the increasing release of these chemicals into the water bodies. Further more in the rural areas, the fecal matter deposited on open ground gets washed into water bodies leading to contamination.

Water being an essential element in the life cycle as well the production cycle means that a wide segment of the population as well as the ecosystem is negatively impacted. These impacts are manifested by among others reduced fisheries production, poor human health and higher costs of production where good quality water is required.

3.4 Wetland Degradation

This is a growing problem due to rapid population growth and decline in productivity of upland soils. Wetlands vital for water storage and spawning of young fish are being drained for dairy farming, crop cultivation and for industrial expansion, particularly in urban areas including Kampala City. The consequences of wetland degradation include loss of traditional grazing and watering grounds, shortage of water, loss of fish and other wetland products, increased incidents and scale of floods and water pollution resulting into higher costs of purification of water.

3.5 Bio-diversity Loss

Uganda is relatively well endowed with bio-diversity (the variety of life and living things.) Most of Uganda's bio-diversity is found in natural forests. But considerable amount is also found in open waters, wetlands, dry/moist savanna and agricultural systems. Uganda's bio-diversity ranges from the variety and variability of wild animals, plants, fish to insects (e.g. butterflies) and their habitats, to the domesticated plants and animals in the different farming systems. There however, has been degradation of bio-diversity as evidenced by extinction of the White Rhino in Uganda. In addition, the large herds of wild animals that used to roam Uganda are now restricted to protected areas, which have also shrank in size. Uganda's indigenous domestic animals and crops are also diminishing in number and distribution. The major causes of this bio-diversity loss are: habitat conversion, introduction of alien species, pollution of ecosystems, over harvesting and trade in live plants, animals and derived parts and climate change.

The implications of this bio-diversity loss are:

- loss in the tourism value and potential;
- loss of life support services;
- poor coping during hardy periods and
- loss of educational and research values.

3.6 Air and Noise Pollution

There is increasing indoor and outdoor air pollution by smoke from indoor combustion from use of firewood, charcoal and paraffin for cooking and lighting. Cigarette smoking is also a significant contributor to indoor pollution. However, outdoor pollution by emissions from industries (particularly cement and coffee factories and stone quarries)

and motor vehicle traffic is the major problem and cause of air pollution. This pollution is blamed for the increase in incidents and spread of respiratory diseases particularly in the urban centers.

Noise pollution is an increasing menace particularly in urban areas as a result of motor vehicles traffic, discos and places of worship.

3.7 Poor Solid and Municipal Waste Disposal/ Management

Generally due to lack of well-planned and developed solid waste disposal facilities or land fills there is indiscriminate disposal of solid waste including hospital waste, municipal garbage and household waste in rural areas. Of critical concern is clinical waste, polyethylene waste material (carrier bags-buveera), municipal garbage and scrap metal.

The prevalence of the above environmental problems is already having negative impacts on the people variously affected. This is therefore compromising sustainable development, as the natural resource capital, which underpins development, is deteriorating in quantity, quality, stability and productivity.

3.0 Strategies for Environmentally Sustainable Development

The measures that have been taken and/ or ongoing to stem environmental resources depletion and degradation, in order to assure the people of Uganda of Sustainable Development are not a subject of this discussion. However, an integrated approach has been adopted to tackle the environmental problems. It encompasses the following strategies among others:

- i) Making specific provisions and requirement for rational and sustainable use of environment and natural resources in the Constitution.
- ii) Completion of the National Environment Action Planning Process resulting to: National Environment Management Policy, 1994, National Environment Action Plan;
- iii) Developing and enforcement of laws and regulations on environment management e.g. National Environment Statute, 1995 and its subsidiary laws;
- iv) Institutional development at national and local level;
- v) Integrated development and environment planning at national and local level;
- vi) Training and public awareness on environment management;
- vii) Support to community natural resources and environment management initiatives; and
- viii) Cross-district, regional and international collaboration.

THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR ENVIRONMENT MANAGEMENT IN UGANDA.

BY: ROBERT WABUNOHA ,SENIOR LEGAL COUNSEL, NEMA.

1.0 INTRODUCTION

The purpose of this paper is to discuss the legal and institutional framework for environmental law in Uganda. The major milestones in Uganda's environmental legislation were triggered off in 1991 with the National Environmental Action Plan (NEAP) process that provided strategies for addressing environmental concerns in the areas of policy, legislation, institutional reforms and new investments with the view of promoting sustainable development.

1.1 The National Environment Management Policy 1994

The Action Plan was closely followed by the adoption of the National Environment Management Policy (NEMP) for Uganda in 1994 which sets out the overall policy goals, objectives and principles for environmental management. Under the National Environment Policy the overall policy goal is-

“Sustainable social and economic development which maintains or enhances environmental quality and resource productivity on a long term basis that meets the needs of the present generations without compromising the ability of future generations to meet their own needs.”

In order to achieve this overall policy goal of sustainable development, the NEMP recommended four initial actions. These actions included, the creation and establishment of an appropriate institutional and legal framework, transformation of existing environmental management systems, evolution of a new sustainable conservation culture, revising and modernisation of sectoral policies, laws and regulations and establishing an effective monitoring and evaluation system to assess the impact of policies and actions on the environment, the population and economy.

The National Environment Policy also allowed for the formulation of sectoral or lower levels of government policies concerning environment and natural resources management.

Some of the policies that have been formulated in conformity with the National Environment Management Policy include: the Water Policy 1995, the National Wetlands Management Policy 1996, the Wildlife Policy 1996, the draft National Soils Policy,

Fisheries Policy 2000, Forestry Policy 2001 and several District Environment Management Policies from 2000 onwards.

2.0 INSTITUTIONAL FRAMEWORK FOR ENVIRONMENTAL MANAGEMENT

Before 1986, Uganda had no institution specifically responsible for environmental management. The environment was 'managed' at the sectoral level. In 1986, the Government created the Ministry of Environment Protection, charged with the responsibility of co-ordinating and enhancing natural resource management, harmonising the interests of resource users, monitoring pollution levels, and advising the Government on policy and legislative reforms for ensuring sound environmental management. The Ministry was later absorbed into a Ministry of Water, Energy, Minerals and Environment Protection which in 1993 became the Ministry of Natural Resources. The responsibility for environmental management then shifted to the Department of Environment Protection (DEP), some sort of a downgrade from commanding a whole ministry.

Consequently, the institutional framework did not give environmental management the authority and profile it deserved. Even when combined with the role of other sectoral institutions and civil society organizations the creation of DEP did not solve the ad hoc nature of environmental monitoring, coordination, supervision and management.

These institutional weaknesses were identified during the NEAP process. Subsequently, the National Environment Management Policy advocated for a new institutional structure, the National Environment Management Authority (NEMA), the structure was provided for in the NEA. NEMA is the principal agency in Uganda for the management of the environment with the express mandate to coordinate, monitor and supervise all activities in the field of the environment. NEMA is one of the highly placed institutions in the country which is expected to influence other institutions and the general public. Its concerns about the environment are voiced at high levels of decision-making and policy formulation and it has the necessary political approval.

An Inter-Ministerial Policy Committee on the Environment (PCE), composed of 11 cabinet ministers, is the supreme organ of NEMA. It is chaired by the Prime Minister. The PCE provides policy guidelines, formulates and coordinates environmental issues in the country for NEMA, and liaises with the cabinet on issues affecting the environment generally. Furthermore, the PCE identifies and removes obstacles to implementation of environmental policies and programmes. Another important institutional organ of NEMA is its board of trustees, which oversees the implementation and successful operation of policy and the function of NEMA. The Executive Director and Board Chairman are ex-officio members of the PCE.

The Act establishes the Board, which is appointed by the Minister responsible for Environment with approval of the policy committee. The members of the board are appointed by virtue of their knowledge and experience in environment management. The principal role of the board is to oversee the operation, policy and to review the performance of the secretariat as well as to establish procedures for the management of staff.

The Board is given the mandate to appoint technical committees including those on:

- a) Soil Conservation;
- b) Licensing of Pollution;
- c) Bio-diversity Conservation;
- d) Environment Impact Assessment.

Since NEMA is not an implementing institution, it must perform its duties through cooperation with other institutions. NEMA is horizontally linked to the lead agencies in the environment sector. NEMA is also vertically linked to the local government structure, the private sector, and civil society.

Under the various sectoral policies and legislation there are lead agencies, which are coordinated by NEMA for purposes of addressing environmental issues. The Lead Agencies have the responsibility to develop internal capacity contribute to sustainable environmental management, collect data and disseminate information, and promote environmental education and public awareness in their respective sectors. They also ensure enforcement, implementation, compliance, and monitoring of laws, policies and activities within their jurisdictions. The lead agencies are also expected to supervise within their legal and administrative setup the up the conduct of environmental assessments, set environmental standards and carry out inspections related to the environment.

NEMA links vertically with local governments. The Local Governments Act, derived from the decentralization policy provides for the devolution of governance from the centre to the districts and lower levels. The District Council (DC) is the highest level of governance at sub-national level. One of its roles is to ensure the integration of environmental issues in the development planning process. The DC has direct linkage with the District Support Coordination Section in NEMA, which provides guidelines for the establishment of district environment committees in consultation with the district councils. Environment Committees are established at sub-county, parish and village levels, although the lowest level of government is the sub-county.

District environment committees are expected to ensure that environmental concerns are integrated in the district plans and projects, formulate bye-laws, promote dissemination of environmental information, and prepare the district state of the environment reports annually.

The Act also creates the office of the District Environment Officer who acts as a liaison officer between NEMA and the District. This kind of institutional framework ensures that environmental resources are controlled and managed by communities for their own benefit on a sustainable basis.

3.0 LEGAL FRAMEWORK FOR ENVIRONMENTAL MANAGEMENT IN UGANDA

The laws discussed below, most of which were enacted from 1995, have continued to promote the concept of sustainable development. In addition to the laws discussed below, a number of reform initiatives are ongoing in other sectors such as forests, mining and fisheries. A detailed discussion of all the environmental related laws is not possible for purposes of this workshop, so what is given below are the highlights of the recent legislation. An appendix is attached to this paper that contains a fairly exhaustive list of the national sectoral legislation pertaining to the environment.

3.1 THE CONSTITUTION OF UGANDA, 1995

The Constitution is the supreme law and it provides for environmental protection and conservation. The 1962 Constitution together with the 1967 Constitution of the Republic of Uganda did not specifically address environmental issues in their provisions. The current 1995 Constitution provides in the National Objectives and Directive Principles of State Policy, that the state shall promote sustainable development and public awareness of the need to manage land, air, and water resources in a balanced and sustainable manner for the present and future generations.

It further provides that the utilization of the natural resources of Uganda are to be managed in such a way as to meet the development and environment needs of present and future generations of Ugandans. In particular, the state is required to take all possible measures to prevent or minimize damage and destruction to land, air, and water resources due to pollution or other causes.

The provisions of the Constitution protect property rights and other individual rights. Furthermore, the state is to promote and implement energy policies that will ensure that the people's basic needs and those of the environment are met. Above all, Article 39 of the Constitution **entitles every Ugandan to a clean and healthy environment.**

The inclusion of a human right to a clean and healthy environment in our Constitution has some major implications. Every right has a corollary duty. Therefore, under Article 17(1) (j) it is the duty of every citizen of Uganda to create and protect a clean and healthy environment. A right also creates complementary capacity if it is to be meaningful. In our case, an individual can bring an action for breach of the right to a clean and healthy environment and for failure to observe the corollary duty. This capacity is general

notwithstanding that specific rights in person or property of the given individual have not been violated (Art. 50 (2)).

The same right to a healthy environment is stated in Section 3 of the National Environment Act which expands the right to include non-Ugandans. In addition under the Act it is the Authority (NEMA) or a Local Environment Committee that is entitled to bring an action against a defendant once it has received a complaint. Again, as in the Constitution, the complainant need not show that the defendant's act or omission has caused any personal loss or injury (Ss.3(4) and 71.).

Further, section 5(2) of the National Forestry and Tree Planting Act entitles any person or responsible body to bring action against any person whose actions or omissions are likely to significantly impact on a forest or for the protection of a forest.

The issue of concern about broadening the ability to bring an action (*locus standi*) is that it increases the number of possible litigants. A number of environmental lawyers have brought cases in the interest of disadvantaged people or groups of people on a *pro bono basis*.

Under Article 237 of the Constitution, the state, including local governments, is required to create and develop parks, reserves and recreation areas and ensure conservation of natural resources and to promote the rational use of natural resources so as to safeguard and protect the bio-diversity of Uganda. The Doctrine of Public Trust is enshrined in the Constitution under Art. 237(2)(b). In accordance with this principle, the management of environmentally fragile resources such as natural lakes, rivers, wetlands, national parks, game reserves and forest reserves is vested in the state.

The Constitution also imposes a duty on the state to protect important natural resources; including land, water, minerals, oil, fauna and flora on behalf of the people of Uganda. In its Article 245, the Constitution provides that parliament shall, by law, provide for 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. Parliament has ably done this through the enactment of the National Environment Act, the Water Act, the Land Act, Fisheries Act, the Wildlife Act, Forest and Tree Planting Act and the Local Government Act.

3.2 THE NATIONAL ENVIRONMENT ACT Cap. 153

This Act establishes the National Environment Management Authority (NEMA) as the overall body, charged with the management of environmental issues. In brief, the Authority in consultation with the lead agencies is empowered to issue guidelines and

prescribe measures and standards for the management and conservation of natural resources and the environment.

The Act provides for the following principles of environmental management:

- (a) to use and conserve the environment and natural resources of Uganda for the benefit of both present and future generations, taking into account the rate of population growth and the productivity of the available resources;
- (b) respect the principle of optimum sustainable yield in the use of natural resources;
- (c) to reclaim lost ecosystem where possible and reverse the degradation of natural resources;
- (d) to establish adequate environmental protection standards and to monitor changes in environmental quality;
- (e) to publish relevant data on environmental quality and resource use;
- (f) ensure that polluter pays;
- (g) ensure that environmental awareness is treated as an integral part of educational all levels; and
- (h) to promote international co-operation between Uganda and other states in the field of environment.

3.2.1 Management Measures under the Act

The Act empowers the Authority in collaboration with Lead agencies to issue guidelines and measures relating to:

- (a) management of lakes and rivers;
- (b) management of lakeshores and riverbanks;
- (c) management of wetlands;
- (d) management of hilltops, hill-sides and mountainous areas;
- (e) conservation of biological resources;
- (f) management of forests;
- (g) planting of wood lots;
- (h) protection of the ozone layer;
- (i) waste management;
- (j) management of toxic and hazardous chemicals;
- (k) management of range lands;
- (l) land use planning; and
- (m) protection of natural heritage sites.

There are two major principles followed by the Authority when applying the various management tools that are contained in the Act. These principles are:

- (a) The Precautionary/Preventive Principle;
- (b) The Polluter Pays Principle.

The Precautionary Principle

This Precautionary/Preventive Principle is implemented through the following tools:

- Planning,
- EIA,
- Audits,
- Standards and Monitoring

The Polluter Pays Principle

Meeting the cost of conservation implies using various methods of raising finances and in particular, ensuring that polluters bear the cost of polluting the environment. There are a number of existing methods under the National Environment Act and the regulations made under it. These include:

- (a) licenses and permits for various activities;
- (b) fines for infraction of environmental law;
- (c) environmental bonds;
- (d) forfeiture of property to the state.
- (e) covering cost of disposal or restoration.

Underlying these approaches is the polluter pays principle. The polluter should repair the damage he has caused either by making actual reparation or paying the necessary monetary compensation to society.

3.2.2 Status of Implementation of the National Environment Act

In order to operationalise the broad measures stated above, the Government has issued a number of regulations and standards to guide the sustainable use of a number of environmental resources. The key emphasis of the regulations is to permit the use of resources within their capacity to regenerate. The regulations and standards that have been developed include:-

- (a) Environmental Impact Assessment Regulations, 13/1998.
- (b) The National Environment (Standards for Discharge of Effluent into Water or on Land) Regulations, 5/1999.

- (c) The National Environment (Waste Management) Regulations 52/1999.
- (d) The National Environment (Hilly and Mountainous Areas Management) Regulations, 2/2000.
- (e) The National Environment (Wetlands, Riverbanks and Lakeshore Management) Regulations, 3/2000.
- (f) The National Environment (Minimum Standards for Management of Soil Quality) Regulations, 59/2001.
- (g) The National Environment (Management of Ozone Depleting Substances and Products) Regulations 63/2001.
- (h) The National Environment (Noise Control and standards) Regulations 63/2001.
- (i) The National Environment (Conduct and Certification of Environmental Practitioners) Regulations 63/2003.
- (j) The National Environment (Control of Smoking in Public Places) Regulations 12/2004.

Other regulations that are being made relate to -

- (a) Air Quality Control
- (b) Oil Spillers Liability
- (c) Access to Genetic Resources and Benefit Sharing

3.2.3 Enforcement Mechanisms in the Act

In the subject of environmental law, "Enforcement" relates to those set of actions that government or other persons take to achieve compliance within the regulated community. Apart from the tools of EIA and audits, the Act contains a number of provisions to ensure enforcement and compliance of the law. Some of these are briefly discussed below:

- (a) **Record Keeping and Inspections:** Persons whose activities are likely to have a significant impact on the environment are required to keep records of the amount of wastes and by products generated by their activities and as to how far they are complying with the provision of the Act. These records are required to be transmitted annually to the Authority.

Inspections are carried out by gazetted inspectors who have very wide powers under the Act. They are empowered to take samples, seize any plant equipment or substance and close any facility. They can also issue Improvement Notices, which are legal notices notifying a person of an infraction and giving a time frame in which to make corrective measures or face further enforcement action.

- (b) ***Environmental Performance Bonds:*** It is known that there are some industrial plants, which produce highly dangerous or toxic substances and therefore have a significant adverse impacts on the environment. It is also known that some facilities may not be prepared to operate and comply with the environmental laws and requirements. Such plants may be required to deposit bonds as security for good environmental practice. Such deposits are refundable after such a duration when the operator has observed good environmental practice to the satisfaction of NEMA, failure to observe good environmental practice leads to confiscation of the bond
- (c) ***Environmental easements:*** Under the Act, a person may apply to court for an easement to protect the environment In view of the constitutional provision relating to rights to a clean and healthy environment and the capacity of any person to enforce that right notwithstanding that his specific rights have been affected, this easement differs from the common law easement. It may be enforced by any body who finds it necessary to protect a segment of the environment although he may not own property in the proximity to the property subject to the easement.
- (d) ***Environment restoration orders:*** Where the person's activities affect the environment, the Authority or a court may issue a restoration order requiring the person to cease the activities or to restore the environment as such as possible to its original state. The order may be given pursuant to an action brought by an individual or upon the initiative of the Authority.
- (e) ***Awareness raising:*** The need for popular awareness is a key requirement for enforcement of legislation. NEMA is given the mandate to carry out education and awareness campaigns to ensure that the public participates in environmental decision making and enforcement.
- (f) ***Licensing and registration of activities and substances.*** There are other activities, which require specific permits. These include the import, manufacture, and disposal of hazardous chemicals, wastes and substances. In order to control the environmental effects of these substances the law requires their classification and labeling.
- (g) ***Use of economic and social incentives:*** The Act clearly provides that management measures should be carried out in conjunction with the application of social and economic incentives including taxation measures.
- (f) ***Use of criminal law:*** Criminal law remains a veritable instrument for the control of behaviour because of the natural tendency of man to fear the infection of pain, isolation or economic loss. Therefore, the Act provides for serious penalties for infraction of its provisions. Under the Act, the fines range from Shs.120,000/= to Shs.36 million. The prison term ranges from 12 months to 3 years. It is, however,

recognised that criminal law cannot be the mainstay for the enforcement of law but is a necessary supplementary measure to the approaches outlined above.

3.3 THE WATER ACT, Cap 152

The Water Act is one piece of Uganda's environmental legislation with key provisions to enhance sustainable development. It provides for the use, protection and management of water use and supply and also provides for sewerage matters. Important aspects in the Act include the following: -

- (a) **Rights in water.** All rights to investigate, control, protect and manage water are vested in the government of Uganda, which is accordingly better placed to ensure that water resources are used sustainably.
- (b) **Planning for water use.** The Act establishes the water policy committee, an intersectoral body whose function among others is to co-ordinate the preparation, revision and keeping to date the comprehensive action plan for the investigation, control, protection, management and administration of water for the nation. Such planning may specify types of activities, development of works, which may not be done without the prior approval of the policy committee.
- (c) **Control on the use of water resources.** The Act provides for the use of permits to use and supply water. A person who has to construct or operate any works or engage in the business of constructing bore-holes needs construction and drilling permits respectively as provided in the Water Resources Regulations, 1998. In addition in order for a person to discharge waste into a water body the person has to acquire a waste discharge permit under the Water Waste Discharge Regulations of 1998 and the National Environment Standards for discharge of Effluent Regulations of 1999.

The permit system ensures that use of water is environmentally friendly and promotes sustainable development. These controls also ensure that water is not treated as a free good but as a good with a value to be paid for. This economic valuation of water is an important incentive for its conservation.

- (d) **Water Easements.** An easement is the right of a person over the land of another. Under the Water Act and Water Resources Regulations, an easement may enable a holder of a water abstraction permit to bring water to or drain water from his land over land owned or occupied by another person. In the same way, an easement may enable a holder of a waste discharge permit to drain waste from his land over the land owned or occupied by another person. The works for which an

easement is granted have to be maintained and repaired so as to comply with development, which is sustainable.

- (e) **Control over water works and water use.** An authorised person may enter land for the purposes of inspecting works for the use of water. He may take samples and make tests to find out whether water is being wasted, misused or polluted or whether the terms of any permit are being met. Non-compliance is an offence.

All these aspects in the Water Act have the object of sustainable use of water resources. Waste, misuse and pollution resulting in unsustainable use of water are prohibited.

3.4 THE UGANDA WILDLIFE ACT, Cap 200

The Act was enacted in 1996, to provide for sustainable management of wildlife, to consolidate the law relating to wildlife management, establish a coordinating, monitoring and supervisory body for that purpose. It creates the Uganda Wildlife Authority responsible for all aspects of wildlife management.

The Act preserves community property rights. Local communities and individuals that have property rights in land within the protected areas will be permitted to carry on activities compatible with conservation of wildlife resources. The Act changes the philosophy of wildlife conservation in Uganda. It moves away from a state centred management system to a system that encourages public participation and private sector involvement. It establishes local government wildlife committees, so as to involve local communities in wildlife management issues.

The relevant functions of UWA for the purposes of wildlife protected areas and wildlife management areas are among others to preserve selected examples of biotic communities in Uganda and their physical environment, and preserve populations of rare, endemic and endangered species of wild plants and animals and to generate economic benefits from wildlife conservation for the people of Uganda.

The Act also contains provisions that provide facilities for studying the phenomena in the wildlife conservation areas for the advancement of science and its understanding. It enables wildlife to have full protection in wildlife sanctuaries notwithstanding the continued use of the land in the area by the people and the communities ordinarily residing there.

The Act restricts entry into wildlife protected areas without authority. Any person who enters contrary to the provisions of the Act commits an offence. This is one way of controlling access to species in protected areas. In addition Section 14 of this Act requires a developer desiring to undertake a project which may have significant effect on any wildlife species or community to carry out an EIA in accordance with the National Environment Act. Section 16 of the same Act obliges the Uganda Wildlife Authority in

consultation with NEMA to carry out audits and monitor such projects that may have an impact on wildlife.

An important feature of the Act is the concept of wildlife use rights, which are tradable rights to hunt, farm, ranch, trade in or use wildlife for educational purposes. The Act provides for their management and transfer. For one to utilise wildlife or wildlife products one must first obtain a grant of wildlife use rights.

Wildlife use rights are not enjoyed in perpetuity and are not absolute. If there is non-compliance by a right holder with the terms of grant or any other sufficient reason, to which the grant of wildlife use rights was made or that it is expedient that a grant of a wildlife use right be revoked, it may be revoked subject to the conditions of the Act. However, such a holder of a wildlife use right may be entitled to compensation.

Outside protected areas, the Act provides measures for regulating and licensing professional trappers and hunters, and penalties for their non-compliance. It prohibits the taking of protected species so as to maintain their abundance.

The Act provides for the management of Vermin and other problem animals. The Act also contains the usual limitations on the methods of hunting and taking of wildlife. It makes provision regulating international trade in species and specimens thereby implementing the CITES (Convention on International Trade in Endangered Species). It is an offence for any person to import, export or re-export or to attempt to import or re-export any specimen, except through a customs officer and without producing to a customs officer a valid permit.

The Act establishes a wildlife appeal tribunal, which consists of seven persons appointed by the Chief Justice. This tribunal hears and determines appeals from the decisions of Uganda Wildlife Authority. It is hoped that this tribunal will expedite cases involving wildlife resources.

All the foregoing is intended to conserve wildlife throughout Uganda so as to maintain the abundance of diversity of species and to support sustainable utilisation of wildlife for the benefit of the people of Uganda.

3.5 THE NATIONAL FORESTRY AND TREE PLANTING ACT; 8 OF 2003

The Forestry and Tree Planting Act of 2003 is the main law that regulates and controls forest management in Uganda. It provides for the conservation, sustainable management and development of forests for the benefit of the people of Uganda. The Act repealed the Forest Act No 246 of 1964. It is also intended to provide for the declaration of forest reserves for purposes of protection and production of forests and forest produce, provide for the sustainable use of forest resources and the enhancement of the productive capacity of forests. The new law establishes the National Forestry Authority and a district forestry service.

Any person has a right to bring an action against any other person or responsible body where a forest is faced with imminent danger to damage or where there is deforestation.

Degazetting of forest reserves requires an EIA, approval of Parliament and designation of an equivalent amount of land for afforestation, among other requirements. The Act also creates private forests where an owner can secure a forest title.

3.6 THE LOCAL GOVERNMENTS ACT

This is an important law for the enforcement of environment law given the policy of decentralization pursued by the government and the policy of environmental management at the lowest levels. The Local Government Act provides for the system of local governments, which is based on the district. Under the District there are lower local governments and administrative units. This system provides for elected councils.

The District Council is the highest political authority in the District. It has both legislative and executive powers to be exercised in accordance with the Constitution and Local Government's Act. The composition of the District Council is laid down in the Act.

The Second schedule to the Act prescribes the functions of the Government that the District Council is responsible for. The following are the functions relevant to environmental management:

- (a) land surveying,
- (b) land administration,
- (c) physical planning,
- (d) forests and wetlands.
- (e) environment and Sanitation
- (f) protection of streams, lake shores, wetlands and forests.

Under the district there are lower local government councils, which consist of:

- A Sub-county Council
- A City Division Council
- A Municipal Council
- A Municipal Division and

Town Council

These Councils have legislative powers. The District Councils have power to enact District Laws (Ordinances) while urban, sub-county division or village councils may in relation to its specified powers and functions make bye-laws not inconsistent with national statutes or the constitution. Through this method, it is hoped that the district and other lower local councils will effectively control and manage their natural resources and environment.

3.7 THE LAND ACT Cap 227

The Land Act provides for the tenure, ownership and management of land. Subject to Article 237 of the Constitution, all land in Uganda is vested in the citizens of Uganda and is owned in accordance with customary, freehold, mailo and leasehold land tenure systems. For the first time the land law has provided security of tenure to customary and bona fide occupants of land and it is hoped that this will strengthen their interest in conserving the land as a resource.

Under the Land Act, all owners and occupiers of land are to manage it in accordance with the Forest Act, the Mining Act, the National Environment Act, the Water Act, the Uganda Wildlife Act, the Town and Country Planning Act and any other law.

Like the Constitution, the Land Act enshrines the Public Trust Doctrine and provides that the government or local government holds in trust and protects for the common good of all citizens of Uganda certain environmentally sensitive areas such as natural lakes and rivers, ground water, natural ponds and streams, wetlands, forest reserves, national parks and any other land reserved for ecological and touristic purposes. Accordingly under the Land Act, Government has no powers to lease or otherwise alienate any natural resource mentioned above but may only grant concessions or licenses or permits in respect of that natural resource.

3.8 THE INVESTMENT CODE

This law empowers the Uganda Investment Authority (UIA) to among other things, attract and co-ordinate all local and foreign investments in the country to enhance economic development. Section 17(1)(d) makes it an implied term and condition of every investment license to take necessary steps to ensure that the operation of its business enterprise does not cause any injury to the ecology or the environment. This is in line with the principle of sustainable development.

4.0 INTERNATIONAL TREATIES

Uganda has international obligations in the field of the environment which are imposed by operation of customary international law, treaties and general principles of law accepted by all nations. International standards have been used as pace-setters when setting national environmental standards.

Uganda's legal framework for environmental management takes into account the problems associated with transboundary resources such as shared lakes and rivers, aquatic biodiversity and the issues of migratory species of wild animals. Uganda is also signatory to a number of treaties that protect her sovereign territory from the illegal dumping of

wastes or toxic substances as well as the illegal trade in genetic material, wild life and trophies.

5.0 CONCLUSION

An analysis of the above laws clearly reveals that the government has rigorously pursued the implementation of the principle of sustainable development in line with its commitments under Agenda 21. A recurrent theme in the laws discussed above is that of public participation in the sustainable management of the resources. This however still needs to be strengthened through vigorous public awareness programs.

The importance of enacting Ordinances and bye-laws at the lower government levels cannot be over emphasised. While the national laws will set the national standards there is still need for locally enacted environmental legislation that takes into account the particulars of locality and circumstance

Another important issue that is reflected in the current environmental laws is expansion of the application of the Polluter Pays Principle to ensure compliance. Many countries are trying to move away from the command theory of criminal law to the use of economic devices in the form of taxes and charges for deleterious activities and tax credits, exemptions loans and subsidies for environmentally friendly processes or products. The primary motive is to modify behaviour by using economic factors, which have in them an inherent logic as opposed to legal compulsion, which relies heavily on law enforcement officials and does not necessarily promote a conservation ethic among the community.

The above laws are not an exhaustive list of all the environmental laws in Uganda. Attached hereto are a number of other laws relating to the environment. Some are in the process of review such as the laws on forestry, fisheries, mining, public health etc. In the final analysis there is need to promote public awareness of the laws through environmental education in order to achieve improved environmental protection and changes in behavioural norms.

GENERAL PRINCIPLES OF ENVIRONMENTAL LAW.

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Introduction

In its widest sense the environment refers to the physical and natural elements of the earth plus man's superstructures or improvements thereon including the interaction between natural elements and man's activities. S.1 of the National Environment Act¹ defines the environment as

"the physical factor of the surroundings of the human being including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment: "

Environmental law regulates man's activities affecting natural resources and the environment. It ensures and facilitates the rational management of natural resources.

As the human activities continue to have an impact on the environment a number of principles have evolved to protect the environment. These include the following, which are subject of our discussion today:

- 1) The Right to a clean and a healthy environment
- 2) The Precautionary principle
- 3) Inter generational equity
- 4) The doctrine of public trust

Additional principles, which are not subject to discussion, include;

- i) Common heritage of Mankind, terra communis and nullius communis
- ii) State sovereignty and state responsibility
- iii) Equitable apportionment of water resource

¹ Cap 153

- iv) Equal right of access of justice
- v) Principle of polluter pay principle
- vi) Environment Impact Assessment

As environmental law and principles evolved a number of questions arose. For instance the question of exhaustibility of nature. There is also the question of locus standi, which we shall discuss.

1. THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT;.

The right to a clean and healthy environment is an emerging right. At independence Uganda adopted the colonial laws wholesale. These laws did not provide for the right to clean and healthy environment.

The laws were more interested in utilizing the environment than conserving and protecting the environment. The 1970s and 1980s saw no major development in environmental law because of the political turmoil Uganda was undergoing.

The 1990s ushered in the legal and institutional framework of environmental law in Uganda. In 1991 the government of Uganda launched the National Environmental Action Plan (NEAP). It intended to provide among other things a framework for integrating environmental considerations into the country's overall economic and social development. In 1994 the government endorsed the National Environment Management Policy (NEMP). The overall policy goal was to achieve sustainable and economic social development which maintains and enhances environmental quality and resource productivity on a long term basis that meets the needs of the present generation without compromising the ability of future generations to meet their own needs.²

In October 1995 a new constitution came into force. Chapter 4 of the constitution sets out a detailed Bill of rights. For the first time in history the Bill contained the right to a healthy and clean environment which is a fundamental right. Article 39 of the constitution states that: "Every Ugandan has a right to a clean and healthy environment." The scope of this right entails the right to a clean air, clean water, and conservation of resources, prevention of pollution and protection from diseases that result from sanitation and poor environmental conditions.

In the Philippine case of Juan Antonia Opossa and others Vs Fulgencio Factoran³ the right to a clean and health environment was equated to the right of life. It was observed by the Supreme Court that.

"As a matter of fact these basic rights need not even be written under the

² State of Environment report (1998) p.242: Environmental Law Hand Book for practitioners and Judicial Handbook p.31

³ Compendium of Judicial decisions on matters related to environmental international decisions (UNEP).

constitution. For they are assumed to exist from the inception of human kind, if they are explicitly mentioned in the constitution, its because of the well founded fears of the framers that unless the rights to a balanced and healthy ecology are mandated as state policy by the constitution itself. "

This means that life and the environment are inseparable. That is why of all the know bodies in the universe life exists on the planet earth simply because the environment on earth is conducive to life.⁴

The constitution in furtherance of it's recognition of the right to a clean and healthy environment set out in it's national objectives and directives principle of state policy provides under objective XXVII that

"ii),... .. the state shall take all possible measures to prevent or minimize damage and destruction to land, air and water resources resulting from pollution or other causes"

The enforceability of directive principles of state policy in general has been addressed by Indian Courts. In summary, courts have held that: a) "the directive principles of state policy are not justifiable, but as the soul of the constitution provide the framework according to which governments of the future should act. In more than one sense, the directive principles constitute a social contract " b) That" the directive principles are the backbone of state action and planning and emphasize the social economic responsibility of the state toward its citizens." c) The Indian Supreme court holds the opinion that "fundamental rights should be understood within the framework of directive principles".⁵

The nature of Article 39 of the constitution is such that it imposes on the government an obligation to protect the environment. It is within these parameters that parliament is empowered to make laws that ensure observance of this right. Article 245(a) reads that parliament shall by law, provide for measures intended "to protect and preserve the environment from abuse, pollution and degradation".

Article 50 provides that any person who claims that a fundamental right or other right has been infringed or threatened he is entitled to apply to a competent court for redress, which may include compensation.

Article 1 7(1) (ii) of the Constitution provides that it is the duty of every citizen of Uganda to create and protect a clean and healthy environment. This duty is participatory.

⁴ "The Impact of the constitution on Environment" Cheryl Loots Associate Professor of law of the Witwatersrand in South Africa.

⁵ Cited from a paper presented by Apollo N. Makubya at an international colloquium on "The significance of Human rights for the African continent."

As a duty it is difficult to enforce taking into consideration the fact that most Ugandans are seeking to obtain basic livelihood. Hence the enforcement of such a duty is an illusion.

The Constitution is reinforced by S.3 of the National Environment Act Cap. 153, which provides that "Every person has a right to healthy Environment". This section encompasses every person including non-Ugandans hence it is more universal than the Constitutional one. However, S.3 of the Act does not provide for a clean environment making it a narrower than the constitution.

In international law the right to a healthy environment is provided in the Convention on the Rights of the Child. This convention was adopted in 1990 and was ratified by Uganda in some year.

2. THE QUESTION OF LOCUS STANDI

In environmental litigation, a question arises as to who has the locus standi to take an action in court? In the case of *Mtikila V AG*⁶ the court observed:

"... Whenever a private individual challenged the decision of an administrative body, the question always rises whether that individual has sufficient interest in the decision to justify court's intervention."

It is trite law that a party seeking to represent a case before a court of law must have the required legal standing. Locus standi has often been confused with 'capacity to sue' which relates to a party's capacity. The correct interpretation of locus standi is a party's competence to claim relief in a court of law as a result of a particular "interest" in the case⁷. However in public interest litigation the plaintiff does not need to have an interest.

a) Background.

Environmental law grew out of the law of tort. It is a modification of tort law and principles. A tort is a crooked conduct, a wrong⁸. In order to understand environmental law one has to understand the history and nature of the law of tort.

In the 14th century England remedies for wrongs were dependent upon writs. Osborn's Concise Law dictionary described a writ as a document in the Queen's (Kings) name under the seal commanding a person to whom it is addressed to do or forbear from doing an act. An original writ was anciently the mode of commencing every action at common law. The number of writs was limited.⁹

After some preliminary amendments of the law in 1832 and 1833 the Common Law

⁶ Civil Case 8 of 1993

⁷ Elmeny Bary: "Locus standi: its development in South African Environmental law"p.123

⁸ Environmental Law Handbook for practitioners and judicial officers:op cit p.6

⁹ Ibid

Procedure Act provided that "it shall not be necessary to mention any form of course of actions in any writ of summons". The Judicature Act of 1873 empowered all courts to apply the principles of law and equity.

b) Individual rights / private litigation

Today the test of locus standi in individual cases is whether the plaintiff enjoyed a right, the defendant violated the right and a remedy is available to the plaintiff. This test is mentioned in the case of Auto Garage v Motokov [1971] EA 514. As already stated environmental law developed from the law of torts. Courts traditionally assumed the role of protecting only private interest. The locus standi in each tort is virtually the same.

There is a tort of trespass. Trespass is the direct interference of in the plaintiff's person, land or property. The aggrieved party has the locus standi to sue. Trespass can be the subject of an environment claim for example where soil or vegetation is removed from one's land, or where pollutants come into direct contact with the plaintiff's land. Some of the possible remedies are an injunction, eviction or compensation.

The rule in Rylands V Fletcher¹⁰ established that if a person keeps dangerous substances on his land and these substances escape and cause damage in the land of a neighbour, then such a person who brings onto or keeps on his land anything not naturally there is strictly liable. This rule is relevant to environmental law as it is concerned with overflowing privies, noxious fumes and hazardous material. The locus standi vests in the neighbor who is aggrieved.

Negligence arises from the failure to exercise a duty of care with the result that the plaintiff suffers injury. Negligence can be the basis of an environment claim where the damage to the environment is a result of a breach of the duty of care. The aggrieved party is the plaintiff whose duty of care is breached.

As Winfield and Jolowicz have stated ".....Nuisance is the branch of law of tort most closely concerned with "protection of the environment" Thus nuisance action have concerned pollution by oil, or noxious fumes, interference with leisure activities, offensive smells from premises used for keeping animals or noise from industrial installations. In Richard Kanyerezi V Management Committee of Rubaga Girls School¹¹ the High Court ordered an injunction to stop nuisance of smelly gases from a pit latrine.

Nuisance may be a private or a public one. A private nuisance is an unlawful interference with a person's use or enjoyment of land and some right over, or in connection with it.

Private nuisance has traditionally been a remedy available only to a person who has suffered an interference with an interest in land.

¹⁰ H& C.724 (Court of Exchequer)

¹¹ High Court Civil Appeal no.3 of 1996

c) **Group and Public Interest Litigation**

In an action in the tort of public nuisance in order to have locus standi, common law demands that the plaintiff should show an interest over and above that of the general public.

0.1 r.8 of the Civil Procedure Rules provide for representative actions. It reads that: "Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court sue or be sued..." Under this rule the parties must have the same interest. His Lordship Ntabgoba¹² noted that:

"A representative action is at times called a derivative action, which is a suit in which a single person or a small group of people represents the interests of a large group, where the following four conditions must exist

(a) the class to be represented must be so large that individual suits would be impracticable.

(b) There must be a legal or factual question common to the class or each member of the class or each member of the class.

(c) The claims or defences of the representative parties must be typical of the class to be represented or of each members of such class: and

(d) The representative parties must adequately protect the interest of the class or each of its members.

Ntabgoba pointed out that a representative action is called a derivative action in the sense that the representative in the action has a claim to represent the class because his or her interest in the suit is the same as the interest of the class or each of its members. The class action was an invention of equity.¹³

What happens when the plaintiff does not have an interest the action? Does Article 50 of the constitution come into force? Article 50(2) of the constitution provides that any person or organisation may bring an action against the violation of another person or group's human rights. So for the first time the constitution provides a right of standing for any aggrieved person. The person enforcing the right does not have to be one personally or physically affected by the violation. As already stated "this means a person in Kabale can take an action to save a wetland in Arua many miles away, or stop pollution in Kampala that does not directly affect him."¹⁴

The constitutional court in Rwanyarare V Attorney General¹⁵ found it difficult to accept that an action could be brought on behalf of an unnamed group of persons. The court observed that

"We can not accept the argument of Mr. Walubiri that any spirited person can

¹² J.H Ntabgoba: " Are representative orders being threatened with extinction by public interest litigation?"

A paper presented at the Uganda Law Society's Program at Hotel Equatoria.

¹³ Ibid p.4

¹⁴ Environmental Law handbook opcit.p.34

¹⁵ Constitutional Petition 11 of 1997.

represent am' group of peons without their knowledge or consent"

The petitioners had sued on behalf of the Uganda Peoples' Congress (UOC) alleging that their political rights had been infringed.

In Byabazaire Grace Thaddeus V Mukwano Industries¹⁶ the court held that National Environment Management Authority (NEMA) is the only person vested with the power and duty to sue for violations committed under the statute, further that the only recourse available to every persons whose rights under the statue is violated is to inform NEMA or the local environment committee of such violation. The plaintiff has no locus standi to sue for any violation under the statute.

Article 17(1) of the Constitution requires citizens to protect the environment. It would be difficult to exercise this duty if they cannot compel statutory bodies to carry out their functions.

However, in National Association of Professions Environmentalists V AES Nile Power Ltd.¹⁷ the court held that in the circumstances of the case, the applicant has reason to seek the intervention of the court in so far as no approval of the environment aspects of the study has been brought in evidence to satisfy the requirements of S.20 of the NEMA statute. To this extent he is entitled to bring this suit.

In the Environment Action Network Ltd. V the Attorney General and National Environmental Management Authority¹⁸ it was held that Order 1 rule 8 of the Civil Procedure Rule governs actions by or against parties (i.e. plaintiff or defendant) together with other parties, that they seek to represent, and they must have similar interest in the suit. On the other hand Article 50 of the constitution does not require that the applicant must have the same interest as the parties he or she seeks to represent or for whose benefits the action is brought. The court observed that:

"There are also decided cases that an organization can bring a public interest action on behalf of groups or individuals members of the public even though the applying organization has no direct individual interest in the infringement act it seeks to have redressed. "

In Greenwatch V Attorney General and another¹⁹ the Learned Judged observed that since the applicant was a Uganda company it was entitled to a clean and healthy environment that every Uganda has a right to a clean and healthy environment. The judge concluded as follows;

" the state ... has failed or neglected its duty towards the promotion or preservation of the environment. The state owes this duty to all Uganda. By so failing or neglecting the government is in breach of its duty towards the citizens of

¹⁶ HCCS 466 of 2000

¹⁷ Misc.cause 268 of 1999

¹⁸ Misc. Application 39/2001

¹⁹ Misc. Cause 140 of 2002

Uganda. Any concerned Uganda has a right of action against the Government ...
"

The Judge observed that NEMA had a statutory duty under the NEMA statute to ensure that the principles of environmental management were observed.

In British American Tobacco Ltd. V The Environmental Action Network²⁰ it was held that the constitution of Uganda does recognize the existence of the needy and oppressed persons and therefore it allows actions of public interest group to be brought on their behalf.

The above authorities show that courts in Uganda are gradually accepting public interest litigation. Public interest litigation unlike private law does not require the motion of "personal interest, personal injury or sufficient interest over and above the interest of the general public"

c) **International law**

In international law the state is liable for the activities of private person. Private people are not the subjects of international law. Private persons may not have the means of compensating the victims. Hans Hand pointed out²¹

"It is a well established principle of international law that the international liability a state may incur for activities of a private person is a function of the state's control over the activities concerned"

Likewise in international law the state seeks redress on behalf of its citizens. In the Trial Smelter Arbitration the government of Canada was held liable for the acts of a smelter company.

3. **THE PRECAUTIONARY PRINCIPLE**

In the international community science cannot provide sufficient evidence of the ecological impact of certain activities, processes, technologies or chemicals. In these cases, the international community has consistently agreed that a precautionary approach be adopted.

Principal 15 of the Rio Declaration on Development and Environment states:

"In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used for post phoning cost effective measures to prevent environmental degradation"

²⁰ HCCS 27 of 2003

²¹ Hnad G. "State liability for accidental transnational environment damage by private persons"
A.J.I.L. Vol.74 (1980) p.527

However what is lacking is the actual theoretical contextualization of the precautionary approach.

It is not always possible to predict with scientific precision the probable environment impact of a chosen cause of action. If preventive and corrective measures were to be based only on the availability of hard scientific evidence, substantial and perhaps irreversible environmental damage could be occasioned before such evidence become available. The precautionary principle therefore demands that preventive action should be taken notwithstanding the lack of full scientific certainty about environment consequences.

a) Background

The first traces of precautionary principle can be traced around the early 1980s, the Council of Experts on environmental matters considered the precautionary action as a requirement for a successfully environmental policy for the North Sea Ecosystem. Two years later in 1982, the World Charter for Nature re-emphasised the position in its principle II (b). The charter stated that

"Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceeded".

Although the World Charter for Nature did not make any explicit mention of the precautionary principle, it contained the essential ingredients of what eventually evolved into the doctrine.

Since 1982, the principle has been progressively codified into subsequent soft law and has eventually found itself in major international environmental law agreements. In the preamble to the Montreal Protocol, the principle was expressed as follows:

"Parties to this Protocol... Determined to protect the Ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge, taking into account technical and economic considerations ".

The Ministerial Declaration at the 1987 Second International Conference on the Protection of the North Sea gave a more explicit statement. The Declaration states that

"{The Parties} agree to accept the principal {by using} the best available technology and other appropriate measures. This applies especially where there is reason to assume that certain damage or harmful effects on the living resources of the sea are likely to be caused by {toxic} substances, even where there is no scientific evidence to prove a causal link between emissions and effects.

The principle has been included in international law agreements such as: The United Nations Convention on Biological Diversity 1992, the United National Framework

Convention on Climate Change, 1992, the Kyoto Protocol to the Climate Change Convention, 1998 and the Cartagena Protocol on Bio-safety 2001.

C . The Application of the Precautionary Principle in Courts

Courts have been undecided in applying the precautionary principle. Courts give judgment based on evidence and not speculations. The precautionary principle appears to question the foundations of evidence law. The precautionary principle has been applied in a few cases.

In Jane Lugolobi and 9 others V Gerald Sigirinva²² the court held that the consequences of continued processing of curry powder in the neighborhood of the applicants by the respondents are so serious and long term that they cannot be compensated by the damages. The court further held that the precaution principle is applied in this case.

In Leatch V National Parks and Wildlife Service and Shoal Haven City Council (Land and Environment court of New South Wales) the judge observed that

"... .. In my opinion, the precautionary Principle is a statement of common sense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decision or activities,) decision-makers should be cautious"

In ShehIa Zia and others Vs Wapda²³ Supreme Court of Pakistan) citizens in Islamabad expressed fear about the construction of a grid station near their locality. They alleged that the electromagnetic field from the high voltage transmissions at the station would pose a serious hazard to the residents. A number of inconclusive studies had been made on the effect of electromagnetic field. As a result the court was confronted with the issue of scientific uncertainty on the subject. The court observed that;

"There is a state of uncertainty and in such a situation the authorities should observe the rules of prudence and precaution. The rule of prudence is to adopt such measures, which may avert the so-called danger if it occurs. The rule of precautionary policy is to first consider the well-fare and safety of human beings and the environment and then pick up a policy and execute the plan which is suited to obviate the possible danger or make such alternate precautionary measures which may ensure safety"

The court concluded.

²² Misc. Application 371 of 2002

²³ The Environmental Law Hand book :op cit p.24

"To stick to a particular plan on the basis of old studies or inconclusive research can not be said to be a policy of prudence and precaution. "

The court further emphasized the fact taking precaution did not necessarily entail scrapping the whole scheme and rather making "such adjustments alterations and additions which may ensure safety and security or at least minimize the possible hazards".

In R Vs Secretary of State for Trade and Industry ex parte Dunderidge²⁴ an application for judicial review of the decision of the Secretary for Trade and Industry whereby the declined to issue regulations to the National Grid Company and other license holders under the Electricity Act 1989 so as to restrict Electro magnetic fields was dismissed. The court held that community law did not impose upon member states an immediate obligation to apply the precautionary principle in considering legislation relating to the environment or human health.

It appears from the judicial decisions courts are reluctant to apply the precautionary principle. There are a number of products, processes and activities that are created and their impact on the environment is uncertain due to insufficient knowledge. Therefore the courts have to balance economic growth against the welfare of society and human beings.

4. INTERGENERATIONAL EQUITY

Intergenerational equity is a value concept, which focuses on the right of future generations. Intergeneration equity speaks of the right to use the environment without compromising the right of future rights.

Edith Brown Weiss states that the central theme of this concept is need to conserve options for the future use of resources including their quality and that of the natural environment. She notes that²⁵

"We hold the natural and cultural environment of our planet in common with all members of the human species, past, present and future generations. As members of the present generation, we hold the earth in trust for the future generations. At the same time, we are beneficiaries entitled to use it and benefit from it. We are also part of the actual system, and as the most sentient of living creatures, we have a special responsibility to protect its robustness and integrity."

She proposes three basic principles of intergenerational equity.²⁶

"First, each generation should be required to conserve the diversity of the natural and cultural resource base so that it does not unduly restrict the options available to future generations in solving their problem and satisfying their own values and should also be entitled to diversity comparable to that enjoyed by previous

²⁴ Vol 7. No.2,224 (UK)

²⁵ Edith Brown Weiss: " In fairness to future generations: International law, common patrimony, and intergenerational equity."p.1

²⁶ Ibid p.1

generations.

Second, each generation should be required to maintain the quality of the earth so that it is passed on in no worse condition than that in which it was received, and should also be entitled to overall environmental quality comparable to that enjoyed by previous generations. In implementing this principle, trade offs are inevitable.

Third each generation should provide its members with equitable rights to access to the legacy of past generations and should conserve this access for future generations.”

This concept has some criticisms. Some writers argue that future generations cannot have a right because they are composed of individuals who do not yet exist. It has also been argued that for every right there must be a right holder with the corollary obligation to the right with the capacity to enforce such a right. This future generation is a legally hypothetical concept.

a) Historical Development of the Principle

The principle of intergenerational equity was affirmed in Principle 1 of the Stockholm Declaration of 1972 which provides that man has the fundamental right to freedom, equality and adequate conditions of life in an environment that permits a life of dignity and well being. And he bears a solemn right responsibility to protect and improve the environment for the present and future generations.

This right is also reflected in principle 2, which provides for the need to safeguard natural resources for present and future generations.

The principle of intergenerational equity has been progressively reaffirmed in various past Stockholm conferences and international instruments. In its preamble the World Charter for Nature called for the sustainability of natural resources and the preservation of species and ecosystems for the benefit of present and future generations.

Principle I of the 1992 of the Rio Declaration states that human beings are entitled to a healthy and productive life in harmony with nature. The declaration further states that the right to development must be fulfilled so as to equitably meet the development and environmental needs of present and future generations.

The principle has also been incorporated in Article 3 of the United Nations Framework Convention on Environmental Change (1992), Convention on Biological Diversity [1992] and the 1992 UN Convention to Combat Desertification.

A number of countries have since the 1980s included the principle of intergenerational equity in their national laws especially as constitutional equity. The 1995 Constitution of Uganda Objective XXVII (ii) provides that the utilization of the natural resources of

Uganda shall be managed in such a way as to meet the development and environmental needs of present and future generation of Ugandans.

b) Application of the Principle in Courts

Since 1992, the International Court of Justice (ICJ) has alluded to the interests of future generations in its development. In its advisory opinion on the legality of the threat for use of nuclear weapons²⁷ the court stated as follows:

"The environment is not an obstruction but represents the living space, the quality of life and the very health of human including generations unborn.

In India and Philippine, courts have used constitutional provision to enforce and protect the rights of future generations. In India in the case of Mehta Vs Union of India and others²⁸ the court in ordering the closure of polluting tunnels stated as follows:

"What is needed in an enthusiastic and calm state of mind, an intense but orderly work to defend and improve the human environment for present and future generations has become an imperative goal. Achievement of this environment goal will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level"

In the Philippine courts have forcefully affirmed the rights of future generations. In the case of Juan Antonio Opussa & Others Vs Fulgension Factoran and another (supra) the petitioners were a group of miners who brought a suit on their own behalf and on behalf of generations yet unborn through a representative action. They argued that the country's forest was being destroyed at such a high rate that the country would be left with no forest resources soon or later. They prayed for an order directing the secretary of the Department of Environmental resources to cancel all existing timber licence agreements and cease approving or accepting new agreements. The court recognized at the onset that this case raised the right of the people of the Philippines to a balanced ecology and the concept of intergenerational justice. The court held inter alia that the petitioners had a _right to sue on behalf of succeeding generations because every generation has a responsibility of the next to preserve the harmony of nature for the full enjoyment of a balanced and healthy ecology.

The emerging juridico philosophy is that future generations have a stake and enforceable rights in the present generation's stewardship of the environmental resources of the earth.

These rights can be enforced through legal action by members of the present generation.

5. THE DOCTRINE OF PUBLIC TRUST

²⁷ ICJ Reports 1906

²⁸ (1988) AC 1037

The essence of the doctrine of public trust is the legal right of the public to use certain land and waters. It governs the use of property where a given authority in trust holds title for citizens.²⁹ There are two co-existing interests in trust lands; the jus publicum, which is the public right to use and enjoy trust lands; and the jus privatum, which is the private property rights that may exist in the use, and possession of trust lands. The state may convey the jus privatum to private owners, but this private interest is subservient to the jus publicum, which is the state's inalienable interest that it continues to hold in the trust land or water.³⁰

Article 237-(2) (a) of the Constitution of Uganda provides that the government or a local government may, acquire land in the public interest. Under clause (b) the Government or local government 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 good of all citizens.

a) Background

The origins of the Public Trust Doctrine were in Roman law. It originated from the declaration of the Justinian Institute³¹ that there are three things common to all mankind: air, running water and the sea (including the shores of the sea). Title to these essential or common resources are held by the state, as sovereign, in trust for the people. The purpose of the trust is to preserve resources in a manner that makes them available to the public for certain public uses.³²

England in adopting much of the Roman law, recognized waters and shores as public in nature. As commerce became important, so did the public interest in the shores. Eventually the shores come to be recognized, as property owned by the king in trust for the public.

The incorporation of the doctrine in English law may itself be traced in the Magna Carta. Para 5 of the Carta made reference to the guardianship of land. It extended the guardianship "to houses, parks fish ponds, tanks, mills, property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second the property may not be sold, even for a fair cash equivalent; and third the property must be maintenance for particular types of uses."³³

b) The Application of the Doctrine of Public Trust by Courts.

Illinois Central Rail road V Illinois³⁴ was the landmark case in establishing the public trust doctrine in America. The issue was whether the Illinois legislature could grant nearly the entire waterfront area of Chicago to the Illinois Central Railroad.

²⁹ Environmental Law Hand book for practitioners and judicial officers:op cit.p.26

³⁰ Paul M. Bray: "The Public Trust Doctrine" (Internet)

³¹ The Body of Roman Civil law that was put together by the Roman Emperor Justian's top legal scholars in 530 AD

³² Gary Overimer: "Public Trust Doctrine"

³³ Environmental Law Handbook for practitioners and judicial officers:op cit p.26

³⁴ 146 U.S.387 (1892)

The Supreme Court of the United States held that Illinois had title to the land underneath the navigable waters of Lake Michigan and that it held this title on trust for the public's use. Illinois was not allowed to convey this land if the effect would be to destroy the public's right of navigation and fishing. The court also held, however, that Illinois could convey parcels of trust lands to individuals so long as the overall effect was to improve the public's ability to exercise its trust right. The conveyance to Illinois did not meet the criterion and was therefore void.³⁵

In 1865 the House of Lords defined the concept of public trust more explicitly in the case of *Grann V Free Fishers of Whitestable*³⁶. It was held that:

"The bed of all navigable rivers where the tide flows and all estuaries or arms of the sea, is by law vested in the crown. But this ownership is for the benefit for the subject and can not be used in any manner so as to derogate from or interfere with the right of navigation, which belongs by law to the subject of the realm"

Under Common Law, the Public Trust Doctrine imposed a high fiduciary duty of care and responsibility upon the state. Professor Joseph L. Sax has asserted that a fiduciary duty under a trustee beneficiary relationship entails three major restrictions on the trustee. "First, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public: second, the property may not be sold, even for a fair cash equivalent: and third, the property must be maintained for particular types of uses."³⁷

In *Mehta V Kamal Nath and others*³⁸ the Supreme Court of India emphasized the essence of the doctrine in the following term:

"The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon government the duty to protect the resources subject to the trust for the enjoyment of the general public rather than to permit use of private or commercial purposes.

In *Nairobi Golf Hotels Kenya Ltd. V Pelican Engineering and Construction Co. Ltd*³⁹. It was observed that the government is a trustee for the public. As the government is the people, the body logically belongs to the people but the government has to preserve it, control it and apportion it for the general good of the people.

In *Attorney General V Lohay Akona and Joseph Lohay*⁴⁰ it was noted that firstly as trustee of public land, the president's power is limited in that he cannot deal with public

³⁵ *ibid.*

³⁶ Environmental Law Handbook for practitioners and judicial officers: op cit p.27

³⁷ *Ibid* p.27

³⁸ Petition No.182 of 1996

³⁹ Civil case 706 of 1997

⁴⁰ Civil Appeal 31 of 1994

land in a manner in which he wishes or which is detrimental to the beneficiaries of the public land. Secondly as trustee, the President cannot be the beneficiary of public land. In other words he is excluded from the beneficial interest.

The public doctrine helps protect the natural resources by empowering the sovereign to hold them in trust for the people. In the event the sovereign breaches its duty as a trustee or threaten to do so the beneficiaries may petition court for redress. This is in line with the 1995 Constitution, which states in Article 1 that all power belongs to the people who shall exercise their sovereignty in accordance with this constitution. Art 126(I) states that judicial power is derived from the people and shall be exercised in the name of the people. Under Article 23 7(I) land belongs to citizens of Uganda as provided in the constitution.

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ANNEX 7

ACCESS TO ENVIRONMENTAL JUSTICE, THE ROLE OF THE JUDICIARY AND LEGAL PRACTITIONERS.

BY: HON. MR. JUSTICE RUBY OPIO –AWERI, JUDGE OF THE HIGH COURT.

Introduction

Much of what I will discuss will be based on how our Courts have been responding to environmental issues and the level of development of environmental jurisprudence. The paper will tackle limitations to access to justice and way forward. In my view what the organizers of this workshop want an inventory of what the bench and the bar have done in relation to environmental issues affecting our regime and the challenges they have to go through.

I will start with definition of some terms and general background.

The Term Access to Environmental Justice:-

According to UNEP access to justice in reference to environment means judicial and administrative procedures available to a person aggrieved or likely to be aggrieved by an environmental issue.

The Scope of Environmental Justice

According to the Friends of the World Special briefing No.7 of November 2001, the concept of environmental justice is based on two basic premises - the first one is that everyone should have the right and be able to live in a healthy environment with access to enough environmental resources for a healthy life, and second is that it is predominantly the poorest and least powerful people who are missing those conditions.

Secondly, environmental justice also implies environmental responsibilities and these responsibilities are on the current generation to ensure that a healthy environment exists for the future generations, and or countries, organizations and individuals in this generation to ensure that development does not create environmental problems or distribute environmental resources in ways which damage other people's health.

The above concept is globally known as the principle of sustainable development, which was conceived in 1992 during the Earth Summit in Rio De Janeiro, Brazil.

In Uganda sustainable development is defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It is development which uses land, water, plant and animal genetic resources in environmentally friendly and non-degrading, technically appropriate, economically viable and in a socially acceptable manner.

Man derives life from the environment. One of the oldest book of civilization, the Bible states that God created environment first and from that material created man by blowing the sprit of life. I am told scientists are at advanced stages of creating human beings using life in the environment and DNA cells. What I want to emphasize is that man and environment are not separable. Man derives all his survival from environment.

These are:

- Food, Security, Leisure, Tools for survival, Transport, Water, Medicine, Fuel, Shelter, Spiritual.

Despite all that we gain from the environment, man has not been living on this planet earth responsibly. Thus about a hundred years ago, ANTON CHEKHOV, a renowned Russian Dramatist and story writer, warned mankind against environment degradation:

“Human beings have been endowed with the reason and creative power so that they can add to what they have been given. But until now they have been not creative, but destructive. Forests are disappearing, rivers are drying up, wildlife is becoming extinct, the climate is being ruined and every passing day the earth is becoming poorer and uglier”.

Those wise words are still relevant to this day. The media is full of concern about our environmental degradation.

Because of the importance of the environment to mankind, the need to use law to protect the environment and sustainable development becomes crucial, hence the role of the judiciary and Legal Practitioners. As was expressed by the UNEP Executive Director during the Global Judges symposium in Johannesburg South Africa, 18th August 2003:

"Law is the most prevalent and enduring foundation for orderly responses to global, regional and national environmental problems ... At the national level, law remains the most effective means of translating sustainable development policies into action. A Judiciary well informed of the rapid expanding boundaries of environmental law and in the field of sustainable development, and sensitive to their role and responsibilities in promoting the rule of law in regard to Environmentally Friendly Development, can play a critical role in the vindication of the public interest in a healthy and secure environment through the interpretation, enhancement and enforcement of environmental law".

Last year the Deputy chief Justice in a similar workshop like this one held the same view and it is worth quoting:

"Solid legal framework and institutions are therefore essential in achieving sustainable development and effective nature resource management, whether the focus is food, security, water quality, agricultural production, land use and management; well designed laws and functioning legal system have a crucial role to play in developing countries like ours. These laws and institutions help to build foundations for good governance, resolve conflict and as a result maintain

peace and security of the person and property. They protect rights and define responsibilities. They enable meaningful participation of all types of stakeholders from Central Government to rural communities. These laws when appropriate, fair and predictable encourage investment and facilitate the operations of markets. They also set norms for environmentally responsible behavior".

As a matter of emphasis, at the end of the above symposium, Global Judges formulated principles, the **Johannesburg Principles** which should guide the judiciary in promoting the goals to sustainable development through the application of the rule of Law and democratic process. Those principles were based on the following considerations:-

Mandate:

The key players in the administration of justice is the Judiciary and the Bar. The power to exercise judicial power has been granted to the judiciary by the Constitution, under Article 126 (1) which provides that judicial power is derived from the people and shall be exercised by the Courts in the name of the people and in conformity with the law and with the values norms and aspirations of the people. The Constitution further guarantees independence of the judiciary. Access to justice is therefore a constitutional guarantee. This is coupled with stipulated offences and appropriate remedies like:

- restoration orders
- forfeiture
- cancellation of license - fine
- imprisonment etc.

Need for Access

A number of environmental issues are provided for under Section 245 (a) (b) and (c) of the Constitution, the NEMA Statute and the land Act and many other Statutes. All those revolve around the following:

(a) The right to protect and preserve the environment from abuse; pollution and deforestation

Pollution:

- (i) water - drinking water, water supply, beaches, marine life; inland water, industrial affluent.
- (ii) air - motor vehicles, industrial emission and smoke etc.
- (iii) Land - forest, soil pollution, soil erosion, conservation, protection, exploitation of mineral resources, agriculture.
- (iv) Noise - motor vehicles, aircraft, industrial noise prayers, discos, etc. Waste - waste management, disposal, packaging and recycling. Hazardous substances - chemicals, radio active and nuclear materials, chemicals, genetically engineered organizations, etc.
- (v) Other pollutions - Odors, tobacco smoke, pesticides, oil litter, and vibration.

(b) Protection of wild life

(c) Protection of flora/vegetation

- (d) Industrial compliance - Licenses and permits.
- (e) Poverty.
- (f) Good governance.
- (g) Sustainable Development.

The current indicators of access to Environmental Justice

(a) Constitutional right of Access to Justice

Chapter 4 of the 1995 Constitution clearly sets out a detailed bill of rights. The bill contains the right to a healthy and clean environment as a human right under Article 39 which is enjoyable and enforceable as any other form of human rights.

(b) Locus Standi

The Constitution further provides for the enforcement of the bill of rights under chapter through the provision of Article 50 which states as follows:

"50 (1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent Court for redress which may include compensation.

(2) Any person or organization may bring an action against the violation of another person's or group's human rights.

"(3) Any person aggrieved by any decision of the Court may appeal to the appropriate Court.

(4) Parliament shall make laws for the enforcement of the rights and freedoms under this chapter.

The import of the above Article was put very clearly by Kenneth Kakuru - in Environment Law Hand book as follows:

"In real terms this means that a person in Kabale can take out an action to save a wetland in Arua many miles away, or stop pollution in Kampala that does not directly affect him. The right to a healthy and clean environment is a right for a healthy and clean environment for all and can be enforced by all. Any aggrieved person under the Constitution may seek remedy from a competent Court. A competent Court has been held to be the High Court. Article 50 is thus straight forward. It gives locus to any person who claims a right has been infringed or threatened but also a third party or organization to bring an action on behalf of others or an individual".

In light of the above provision there has been an increase in environmental jurisprudence especially in the field of public interest litigation which can be demonstrated by a growing number cases. One of the leading cases on various aspects of access to environmental justice is the case of Greenwatch Vs. Attorney General & another, Miscellaneous Cause No. 140/2002 where **Ag. Justice Lameck N. Mukasa** made several landmark pronouncements on several aspects of access to environmental justice.

In that case, Greenwatch which is a Non-governmental organization registered and incorporated as a Company Limited by guarantee with the objectives of "watching" on

issues and problems of environmental management sued the Attorney General and the National environmental management Authority (NEMA) seeking the following orders and declarations:

- (i) A declaration that manufacture, distribution, use, sale, disposal of plastic bags, plastic containers, all other forms of plastic commonly known and referred to as "kavera" violates the rights of citizens of Uganda to a clean and healthy environment.
- (ii) An order banning the manufacturer, use, distribution and sale of plastic bags and plastic containers of less than 100 microns
- (iii) An order directing the second respondent to issue regulations for the proper use and disposal of all other plastics whose thickness is more than 100 microns including regulations and directions as to recycling re-use of all other plastics.
- (iv) An environmental restoration order be issued against both respondents directing them to restore the environment to the state which it was before the menace caused by plastics.
- (v) An order directing the importers, manufacturers, distributors of plastics to pay for the costs of environmental restoration.
- (vi) No order be made as to costs.

When the matter came for hearing, the State Attorney who represented the Attorney General raised three preliminary points of objection.

The first one was that the application did not disclose a cause of Action against the Attorney General;

The Second one was that the application was not proper before Court in that it was brought by the Applicant on behalf of other Ugandans who had not authorized the Applicant to do so and without leave of Court as legally required under order 1 rule 8 of the Civil Procedure Rules before filing a representative suit.

Thirdly that the application is supported by defective affidavits which should be rejected. I shall not dwell on this objection in this paper.

On the first objection it was contended for the respondents that the application did not satisfy the three elements to support a cause of action as was set out in Auto Garage Vs Motokov (No.3) 1971 EA 514 that:

- (i) the Plaintiff (Applicant) enjoyed a right;
- (ii) that the right has been violated
- (iii) the defendant (Respondent(s)) is liable.

The Learned Judge observed that since the Applicant was a Ugandan company it was entitled to a right to a clean and a healthy environment under Article 39 of the Constitution and Section 4 (1) of the National Environment Statute 4/95 which provides that every Ugandan has a right to a clean and healthy environment. .

The Learned Judge held further that the Applicant's right and cause of action was based

on the allegation that the uncontrolled and indiscriminate use and disposal of plastics had caused harm to the environment and the plastics used as carrier bags, containers were dangerous to human health and life.

The Learned Judge made further references to:

Article 20 (2) of the Constitution which provides:

"The rights and freedom of the individual and groups enshrined in this chapter shall be respected, upheld and promoted by all organs and agencies of the Government and by all persons.

Article 245 of the Constitution which provides:

"Parliament shall, by law" provide for measures intended:

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

The Constitution under the National Objectives and Directive Principles of State Policy; Objective XXVII provides:

"The Environment

- (i) The State shall promote sustainable development and public awareness of the need to manage land, air, water resources in a balanced and sustainable manner for the present and future generations.
- (ii)
- (iii) The state shall promote and implement energy policies that will ensure that peoples' basic needs and those of environmental preservation are met".

On the cause of action against the Attorney General, the Learned Judge concluded as follows:

"I have studied the application and the two affidavits filed in support and found them pointing a finger at the State that it has failed or neglected its duty towards the promotion or preservation of the environment. The State owes this duty to all Ugandans. By so failing or neglecting the government is in breach of its duty towards the citizens of Uganda. Any concerned Ugandan has a right of action against the Government of the Republic of Uganda. for that matter against the Attorney General in his representative capacity to seek the enforcement of the failed or neglected duty of the State"

On the cause of action against the National Environmental Management Authority, the Learned Judge observed that NEMA had a statutory duty under Section 3 of the NEMA Statute, to ensure that the principles of environmental Management were observed i.e.

- a) to assure all people living in the country the fundamental rights to an environment adequate for their health and well being;
-
- g) to establish adequate environmental protection standards and to monitor changes in environmental quality;

i) to require prior environmental assessment of proposed projects which may significantly affect the environment or use of natural resources.

k) to ensure that the true and total costs of environmental pollution are borne by the polluter.

Other functions as stipulated in Section 7 of the Statute.

The Learned Judge considered the above duties and functions of the 2nd Respondent and concluded that it had failed in its Statutory duty to ensure that the principles of Environmental Management were observed, which duty it owed to the citizens of Uganda. Hence there was a cause of action against it.

On the second leg of the objection that the Applicant had no locus before the Court that it did not comply with the provisions of Order 1 rule 8 of the Civil Procedure Rules, the learned Judge followed the decision of the Principal Judge in the case of *The Environmental Action Network Ltd. Vs The Attorney General and National Environment Management*; Miscellaneous Application No. 39/2001 where it was stated

" the State Attorney failed, in his preliminary objection, to distinguish between actions brought in a representative capacity pursuant to Order 1 rule 8 of the Civil Procedure Rules, and what are called Public interest litigation which are the concern of Article 50 of the Constitution and S 1 26 of 1992. The two actions are distinguishable by the wording of the enactment or instruments pursuant to which they are instituted. Order 1 rule 8 of the Civil Procedure Rules governs actions by or against the parties (i.e. Plaintiff or defendant) together with parties that they seek to represent and they must have similar interest in the suit.

On the other hand, Article 50 of the Constitution does not require that the Applicant must have the same interest as the parties he or she seeks to represent or for whose benefit the action is brought".

The learned Judge accordingly concluded that the wording of Clause 2 of Article 50 grants locus to any concerned person or organization to bring a public interest action on behalf of groups or individual members of the country even if that group or individual is not aware that his fundamental rights or freedom are being violated.

In conclusion I find the above case very pertinent on the following aspects of access to environmental justice :-

- Procedural issues;
- Cause of action.
- locus Standi; and
- Public awareness.

On Public awareness, the Learned Judge observed:

"There is Limited Public Awareness of the fundamental rights or freedom provided for in the Constitution, let alone legal rights and how the same can be enforced. Such illiteracy of legal rights is even evident among the elites. Our

situation is not much different from that in Tanzania where Justice Lugakingira, in the case of *Rev. Christopher Mtikila Vs The Attorney General*, High Court Civil case No.5 of 1995, stated:

"Given all these and other circumstances, if there should spring up a public spirited individual and seek the Court's intervention against legislation or actions that prevent the Constitution the Court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise up to the occasion and grant him standing"

The above authorities not only demand but provoke the bench and the bar to stand for those who cannot speak for themselves as a matter of Constitutional duty.

Other cases on access to Environmental Justice

1. Greenwatch & another Vs. Golf Course Holdings HCCS No. 834/2000.

The above suit was brought under Section 72 of the NEMA Statute. Statute 4/95. The Plaintiffs, re-known public litigants claimed that the Defendant was constructing a hotel on a wetland and green areas in Kampala against the law on sustainable Development.

2. National Association of Professional Environmentalists (NAPE) Vs. AES Nile Power Ltd. High Court Miscellaneous Cause No. 286/99.

The above case is on the controversial AES Nile Power project at Bujagali. The Applicants took an action to restrain the respondent from concluding a power purchase agreement with the Government of Uganda until NEMA had approved an Environmental Impact Assessment (EIA) on the project as required by Section 72 of the NEMA Statute. It was contended that a protective measure with the project could invoke as part and parcel of accessing the constitutional guarantee of the right to a clean and a healthy environment and therefore avoiding compliance was directed at the NEMA statute hence the Constitutional Regime of environmental rights in Uganda. Hon. Justice Okumu held among other things that Section 72 of the NEMA Statute was an enactment of a class actions and public interest litigation and abolishes the restrictive standing to sue on locus standi doctrine by stating that a Plaintiff need not show a right or interest in the action.

3. The Environmental action Network Ltd vs. The Attorney General and NEMA Miscellaneous Cause No. 39/2001.

The above case is on a right to clean environment. The Hon. The Principal Judge held inter alia that the applications brought under Article 50 of the Constitution are governed by the fundamental rights and freedoms (enforcement procedure) Rules S1 No. 26/92. Hence no need for notice of intention to sue, that being public interest litigation.

4. Greenwatch Vs. Hima Cement 1994 Ltd.

This was on the right against pollution. Hima Cement Factory was found to be emitting over 80 tons of cement dust into the atmosphere from its factory. The same was causing harm and damage to people, animals, crops and the general environment. The Plaintiff took an action as a public litigant to stop the cement factory from polluting the environment, seeking pollution and environmental restoration order. The matter was however resolved amicably.

5. Greenwatch Vs. The Attorney General and Uganda Electricity Distribution Company Ltd.

The above case illustrates the point that access to environmental justice requires access to information as provided by Article 41 of the Constitution.

Limitations to access to Environmental Justice

(1) Cost of Litigation:

It is a fact that access to justice involves fairness and impartially and that justice should never be a "high horse" inaccessible to the ordinary man. The Courts of Law should be cheap, easy and quick to access. Environmental matters normally involve the interest of very poor people who can hardly afford Court fees and or Lawyers fees. These are people who cannot afford to pay costs of litigation. Being a matter of constitutional importance government should come up with a separate Court fees structures in the interest of sustainable development. The question which is asked is why pay fees for the interest of public?

(2) Security for costs:

Since environmental justice is a matter of public interest as it promotes sustainable development how do we consider the issue of security of costs?

Last year, a Kampala High Court circuit at Nakawa slammed security for costs in the tune of Shs.50 million against Greenwatch and Advocates Coalition for Development and Environment(ACODE) in the case of *Greenwatch and another Vs. Golf Course Holdings* HCCS No. 834/2000. In that case Greenwatch and Advocates Coalition for Development and Environment (ACODE) had sued Golf Course Holdings of constructing a hotel on a wetland and green areas and of carrying out an illegal Environmental Impact Assessment to justify their development on the plot. The Plaintiffs sought among other things, a permanent injunction to restrain further development on the plot, a declaration that the Environmental Impact Assessment carried out by Golf Course was illegal and a declaration that the said land was a wetland and that an environmental restoration order be issued against the Golf Course holdings. The Learned Counsel for the Defendant applied for security for costs on the ground that the Plaintiffs were likely to loose the case and fail to pay costs since the Defendant had acquired proper lease from Kampala City Council. The Court granted the application but reduced the amount of costs claimed from 300 million to 50 million which was to be paid within 30 days before the case could take off. One would challenge the above order on two grounds:

(a) Access to justice is a constitutional right especially of the poor. Demanding security for costs would tantamount to shutting them from their rights.

(b) Access to justice is about sustainable development which demands that one should use his property in a manner which will not affect others. It is not a question of ownership but a question of sustainable use of property. Therefore demanding security for costs on such a premise would be watering down the law to protect the environment and sustainable development.

2. Adjudicating Capacity

One of the greatest limitation to access to environmental justice is lack of technical training in environmental law. Environmental jurisprudence as a green movement is just developing. Most Judges and Lawyers on the bar graduated some decades before environmental law was being offered. Most of them get difficulties in understanding and applying basic principles of environmental law such as sustainable development and other environmental consideration. In most cases they merely get entangled on the common law principles of nuisance, negligence and trespass. There are cases to illustrate the above scenario:

(i) Byabazaire Grace Thaddeus Vs Mukwano Industries, Miscellaneous Application No. 909/2000 (arising from Civil suit No. 406/2000).

The Plaintiff who had a home near the Defendant's factory sued the Defendant claiming that the defendant's factory was emitting smoke which was obnoxious, poisonous, repelling and a health hazards to the community around and to the plaintiff in particular who was already affected in health. The plaint was struck out on the ground that it did not disclose a cause of action and that the plaintiff did not have locus standi in that matter should only have been taken to Court by NEMA and not by the Plaintiff.

In light of what I have discussed above it is very clear that both the Court and the lawyers involved did not apply the relevant laws properly. The Plaintiff had locus standi under Article 50 of the Constitution.

(ii) Greenwatch (U) Ltd. and another Vs Golf Course Holdings (supra).

The brief facts of this case are as set above. The Applicants sought for an injunction but the same was dismissed on the ground that the Applicants had failed to satisfy the condition for the grant of a temporary injunction i.e. proof of prima facie case, proof of irreparable damages and the balance of convenience. The Court held that the Applicants had not proved a prima facie case against the Respondent because the Respondent had land title to the property in question. It is important to note that environmental justice is not about ownership of property but on sustainable use of such property, creating a Constitutional right to health. Therefore the Court should have applied the principle of sustainable development rather than the rigid common law principles.

(iii) NAPE Vs AES Nile Power Ltd (supra).

In that case the Applicant sought an injunction to stop the Respondent from signing a power purchase agreement with Government of Uganda before Environmental Impact Assessment (EIA) was carried out. The injunction was denied. The Court held, rightly in my view, that an Environmental Impact Assessment was required as a guiding environmental regulation model for implementation of certain projects (which included the instant one). The Court further held that it was a Criminal Offence for any person to fail to prepare an EIA contrary to Section 20 of the Act. In denying the injunction the learned Judge had this to say:

"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 signing of the agreement and declaration. An injunction of this nature cannot be given in my view since the agreement per se does 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 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 on the environment".

It is the Statutory duty of NEMA to see that the law on sustainable Development is enforced to the last letter. One of the tools for enforcing the same is through EIA. The letter and spirit of the law makes it a Criminal offence for anyone who fails to prepare a proper EIA. Those were the findings of the Court. The Court further found that executing the agreement before EIA could place the Respondent in a position as to be able to alter the environment by commencing works. In light of the above status quo one would certainly contend that an injunction sought was very proximate to the environmental concerns of the Applicant thereby concluding that the Court did not apply proper principles of environmental law.

(iv) Buganda Road Cr Case No. 735/2001 Uganda Vs. Ddungu:

Although Environmental offences by nature appear to be of strict or vicarious liability, the Statutes do not expressly state so. This is likely to cause controversy. A case in point is Uganda Vs Ddungu Buganda Road Cr. Case No. 735/2001.

That case involves NEMA and a Company called COIN Ltd. Mr. Ddungu was taken to Court as one of the directors of COIN Ltd. for constructing a structure on a wetland and failure to carry out an Environmental improvement order, among other things. Those allegations were supposed to have occurred between March 2000 and January 2001 at COIN Ltd.

The Court found that the alleged crimes had been committed but held that it had not been proved that it was the accused (Ddungu) who had committed the same personally or under his instructions since COIN Ltd had more than one director. However after the

acquittal the Court went ahead to make restoration order against the management COIN Ltd on the basis that the Accused was part of the management. There is therefore need for clear predictability.

4. Delays:

Another drawback to access to environmental justice is delays of justice. Justice delayed is no doubt justice denied. The Constitution of the Republic of Uganda in Article 126 (2) (b) provides that justice shall not be delayed. Environmental justice is more crucial than ordinary justice as it is aimed at protecting human health and the environment for posterity. Environmental jurisprudence in Uganda has shown that our courts are not quick in redressing environmental matters expeditiously. A case in point is **Greenwatch (U) Ltd and another Vs Golf course Holdings Ltd (supra)**.

That case has not been resolved and yet the hotel has now been completed and is now in operation. The case is unlikely to take off in view of an order for security for costs against the Applicants, which I have indicated earlier.

5. Public Participation:

The Constitution of Uganda provides for public participation in the administration of justice. However in environmental justice, public participation is very poor. This may be due to the fact that the majority of the citizens are ignorant of their environmental rights. Associated to this is an element of poor leadership. For example the issue of high power tariffs have failed to be resolved and yet parliament had made a resolution to have it reduced.

A greater proportion of our citizenry are also oblivious of environmental damages surrounding them more especially when the damage is caused by intangible processes. For instance when Lt. General Tinyefuza raised an issue of noise from a nearby mosque which was affecting his environment very few people showed concern about the damage.

Public participation is a function of access to information which is guaranteed under Article 41 of the Constitution. Access to information is an indicator of transparency and accountability in public affairs. There is a saying that "an ignorant or ill informed or misinformed populace is prone to manipulation or exploitation as it does not know its rights.

Our jurisprudence shows that in certain case and for unknown reasons Government is not willing to grant its citizen access to information as a Constitutional right. An example is the case of **Greenwatch Vs. The Attorney General and Uganda Electricity Distribution Company Ltd (supra)**.

6. Poor Government Policy:

There is contention that Government is interested in attracting investors at the expense of sustainable development and when such investors are challenged they seek protection from the executive. Challenging such investors becomes a political risk and very few Lawyers would be willing to take up such cases. This may explain the reason why cases of public interest litigation are being pursued by very few firms of Advocates.

7. Corruption attributed to the enforcement agencies:

8. Advocates' Act and Law Council:

Access to Environmental Justice is a Constitutional right. This is naturally supported by access to information. Recently however, the Law Council came out with a directive under the Advocates Act stopping Advocates from expressing their opinions publicly on Legal and Constitutional issues. Considering the fact that a right to healthy environment is a fundamental right granted by the Constitution, how tenable is that directive?. My personal view is that writing an article on a legal and a Constitutional matter does not constitute touting except that it should not offend the rule of subjudice.

Our citizens should be informed of the Legal and Constitutional issues governing them. I would go by the practice in the United States where Advocates are allowed to advertise and tout for business. After all when I get a poor lawyer I am the one to pay costs. Why is it that the same law does not allow me room for choice?

9. General fear of Litigation:

Poor access is also due to the fact that generally people fear litigation for various reasons:

- lack of resources and familiarity with legal institutions
- lack of knowledge of how to go to Court
- lack of knowledge and trust of remedies available to them. People associate Court with imprisonment.

10. Procedural Constraints:

Another drawback to access to justice is how a dispute over alleged or threatened degradation may reach a court of justice.

In Uganda like other common law jurisdictions a court is seized with jurisdictions only after a formal pleading is filed. Other jurisdictions have however departed from the above orthodox rule. The best example is the Indian Supreme Court as seen in the case of **SUDIP MAZUNDAR vs. STATE OF MADYA PRADESH {1994} SUPP 2**.Supreme Court Cases 327.

In the case the court gave an order on the basis of the letter addressed to the Chief Justice by a journalist. In the letter the journalist alleged that the safety precautions in the Indian Army's ammunition test firing range in Madya Pradesh were inadequate, with the result that villagers in the vicinity, who tended to stray into the range, were killed or injured. After hearing the respondents the court gave an order requiring the state government to b take adequate precautions. The court also laid down a frame within which the order was

to be complied with.

In another case of M.C. Mehta Vs Kamal Nath and others (1996) Supp 10 S.C.R.12 the court acted in a news item which appeared in a newspaper and stated that “ a private motel in which the respondent’s family had direct link, had floated a club at the bank of River Beas by encroaching land including substantial forest land which was later regularized and leased out to the company when the respondent was a Minister in the Central Government. It stated that the motel used bulldozers and earthmovers to turn the course of the river. The bulldozers created a new channel by diverting the flow of the river. According to the news item, three private companies were engaged to reclaim vast tracts of land.

WAY FORWARD

1. Open up to allow advocates to speak freely and express their views on legal and Constitution matters on behalf of the disadvantaged or marginalized groups.
 2. Our development partners like TEAN, Greenwatch, NAPE, NEMA, ACODE, ELI and UNEP are doing a lot of support in capacity building. These organizations have committed their resources in training lawyers and judicial officers. Some of them are also doing public litigation cases as a service to the nation.
 3. Need for constant training for the bench and the bar.
 4. The need to create environmental and human rights department of the High court.
 5. There is need to publicize and circulate environmental case laws and materials. Prof. Okidi, John Ntabirweki, UNEP, ELI, ACODE, NEMA and their officers should be commended for their contributions in terms of books and other resource materials on environmental law.
 6. Possibility of creating environmental tribunals.
 7. The need for judicial activism.
 8. Explore the possibility of making environmental education gain foundation from primary up to tertiary institutions. The same should be made compulsory in law schools.
 9. All the environment enforcement agents and friends should be effectively supported and strengthened.
 10. There must be political will in support of environmental protection. Government must be transparent and accountable in all matters concerning sustainable development.
 11. Access to environmental justice should be incorporated in chain link initiative to create public awareness and accountability.
 12. Substantive justice should be the basis rather than technicalities.
- Courts should administer substantial and sustainable justice, justice that can stand the test of time like the case of *Donoghue Vs. Stevenson* (Opeit).

Thank you.

ANNEX 8

ACCESS TO INFORMATION

Introduction

Over the past few decades, there has been a growing recognition that environmental protection and management must involve all sectors of civil society to be effective. Most environmental impacts are local, and citizens frequently know their particular local area more intimately than any government can. Members of the public can bring their experience, resources, and energy to bear on environmental problems, supplementing and improving governmental actions. Such public involvement enhances environmental decision-making, encourages sustainable business practices, and strengthens civil society. Furthermore, including civil society in the development, implementation, and enforcement of environmental norms educates the public and the regulated community and builds support for governmental actions.

Procedural rights of access to information, participation, and justice are found throughout human rights declarations, as well as in modern international environmental law and policy. The 1992 *Rio Declaration* crystallized emerging public participation norms in its Principle 10:

Environmental issues are best handled with **the participation of all concerned citizens**, at the relevant level. At the national level, each individual shall have appropriate **access to information** concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and **the opportunity to participate in decision-making** processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective **access to judicial and administrative proceedings**, including redress and remedy, shall be provided. [Emphasis added.]

Agenda 21, the “Blueprint for Sustainable Development,” was adopted at the U.N. Conference on Environment and Development, in Rio de Janeiro, June 1992, to implement the principles in the Rio Declaration. It has significantly shaped the activities of the United Nations Environment Programme and other international organizations. It is also intended as a blueprint for national governments in working toward sustainable development. Agenda 21 relies heavily on the role of civil society in developing, implementing, and enforcing environmental laws and policies. Access to information, public participation, and access to justice appear throughout Agenda 21, and particularly in Chapters 12, 19, 27, 36, 37, and 40.

Since Rio, there have been many declarations about the importance of transparency, public involvement, and accountability, and many regions and international institutions have started to implement and expand upon Principle 10, with the UN/ECE Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (Aarhus Convention) the most far-reaching treaty to date.

Article 4 of the Aarhus Convention requires nations to provide a system to allow the public to request and receive environmental information from public authorities. Article 5 requires nations to provide a system under which public authorities collect environmental information and actively disseminate it to the public without request. Environmental information is broadly defined in Article 2 to include: “any information in written, visual, aural, electronic or any other material form on:

- The state of elements of the environment such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interactions among these elements;
- Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programs, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;
- The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by they state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.”

National laws are, however, the most important to providing people the information they need to effectively participate in decisions that affect them. Information about the environment can also be critical to the public’s ability to protect itself from risks to public health and safety. Environmental information may also be useful so the public may inform itself about the state of the environment as it affects them. The following discussion illustrates how these purposes have been achieved in the United States, for example.

The United States enacted the Freedom of Information Act in 1966, which stated the general principle that information held by agencies of the U.S. government should be made available to the public. Much of the statute concerns the limited exceptions under which the government may withhold information from a member of the public requesting access to the information. Principal among these exceptions are national security, certain types of personal information, confidential business information or trade secrets, and information about matters that are still under deliberation (so-called pre-decisional information). These exceptions obviously are subject to abuse if government officials use them to justify keeping documents and information secret for other reasons. Judicial review of decisions to withhold information is critical to maintaining the integrity of the system and public confidence in the rule of law.

The states in the U.S. actually have a longer history of, and greater openness about, providing public access to information. Most states have long had policies and laws requiring public records to be open to the public. Such “open records laws” generally mandate that the public be allowed access to any records held by the state. There may be limited exceptions for information the state requires and that a business formally claims as trade secret, but such a claim is subject to administrative and judicial review. Although states have generally had a good record in terms of allowing the public access to records when requested, until recently few states actively publicized information they held. One notable exception was that state health departments issue public warnings about rivers and lakes that are too polluted to swim in (there is a general presumption that water bodies in the U.S. are not safe for drinking unless the water is treated) or if the fish are too contaminated to eat.

The advent of the Internet has led many states to actively provide more environmental information to the public. Unfortunately, many people still do not have easy access to the Internet, making this an incomplete method of providing information to the public.

In addition to the general federal and state laws mandating access to information, many national environmental laws in the U.S. require that the public be actively informed about specific environmental information. For example, the Safe Drinking Water Act requires public agencies that provide drinking water to the public to notify recipients of their water at least once per year of any contaminants found in the water in excess of drinking water standards. This law has resulted in significant controversy in the capitol this year as the agency that supplies drinking water to Washington, DC was found by the US Environmental Protection Agency to have violated this requirement by failing to inform the public that significant numbers of homes received water that contained very high levels of lead.

Another example is the Surface Mining Control and Reclamation Act, which requires a coal mining company to notify residents and businesses within ½ mile of the site when they will be blasting, including an audible siren warning shortly before the actual blast. Obviously, such information can be essential for members of the public to be able to protect themselves from a potential safety hazard. The Toxic Release Inventory may be the most widely copied public information law in recent times. It requires anyone who stores or releases into the environment specified toxic chemicals to report the amounts that they store and release each year. Adopted as a result of the Bhopal tragedy, this law seeks to allow the public and emergency providers to be informed about potential risks from toxic chemicals. It also has served as a significant source of information about the amount of pollution released to the environment annually and has caused many companies to voluntarily reduce the amount of their releases.

Public access to environmental information also allows the public to correct mistakes and to provide new information. When the public sees the information that the government has it may realize that it actually knows far more about particular resources, such as water quality in rivers and lakes, or knows more about violations than the government agency. This may prompt members of the public to report violations, damage to natural resources,

spills of toxic substances, or the existence of wildlife in places it was not officially known to exist.

Under the U.S. Clean Water Act any person who discharges a pollutant to a water body is required to obtain a permit and as a condition of that permit must report the levels of pollutants discharged. These Discharge Monitoring Reports are sent to the environmental agency, where they become open to the public. The public, particularly non-governmental organizations interested in maintaining and improving water quality use these reports to make sure that the environmental agencies take enforcement action when the levels of pollutants discharged exceed the standards allowed under the permit and the regulations.

The environmental impact assessment (EIA) and permitting processes are examples of how public access to information improves decisions. A key element of the EIA process is making environmental information related to a proposed project available to the public. This allows the public to become informed about the environmental impacts of the project and to make its views known about the relative importance of those impacts compared with the benefits of the project. Members of the public often are able to provide additional information about environmental impacts that can improve the design of the project, help mitigate its impacts, or show that the impacts outweigh the benefits. Similar benefits can come from publicizing environmental information during the process of deciding on whether to grant a permit where, as is often the case in the U.S., a project requires an environmental permit but no EIA is required.

As a final note, the concept of public access to environmental information has been taken to another forum in the U.S. The U.S. courts are now required to open their decisions in certain cases to comment by the public. This procedure applies only to civil cases brought by the U.S. government seeking recovery of the cost of cleaning up contaminated sites where the parties seek to settle the case before trial. In such cases the judge must approve the settlement and enter it as an order of the court, but before doing so the draft order is published and the public is given at least 30 days to comment on the settlement. This procedure is limited to the so-called Superfund statute and has not been applied to other environmental cases.

ANNEX 9

CRIMINAL ASPECTS OF ENVIRONMENTAL LAW AND TECHNICALITIES OF ENVIRONMENTAL CRIMES.

**BY MR. VINCENT WAGOONA- PRINCIPAL SENIOR STATE ATTORNEY,
DIRECTORATE OF PUBLIC PROSECUTION.**

1.0 INTRODUCTION

An environmental crime is any deliberate act or omission leading to degradation of the environment and resulting into harmful effects on human beings, the environment and natural resources. Environmental crimes include all violations of environmental laws attracting criminal sanctions. Environmental crime prosecutions therefore refer to the prosecution of environmental cases in the criminal courts.

Historically, traditional criminal law did not care about environment protection hence there has been a tendency of advocating for it to be included among those crimes that affect or is affected by public order, morality and social economic development. The question has always been whether the environment deserves the response of criminal law.

In subject of environmental law, enforcement becomes one of the most important components. Environmental enforcement relates to those sets of actions that Government or other persons take to achieve compliance within the regulated community and to correct or halt situations that endanger the environment or public health. Enforcement by Government usually includes inspections, negotiations, compliance promotions and legal actions of civil litigation and criminal prosecution.

The objective of environmental law enforcement is the same like other branches of law i.e. to deter detected violators from violating again; to deters other potential violators from violating by sending a message that they too may experience adverse consequences for non compliance.

The objectives of deploying criminal law in environmental law enforcement are

- (a) to confirm standards established in the interest of
- the environment or public health;
 - government credibility and government control (standard setting)
 - fair competition;
- (b) protecting or restoring environmental damage to ensure sustainable development.

2.0 THE LEGAL FRAMEWORK FOR ENVIRONMENTAL CRIMES

There are a few provisions in our Penal Code Act relating to environmental protection in the sense of protecting the right to a clean and healthy environment. These relate to nuisances and offences against health and convenience under Part XVII, offences endangering life or health under Part XXII, negligent acts likely to spread infection of disease, adulteration of food or drink, fouling water and air (ss 171, 172).

The effectiveness of the above provisions on environment and/or public health protection

is limited because they are generalized crimes and not specific and therefore difficult to interpret. They also do not offer other alternatives that can lead to protection of the environment.

The National Environment Statute of 1995 therefore seeks to provide for a more comprehensive and effective legal framework for criminalisation of and sanctions against those who commit environmental law violations, as one of the ways of ensuring compliance with environmental protection legal provisions.

The National Environment Statute introduced a fundamental change in the management of all aspects of the environment. Before the introduction of the Statute, however, the principal themes in as far as criminal aspects in environment related laws was that most of the laws had outdated or outmoded criminal provisions and lacked effective sanctions to deter infraction.

This situation has now changed and new methods, aspects and legal provisions of environmental criminal law have come into play. The question is whether these new norms can be successfully used to protect the environment.

There are 3 aspects that can be used in today's environmental law enforcement.

- ✓ **Traditional Criminal Law:** by means of fines and imprisonment.
Where the traditional criminal law is used, it is still necessary to bring it in line with current thinking of conservation. The intention of environmental criminal law is to restore the environment and not necessarily punish the offender. However, infraction of environmental conservation and standards should be made an expensive affair.
- ✓ **Punishment through community service:** In lieu of imprisonment or fine (which is usually simple to pay), the use of "community service" with an environmental orientation is very effective. The community service acts as an instrument for mobilizing shame in a public manner. This may act as a deterrent more effectively than fines or prison sentences.
- ✓ **Publicity:** Perception is so important in creating deterrence in the environment field. How enforcement actions are taken is just as important as the fact that they are taken. Enforcement actions can have significant effects far beyond bringing a single violator into compliance if they are well placed and well publicized e.g. the press, or an apology.

Law applicable:

The main legislation under which charges will commonly be brought is the National Environment Statute 4 of 1995 and other laws that were previously presented. Charges will also be commonly brought mainly under subsidiary legislation that was mentioned in the previous paper.

3.0 CONCEPTUAL LEGAL ASPECTS FOR ENVIRONMENTAL CRIMINAL LAW ENFORCEMENT

Changing man's or woman's environmental behavioral norms may be achieved in three ways: **EDUCATION, INCREASING CAPACITY AND LEGAL**. I will only deal with legislation related issues.

Several measures have been used in an integrated manner in Uganda's legislation in order to achieve environmental goals. There may be divided into several stages: prohibition, prevention, licensing and inspection, orders, restoration to previous conditions, penalties and public participation, among others.

(a) Prohibitions

The prohibition stipulated in the legislation should be clear with an orientation on results. The prohibition should be absolute, dispensing of the need to prove **intent or negligence** - *mens rea*.

In case of pollution or degradation violations (e.g. prohibition of water pollution, soil erosion, etc), it is emphasized that the condition of the area prior to pollution or degradation is not a factor in the considerations leading to conviction, the very act of prohibition is prohibited, not the results. This makes the burden of proof easier since it is a form of strict liability offence.

(b) Anticipatory Prevention

Environmental law is anticipatory, as it requires prior activities to be done before the environment is modified. The provisions relating to EIA, audits and "polluter pays principle" play an important role here. The criminal implication of this is that potential polluters and environmental degraders should be aware and should be required to cover the costs of environmental damage financial liability of damage caused. This is in addition to the environmental crime of not carrying out an EIA.

(c) Permits and licenses

An especially effective means of ensuring compliance in the granting of licenses and permits by NEMA and other lead agencies. This grants NEMA and the lead agencies the power to issues, revoke or incorporate conditions in it.

The very act of managing a project without those licenses or permits even if no environmental damage has been caused constitutes an offence under the law. To combine the permits with the prohibitions mentioned above makes the charge sheet very interesting.

(d) Improvement Orders

The law authorizes an environmental inspector to issue an improvement order to an owner or operator of a facility directing him to adopt specific measures in order to abate

the environmental problems. This is issued with time limits of compliance.

Failure to act according to instructions of the environmental inspector is deemed a personal offence of the owner or operator of the facility irrespective of the impact of the action on the environment.

(e) Restoration orders

Further, to improvement orders, the Executive Director is empowered to issue a Restoration Order to any person. These are also deemed personal offences irrespective of the impact of the action on the environment. The order instructs the owner or operator to act in a certain manner.

4.0 SALIENT CRIMINAL ASPECTS UNDER THE ENVIRONMENT STATUTE

The regulation of activities that have or are likely to have an impact on the environment is the main province of environmental law. The law is anticipatory in that even attempts to commit an offence are as bad as commission of an' offence. This is especially to areas of EIA, management of hazardous wastes and toxic chemicals, trans-boundary movement of wastes, etc.

The core environmental crimes under the Statute are-

- **Environment Impact Assessment (EIA)**

Criminal Implications:

- ✓ Failure to submit or prepare an EIA creates a criminal offence which can lead to 18 months imprisonment or fine of not less than Shs.180,000= and not more than Shs.18m/= or both.
- ✓ Developing a project without an EIA is an environmental crime per se.
- ✓ The burden is on the Developer to conduct and submit an EIA Report to NEMA.

- **Environmental Standards**

Every establishment or individual is under a duty to operate within the prescribed standards are minimum standards, criteria and measurements.

There are environmental standards for the discharge of effluent and waste-waters, noise, soil quality, ozone and solid waste.

Criminal Implications:

- ✓ Failure to operate within the standards or the guidelines attracts not more than 18 months imprisonment or a fine of not more than Shs.18m/= or both.
- ✓ Breach of the standards is both a strict and vicarious liability.
- ✓ Environmental standards need scientific measurement and proof.

- **Waste Management (Sec. 53)**

Wastes are widely defined under the Statute and the Regulations.

Criminal Implications

- ✓ Every person is under duty to manage wastes generated by his establishment in such a manner that he does not cause ill health to the person or damage the environment.
- ✓ Every person is under obligation treat, reclaim and recycle the wastes as a waste minimization measure.
- ✓ No person is allowed to dispose of wastes into the environment unless he or she follows the law and the standards.
- ✓ It is a criminal offence to import any wastes which is toxic, extremely hazardous, corrosive, carcinogenic, flammable, persistent, explosive, radioactive, etc.

Criminal Implications:

- ✓ On conviction, an imprisonment term of not less than 36 months or to a fine of not less than 360,000 and not more than 36 million.

Control of Pollution and Discharge of Oils into the Environment

It is an offence to pollute or lead any other person to pollute the environment or in excess of the set standards or guidelines.

Criminal Implications

- ✓ Polluting or discharging oils *per se* is a strict liability offence
- ✓ Offence attracts Shs.360, 000/= or a 36 months imprisonment term or both.
- Environmental Inspections and Record Keeping

i) Environmental Inspectors

- ✓ S.80 of the Statute creates the institution of environmental inspectors. These have the same powers of entering, confiscating and inspecting facilities to ensure that there is compliance with the legal requirements.

Criminal Implications

- ✓ Hindering or obstructing an environmental inspector, or failing to comply with a lawful order such as **IMPROVEMENT NOTICE** is criminal offence on conviction attracts imprisonment of a term not less than 12 months or a fine of not less than Shs. 120,000= and not more than 12 million or both.
- **Records keeping**
- ✓ Facility owners or their agents are required to keep records of the amount of wastes and by products generated by their activities so as to show how far they are complying with the provision of the Statute.
- ✓ Failure to keep records of activities, products, by-products, and wastes required to be kept leads to an offence being committed and liability on conviction to imprisonment for a term of not less than 12 months or a fine of not less than 120,000= and not more than 12 million or both.

- **Conservation of Wetlands, Lakeshores and River Banks**

The National Environment (Wetlands, River Banks And Lake Shores Management Regulations, 2000 prohibits any reclamation- or drainage, depositing of any substance, damaging or destruction of any wetland without a permit from NEMA. Riverbanks and lakeshores are also protected.

Criminal Implications

- ✓ Depositing any substance in a lake or river or their banks and shores or drain a river or lake without a permit or reclaiming or draining or destroying a wetland attracts 12 months or a fine of 120,000= and not more than 12 million or both.

5.0 COMMON ENVIRONMENTAL CRIMES IN UGANDA.

The types of common environmental crimes likely to feature in our courts will generally include doing the following in contravention of the law or without a permit as the case may be-

- ✓ Setting up and operating a project without an EIA;
- ✓ Discharging from an establishment without a permit;
- ✓ Offences relating to environment inspectors and inspections;
- ✓ Failure to comply with requirements of a restoration or improvement order;
- ✓ Maintaining and operating a facility that emits noise without a permit or beyond the set standards;
- ✓ Discharging harmful or polluting substances or waste substances into water systems contrary to the law;
- ✓ Disposing, Storing and treating or transporting of hazardous waste without a permit
- ✓ all the degrading prohibitions relating to wetlands, river banks and lakeshores (using wetlands, river banks and lakes shores without a permit, area related prohibitions (protected zones)
- ✓ exporting genetic resources or derivatives without a permit;
- ✓ all the degrading prohibitions relating to fragile soils protection, hilly and mountainous areas.;

6.0 LEGAL TECHNICALITIES AND PRINCIPLES RELEVANT TO THE PROSECUTION OF ENVIRONMENTAL CRIMES

- ✓ Environmental law provides for **anticipatory injury** or damage. Even where a violation of the law may not necessarily result in any direct or immediate injury to person or property, failure to comply with the law is an offence. In such cases, the law seeks to guard against the danger or probability of injury or damage and thereby minimize it.
- ✓ Environmental laws **punishes** violations **of the law provisions**. Unlike the traditional

criminal offences under the Penal Code Act which prohibit specific acts and impose penalties for those acts, environmental statutes tend to provide for criminal penalties for violation of any of the provisions of the Statute.

- ✓ **Environmental offences tend to impose strict and vicarious liability.**
Although the burden of proof lies with the prosecution, there is no need to prove *means rea* (criminal intention). Also, the employer or proprietor of a facility can be held liable for the acts of the employees. Environmental cases are therefore relatively easy to prove in court. The strict liability nature can be seen from the wording of the provisions in the statute.
- ✓ Environmental laws are regarded as 'public welfare' statutes (creating public welfare offences). The law is aimed at protecting human health and the environment. The offender (a reasonable person) is deemed to know that his or her conduct is subject to stringent public regulation and may seriously threaten the community's health or safety.
- ✓ **Like other criminal offences, causation must be established, i.e.** that the prohibited event was caused by the accused's acts or omissions.
- ✓ **No requirement for notice of violation before instituting criminal proceedings.**
There are always attempts to handle environmental violation amicably. In this regard, in practice, the offender may be notified that they are violating the law. The notice, however, is not a legal requirement and is therefore not a legal pre-requisite for instituting criminal proceedings. Criminal proceedings can be commenced even without a prior notice of violation.
- ✓ **No requirement for prior civil proceedings.** There is no requirement to institute civil proceedings before commencing criminal proceedings.
- ✓ **Drafting charges and trial procedure.** The rules under the MCA apply:
- ✓ **Reporting of cases.** The practice has been that aggrieved members of the public or interested environmental concern groups report a case to a lead agency, the District Environment Office or NEMA headquarters. In the near future, cases will also be reported to the Police.
- ✓ **Investigations.** Environmental inspectors play a key role to gather scientific evidence and make reports. These are some of the expert witnesses the courts should expect to see commonly, testifying in environmental hearings. Even when the Police takes over the investigations, as will be the case, the Environmental Inspectors will continue to play a crucial role together with them. The Inspectors assist to identify key witnesses and exhibits. Already, NEMA has been using Police Photographers to take photographs.
- ✓ **Exhibits.** The documentary and exhibits the courts should expect to see will include-

reports of the Environment Inspectors-laboratory reports-photographs-maps.

- ✓ **Decision to prosecute.** The decision to prosecute is by the DPP, but NEMA plays an important role. In future, other players and lead agencies should be able to inform and bring to notice the police and DPP.

- ✓ **Use of criminal summons.** Environmental offences are not committed by "criminals" in the normal sense of the word. The people who commit environmental crimes are respected members of society like factory managers and proprietors, mayors of local authorities, etc. What will happen in practice is that the case will be registered and a criminal summons applied for. An arrest warrant will be sought and prosecution commences.

- ✓ **Jurisdiction and bail.** The offences are triable and bailable by a Magistrate Grade 1 or Chief Magistrate.

- ✓ **Trials.** These will be characterized by scientific evidence to prove ingredients. A lot of background study will be expected of the Prosecutors.

- ✓ **Punishments.** Most offences are punishable with a fine, imprisonment or both. However, under S. 106 of the NES, the court *may* in addition to *any* other orders, order
 - (a) that the substance, equipment and appliance used in the commission of the offence be forfeited to the state;
 - (b) that *any* license, permit or other authorization given under the Statute and to which the offence relates be cancelled;
 - (c) that the accused do community work which promotes the protection of the environment;
 - (d) issuance of an environmental restoration order against the accused under Part 1 of the Statute.

Thank you for listening to me.

PUBLIC INTEREST LITIGATION IN UGANDA
BY: MR. PHILLIP KARUGABA, TEAN.

PRACTICE AND PROCEDURE

PITFALLS & LANDMARKS¹

"And what is the argument for the other side? Only this that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before we shall never get anywhere. The law will stand still while the rest of the world goes on and that will be bad for both"

Lord Denning PACKER-V-PACKER

[1953] 2 AER 127 @ 129

A. INTRODUCTION.

Public interest litigation describes legal actions brought to protect or enforce rights enjoyed by members of the public or large parts of it. It has been used as a tool of great social change in India, Pakistan, Bangladesh and the Philippines on such diverse issues as the environment, health and land issues.

According to **BHAGWATI J in BANDHUA MUKTI MORCHA-V-UNION OF INDIA AIR 1984 S.C;**

"Public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice, which is the signature tune of our Constitution ".¹

In Australia, the criteria used by the Public Interest Law Clearing House (Vic) Inc. and the Public Interest Law Clearing House Inc. (NSW) to determine public interest cases to support are;

The matter must require a legal remedy and be of public interest which means it must;

- a) affect a significant number of people not just the individual or;
- b) raise matters of broad public concern or;

¹ Originally presented to the Judges Training Workshop at Jinja Nile Resort 10th September 2003

¹ NARAYAMA: Public Interest Litigation [2nd Edn 2001]

c) impact on disadvantaged or marginalized group, and

d) it must be a legal matter which requires addressing *pro bono publico* ('for the common good')²

In Uganda, public interest litigation it is yet to come of age. Some examples of public interest litigation are the Rwanyarare petitions in the Constitutional Court in respect of political rights; Uganda Law Society petitions on the Referendum Act; execution of death penalty sentences by field court martial without affording a right of appeal the constitutional petition by FIDA and some men on the Divorce Act; Greenwatch actions; (Butamira, AES access to information, Golf Course development (now Garden City), curry powder, kaveera case), petition on freedom to worship by seventh day Adventists, TEAN actions on smoking in public places and on stronger warning labels for tobacco.

"The harvest is plentiful but the labourers are few". Many more issues abound all bedded in the Constitution but hot with controversy for example; issues of torture of suspects, arrest of persons released by the courts, death penalty, street vendors' rights, pornography, prostitution.

As you will see from the list, public interest litigation attracts a lot of attention and for this reason is often wrongly called "*publicity interest litigation*". But the media are an important and indispensable ally in any battle for societal rights.

Public interest litigation is a new tool in the arsenal of civil society. It presents a strategic opportunity to engage the Judiciary in ordinary societal issues. It would allow civil society organizations to jump from conferences tables and lamentations to strategic, decisive and enforceable action.

The attempts at public interest litigation in Uganda have been beset with technicalities, which we propose to discuss below in a humble attempt to bring clarity to this area of the law and by so doing, promote a culture of constitutionalism, of human rights enforcement and the Rule of Law.

B. THE ENABLING LAW;

The bedrock of public interest litigation lies in Article 50(2) of the Constitution. It provides:

"Any person or organization may bring an action against the violation of another persons or group's human rights".

Its simple language belies the problems that have beset its application. It is set against the backdrop of Article 50(1), which provides for the enforcement of individual constitutional rights. In the words of the President of the Law Society (as he then was)

² PENNY MARTIN Defining and refining the concept of practicing in the public interest [Alternative Law Journal Vol. 28 Number 1 February 2003 PA]

Mr. Andrew Kasirye, this provision makes us "*our brother's keeper*"³ By using an expression "*any person*" instead of say "*an aggrieved person...*" it allows any individual or organization to protect the rights of another even though that individual is not suffering the injury complained of. Whenever there is an injury caused by any act/omission contrary to the Constitution, any member of the public acting bonafide can bring an action for redress of such wrong.

Another avenue to public interest litigation lies in Article 137(2), which allows any person who alleges a violation of the Constitution to have taken place to petition the Constitutional Court. Such a violation may stem from an act or omission of a person/organization or from and Act of Parliament being inconsistent with the Constitution. The article provides;

3) "*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 any act or omission by any person or authority,

b) 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. "

Justice Mulenga JSC in **ISMAIL SERUGO-V-KCC & ATTORNEY GENERAL** [Constitutional Appeal No.2 of 1998] was emphatic that the right to present a constitutional petition was vested not only in the person who suffered the injury but also in any other person.

This is particularly pertinent since Article 3(4) of the Constitution imposes on every citizen of Uganda a right and duty at all times to defend the Constitution.

Also worthy of mention is S.72 of the National Environment Statute 1995 that empowers any person to apply for an environmental restoration order even though such person is not suffering any harm and has no interest in the land in use.

There is also a now probably archaic S. 63(1) of the Civil Procedure Act (Cap. 65), which requires that suits for a public nuisance by maybe instituted by the Attorney General or two or more persons with the consent of the Attorney General.

We will move to a consideration of some of the issues that have beset public interest litigation.

³ Opening speech at Regional Workshop on Tobacco: "The Role of Civil Society Organisations in the development of Tobacco Control Legislation 18-20 August 2002.

C. PROCEDURE IN PUBLIC INTEREST LITIGATION

1. General

We will focus here on procedure under Article 50, first. It presents a classic case of needing to know where one is coming from to know where one is going. The procedure of enforcement of the rights under the 1967 Constitution was only put in place in 1992 under the Fundamental Human Rights (Enforcement Procedure) Rules S.I No. 26 of 1992.

What has given rise to much confusion here is the dicta in the case of **UGANDA JOURNALISTS SAFETY COMMITTEE-V-ATTORNEY GENERAL** [Constitutional Petition No.7 of 1997] in which the Supreme Court bought the Attorney General's argument that no rules had made for the enforcement of Article 50.

This has been further compounded by the High Court ruling in **JANE FRANCIS AMAMO- V-ATTORNEY GENERAL** [Misc. Application No. 317 of 2002 arising from H.C.C.S No. 843 of 2001] in which the learned trial Judge said in dismissing an action under Article 50,

"The Constitution clearly and in no uncertain words said Parliament was to make laws for the enforcement of the rights and freedoms under the said Constitution. In my humble opinion this means that Courts can no longer apply the Rules passed in 1992. That would mean to me that until Parliament makes laws under Article 50(4), Article 50(1) is in abeyance."

As fact that would be correct that no rules have been made under Article 50(4) of the Constitution. However Article 273 when read with the Judicature Statute 1996 and the 1992 Rules goes to supply the omission. The 1992 Rules were saved under the 1996 Judicature Statute and must continue to apply as existing law subject to Article 273. The 1992 Rules must be read with such modifications as to bring them into compliance with the 1995 Constitution.

Aside from the fact that **AMAMO** was wrongly decided, it was said that the Court was turning away a citizen, who was complaining of a violation of his fundamental rights, on basis of lack of procedure. The **AMAMO** decision contrasts rather sharply with the approach of the Tanzanian Courts when faced with actions to enforce human rights before the relevant rules were made. In **CHUMCHA MARWA-V - OFFICERI/MUSOMA PRISON** [Misc. Crim Case No.2 of 1988] (MWANZA) Justice Mwalusanya ruled that since the Articles provided that Government "may" enact such rules, then it was not a must that the rules were enacted prior to the enforcement of the Bill of Rights.⁴

⁴ Cited in JUSTICE KAHWA LUKAKINGIRA: The Judiciary and the interpretation of Tanzania's Constitution: Problems and Prospects [East African journal of Peace and Human Rights Vol. 7 1 2001 p.1]

The Tanzanian Court of Appeal took the same position in **DPP- V -DAUDI PETE** [1991] LRC (Const) stating that until Parliament passed the relevant legislation the enforcement of the basic rights, freedoms and duties may be effected under the procedure that is available in the High Court in the exercise of its original jurisdiction, depending on the nature of the remedy sought.⁵

This certainly appears to be the more deserving approach, as every effort should be made to give effect to the Constitutional protections and fundamental human rights enshrined in the Constitution, as the supreme law of the land.

It is most strange that the Rules Committee made all the other rules prescribed in S.51 (2) of the Judicature Statute 1996, being Supreme. Court Rules, Court of Appeals Rules, Constitutional Court Rules but fell just short in making new rules for the enforcement of fundamental human rights.

Hitherto the High Court has had no difficulty in hearing Article 50 applications. In **NATIONAL ASSOCIATION OF PROFESSIONAL ENVIRONMENTALISTS-V-AES NILE POWER LTD** [Misc. Application No. 268 of 1999] probably the first action under Article 50, Court was quite clear that the correct procedure for the Plaintiffs to have followed in that case was by notice of motion as prescribed under the 1992 Rules.

TEAN-V-ATTORNEY GENERAL AND NEMA [Misc. Application No. 39 of 2001], [Non-Smokers rights case] and **TEAN-V-B.A.T** [Misc. Application No. of 2002] (warning labels), **PASTOR MARTIN SEMPA-V-ATTORNEY GENERAL** [Misc. Application No. 71 of 2002] (on Electricity tariffs), **GREENWATCH-V-ATTORNEY GENERAL** [Misc. Application No. 140 of 2002] (the Kaveera suit) the Judges had no problem in applying the 1992 Rules. It therefore appears and is certainly hoped that the **AMAMO** line of decisions will remain isolated.

Under the 1992 Rules, the procedure is by notice of motion and affidavit filed in the High Court. [A word of caution in reading the Rules. The bound copies of the Laws of Uganda issued by the Supreme Court wrongly bound up S.L 25 and 26. It is best to refer to the original statutory instruments. Both instruments deal with similar subject matter and with a similar number of sections. S.I 25 of 1992 is Interpretation of the Constitution (procedure) Rules 1992; which was replaced by LN. No.3 of 1996, The Interpretation of the Constitution (Procedure) Rules 1992 (Modification) Directions 1996.

With respect to Article 137(3) petitions to the Constitutional Court, the procedure is governed by legal Notice No.4 of 1996 Rules of the Constitutional Court (petitions for Declarations under Article 137 of the Constitution) Directions 1996. These Rules were made under S.51 (2)(c) of the Judicature Statute 1996.

An important note is that to proceed under Article 50, the matter must relate directly to a fundamental human right in the Constitution. **PASTOR MARTIN SEMPA's** action (Supra) was brought to object to new electricity tariffs that had been imposed without

⁵ Ibid

giving the members of the public a hearing and that accordingly the Applicant's right to fair treatment under Article 42 of the Constitution. The Learned Trial Judge struck out the action on the ground that it did not disclose violation of a Constitutional right. He ruled

"It is not enough to assert the existence of a right. The facts set out in the pleadings must bear out the existence of such a right and its breach would give rise to relief."

Similarly in AMAMO (supra), the Trial Judge was of the view that Article 50 was not suitable for actions for wrongful dismissal.

2. Competent Court

Article 50 prescribes the forum for enforcement of human rights actions as a "competent court" The expression is not defined. However the 1992 Rules state that the application shall be filed in the High Court.

For Article 137 actions the correct forum is the Constitutional Court. However the challenge always arises in determining whether the action should be under Article 50 or Article 137.

WAMBUZI CJ(as he was then) in **ATTORNEY GENERAL-V-DAVID TINYEFUZA** [Constitutional Appeal No.1 of 1997] said;

"In my view, jurisdiction of the Constitutional Court is limited in Article 137(1) of the Constitution. Put in a different way no other jurisdiction apart from interpretation of the Constitution is given. In these circumstances I would hold that unless the question before the Constitutional Court depends for its determination on the interpretation or construction of a provision of the Constitution, the Constitutional Court has no jurisdiction"

In the case of **ISMAIL SERUGO -V-KCC & A.G** [Constitutional Appeal No.2 of 1998] the Court ruled that in the course of handling Article 137 matters the Constitutional Court could deal with Article 50 matters. However unless the action requires interpretation of the Constitution, the Court of first instance should be the High Court

This use of the word "interpretation" in the mandate of the Constitutional Court prescribed in Article 137(1) of the Constitution has given rise to some difficulty. Actions have been dismissed in the Constitutional Court on the grounds that the requisite remedy is not Article 137 interpretation but Article 50 enforcement.

In **ALENYO-V-THE ATTORNEY GENERAL** [Constitutional Petition No.5 of 2002] the Court considered the word "interpretation"

"The Constitution does not define the word "interpretation". However Article 137(3) gives a clear indication of what the word means..."

"We hold the view that the allegations made to the Constitutional Court, if they are in conformity with Article 137(3), give rise to the interpretation of the Constitution and the Court has jurisdiction to entertain them..."

In the instant petition, the petitioner alleges that the Law Council is guilty of commissions or omissions which are inconsistent with or in contravention of the Constitution. He has petitioned this Court for a declaration to that effect. In our judgment these are the types of actions envisaged by Article 137(3)(b). He is not stating as a fact that he has a definite right that should be enforced. He is alleging that the conduct of the Law Council has violated his rights guaranteed by specified provisions of the Constitution and this Court should so declare. In order to do that the Court must determine the meaning of the specified provisions of the Constitution allegedly violated and whether the conduct complained of has actually violated those provisions. The carrying out of the exercise by the Court is an interpretation of the Constitution. It is not an enforcement of rights and freedoms. The Court is being called upon to interpret the Constitution. It can make a declaration and stop there or it can grant redress if appropriate. Whether the alleged acts and omissions of the Law Council contravene or are inconsistent with the Constitution is not relevant to the issue of jurisdiction. It is what the Court is called upon to investigate and determine after it has assumed jurisdiction. It is not relevant either that there is a remedy available to the petitioner elsewhere. That alone cannot deprive the Court of the jurisdiction specifically conferred on it by Article 137

WAMBUZI CJ said in **SERUGO** (supra) that;

"In my view for the Constitutional Court to have jurisdiction the petition must show on the face of it, that interpretation of a provision of the Constitution is required. It is not enough to allege merely that a constitutional provision has been violated. If therefore any rights have been violated as claimed, they are enforceable under Article 50 of the Constitution by another court"

The position was turned on its head by Justice **KANYEIHAMBA in TINYEFUZA** and despite its length, its is most instructive to set it out in extenso;

"The marginal note to Article 137 states that it is an article which deals with questions relating to the interpretation of the constitution. In my opinion, there is a big difference between applying and enforcing the provisions of the constitution and interpreting it. Whereas any court of law and tribunals with competent jurisdictions may be moved by litigants in ordinary suits, applications or motions to hear complaints and determine the rights and freedoms enshrined in the Constitution and other laws, under Article 137 only the Court of Appeal sitting as the Constitutional Court may be petitioned to interpret the Constitution with a right of appeal to this Court as the appellate Court of last resort.

Under the Uganda Constitution, courts and tribunals have jurisdictions to hear and determine disputes arising from the application of such articles as 20, 23, 26, 28, 31,32, 35, 42, 44, 45, 50, 52, 53, 67, 84, 107, 118 and generally under chapter 8 of the Constitution. In my opinion, Article 137(1) and 137(3) are not mutually exclusive. I do believe that the jurisdiction of the Constitutional Court as derived from Article 137(3) is concurrent with the jurisdiction of those other courts which may apply and enforce the articles enumerated above, but there is an important distinction that I see and that is that for the Constitutional Court to claim and exercise the concurrent jurisdiction, the validity of that claim and the exercise of the jurisdiction must be derived from either a petition or reference to have the Constitution or one of its provisions interpreted or construed by the Constitutional Court. In other words, the concurrent original jurisdiction of the Court of Appeal sitting as a Constitutional Court can only arise and be exercised if the petition also raises question as to the interpretation or construction of the constitution as the primary objective or objectives of the petition. To hold otherwise might lead to injustice and, in some situations, manifest absurdity.

Take the case of a pupil who comes late in a primary school. The teacher imposes a punishment upon the pupil who is required to clean the classroom after school hours. Can it have been the intention of the framers of the Constitution that as an alternative to the pupil's right to complain and seek redress from the head teacher of the school board of governors, the pupil would be entitled to petition the Constitutional Court under Article 137(3)(b) on the grounds that his rights under Article 25(3) have been violated in that he or she has been compelled to do "forced labour"? A prison officer opens and reads a sealed letter addressed to one of the inmates suspecting that the letter contains secret information advising the prisoner how to escape from jail.

Would it be reasonable for the prisoner to petition the Constitutional Court on the grounds that the opening of his mail was inconsistent with Article 27(2) of the Uganda Constitution which provides that no person shall be subject to interference with the privacy of that person's home, correspondence, communication or other property or should the prisoner complain to the Minister of State responsible for prisons?

A resident in suburbia is constantly awakened from sleep by the loud noise from a disco nearby. Should the resident petition the Constitutional Court under Article 43(1) on the ground that the enjoyment of music by musicians and dancers has directly interfered with the right of quiet and peaceful enjoyment of the property? Or should the resident be advised to go to the local government council for possible reconciliation and redress? In my opinion, it could not have been the intention of the framers of the Uganda Constitution that such matters inconsistent as they may appear with the provisions of the Constitution would have direct access to the Court of Appeal which happens to be one the busiest courts in the land, entertaining appeals from other diverse courts and judges.

This Court must give guidelines on these matters by construing the Constitution so as to avoid these absurdities and so direct such suits and claims to lower tribunals, magistrates' courts and, where appropriate to the High Court.

It is to be noted that the Constitutional Court consists of not less than five senior judges of the Court of Appeal. The Court hears many appeals involving grave and important issues of public importance. It cannot have been in the contemplation of the makers of the Constitution for the present or the future that in the event of such small claims going direct to the Court of Appeal as a Constitutional Court, the Court of Appeal should be in a position of deciding whether or not to abandon appeals involving death sentences, treason and gross violations of other human rights originating from the High Court and entering the Court of Appeal by way of ordinary procedure in order first to resolve those trivial matters arising from allegations that they are inconsistent with the provisions of the Constitution under Article 137(3) and (7).

Therefore it is my opinion that while the Constitutional Court would have jurisdiction to hear and determine the petition, in exercising that jurisdiction in this case it exceeded its powers by taking into consideration and determining matters not contemplated under Article 137. I do not believe that the Constitutional Court was correct in accepting the arguments that Article 97 of the Constitution which is merely an enabling Article had been violated when in fact the only relevant law which needs to be considered and taken into account were the Acts of Parliament and other laws in which the immunities and privilege contemplated by that article are clearly defined, described and limited. Article 97 does not, by itself create any immunities or privileges for which the respondent could have taken advantage of It merely directs Parliament to create, define and describe them. "

D. THE DISABLING LAW

By "disabling law" we refer to that body of jurisprudence that has arisen from the preliminary objections raised by the Attorney General and other respondents to have actions struck out.

We set the objections in quotations in the popular form in which they are raised and we seek to discuss the relevant cases and provide some answers to the objections. Hopefully what was a shipwreck for those who went before will become a seamark for those to come.

1. "The applicant has no locus standi to bring this action"

This has been raised severally in Article 50 proceedings

The Constitutional Court in **RWANYARARE-V-ATTORNEY GENERAL** [Constitutional Petition No. 11 of 1997] found it difficult to accept that an action could be brought on behalf of an unnamed group of persons. **Justice Manyindo DCJ** (then) ruled that the implications on costs and the doctrine of res judicata would be too great.

To quote the Learned Judge;

"We cannot accept the argument of Mr. Walubiri that any spirited person can represent any group of persons without their knowledge or consent. That would be undemocratic and could have far reaching consequences. For example ... how would the Respondent recover costs from the unknown group called Uganda Peoples' Congress? What if other members of Uganda Peoples' Congress chose to bring a similar petition against the Respondent, would the matter have been foreclosed against them on the grounds of res judicata. "

The petitioners in that case sued on behalf of the members of Uganda Peoples' Congress (UPC) alleging that their political rights had been infringed. The action was brought before the Constitutional Court under Articles 50 and 137 and the Court went on to hold that it could not be brought on behalf of unnamed persons.

The question arose again in the Non-Smokers rights case. This was an action brought on behalf of non-smokers for declarations that smoking in public places violated the non-smokers constitutional rights to a clean and healthy environment and to life. It went without saying that all the nonsmokers in Uganda could not be and were not named in the motion.

The Attorney General raised the objection that the action was not maintainable on the basis of the **RWANYARARE** decision.

The Court overruled the objection and found that in public interest litigation there was no requirement for *locus standi*. The Court relied on the English decision of **IRC-V-EXP. FEDERATION OF SELF EMPLOYED** [1982] AC 643 and the Tanzanian decision of **REV. MTIKILA-V-ATTORNEY GENERAL** [H.C.C.S No.5 of 1993] The Court further ruled that the interest of public rights and freedoms transcend technicalities, especially as to the rules of the procedure leading to the protection of such rights and freedoms. The Judge ruled that it was compelling that the Applicant would stand up for the rights and freedoms of others and he would accordingly grant them a hearing.

In **MTIKILA**, (supra) the Tanzanian Court relied on a similar provision in the Constitution which enabled citizens to bring actions in defence of the Constitution. The Court found that this provision vested citizens with both a personal and a communitarian capacity. The Court further justified public interest litigation based on the prevailing socio-economic conditions; the low literacy level, financial disablement and the culture of apathy and silence deriving from years of ideological conditioning. To the Court this justified any public-spirited individual taking on the burden of the community and it would be contrary to the Constitution to deny him or her standing.⁶

This reasoning was echoed again in **B.A.T LTD-V-TEAN** [Misc. Application No. 27 of

⁶ LUGAKINGIRA (Ibid)

2003 Arising from Misc. Application No. 70 of 2002] where the trial Judge overruled an objection by the Applicant who sought to say that since the words "public interest" did not appear in our Constitution as they did expressly in the South African Constitution then public interest litigation was prohibited. The learned Judge stated;

"It is elementary that "person", "organizations" and "groups of persons" can be read into Article 50(2) of the Constitution to include "public interest litigants" as well as all the litigants listed down in (a) to (e) of the South African Constitution. In fact the only difference between the South African provisions (i.e. Section 38) and our provision (under Article 50(2)) is that the former is detailed and the latter is not. That is my considered view based on the reality that there are in our society, persons and groups of persons whose interest is not the same as the interest of those who Lord Diplock referred to as "spirited" persons or groups of persons who may feel obliged to represent them i.e. those person or groups of persons acting in the public interest. To say that our Constitution does not recognize the existence of needy and oppressed persons and therefore cannot allow actions of public interest groups to be brought on their behalf is to demean the Constitution"

Unfortunately no reference was made to the RWANYARARE decision in the ruling and the Attorney General's application for leave to appeal on this point was struck out as being out of time.

Locus standi in the context of actions to enforce environmental rights also holds some potential issues. As we have seen from the treatment of Article 50, it entitles any person to enforce any of the constitutional rights including the right to a clean and healthy environment (Article 39)

Article 17(j) of the Constitution makes it the duty of every citizen, including members of the Bench, to create and protect a clean and healthy environment.

In **BYABAZAIRE THADEUS-V-MUKWANO INDUSTRIES** [H.C.C.S No. 466 of 2000] It was held that it was only the National Environment Management Authority (NEMA) that could bring an environmental action, based on the provisions of S.4 of the National Environmental Statute 1995

It is submitted that a purposive reading of the Constitution read with the National Environment Statute 1995 should open the gates to all citizens seeking to do their duty in protecting the environment.

2. ***"The applicant failed to comply with O.Ir.8 procedure for bringing representative suits"***

O.Ir.8 CPR provides

"where there are numerous persons having the same interest in one suit, one or more of such persons may with the permission of the Court, sue

or be sued, or may defend in such suit on behalf of or for the benefit of all persons so interested”.

This is the basis for representative suits, where all parties have the same interest and therein lies the distinction between representative actions and public interest litigation.

The issue arose in the Non-Smokers rights case where it was contended that **TEAN** did not have the authority of the non-smokers in Uganda to bring an action on their behalf. It was contended that **TEAN** should have first sought an order under O.Ir.8 CPR to bring the action.

The Court found O.Ir.8 inapplicable in so much as the Applicant, did not have the same interest as the non-smokers on whose behalf the action was being brought. The requirement of having the same interest is key to the application of O.Ir.8 while there is no such requirement in Article 50.

The issue arose again in **BRITISH AMERICAN TOBACCO UGANDA LTD-V-TEAN** [Misc. Application No. 70 of 2002]. The Court dealt with the RW ANY ARARE case on the point of whether one could sue for unnamed other persons without their authority and properly distinguished it.

The learned Judge stated;

"I do not agree at all with Counsel's argument that no distinction can be drawn between these groups of persons and the group of persons represented or purported to be represented by Dr. Rwanyarare and others in Constitutional Petition No. 11 of 1997.

The distinction is quite obvious; Dr. Rwanyarare and another were representing the group described in the application or "specific and identifiable existing persons or groups". Such group is the one referred to as Uganda Peoples Congress. With due respect to the Constitutional Court (they) cannot have been talking about the type of persons of persons I have referred to above namely; the children, the disabled and the illiterates. These are persons who cannot be served under OIr.8 CPR, the reasons being they are not easily identifiable; they cannot be served as they would have no capacity to respond with a view to requesting to be joined in the action and they have no similar interest with those who represent them. To say that either these people are lumped together with the members of Rwanyarare's interest or that they do not fall under the Constitution in Article 50(2) of the Constitution is to belittle the foresight of the framers of the Constitution. "

Later in the judgment

"Dr. Rwanyarare and another had similar interest with fellow UPC members. They could therefore sue on behalf of the fellow members of UPC and actually and logically O.ir.8 CPR should apply. The same should apply to members of a

football club, of a golf club or of a trade union. But the question is can the rule apply to groups of people who because of inability or incapability engendered by say ignorance, poverty, illiteracy, etc cannot sue or be sued or defend a suit for the simple reasons that apart from being indigent, they cannot even identify their rights or their violations. These are the groups who badly need the services of "public interest groups" like TEAN to bring action on their behalf under what in paragraph 38(d) of the South African Constitution is referred to as "public interest persons" but who have no similar interest on the action with those they represent.

It cannot be denied that such group of persons abound in our society and we cannot hide our heads in the sand by saying that the' Constitution does not expressly mention them and therefore they must be excluded from the Constitutional provision regarding recourse to remedies when rights are violated. It is to be remembered that such groups cannot be served either directly or indirectly. They have neither postal address nor telephones. Their fate depends entirely on the public interest litigation groups or persons and they are not personally identifiable; yet they exist and can be identified only as a group or groups.

The Constitution cannot escape from authorizing representative action without interest sharing with those who represent them. That is why Article 273 of the Constitution becomes handy because the rules of procedure [O.1r.8] are in this respect, rendered inoperable by the Constitution. Needless to say that it would be illogical to argue that actions brought b such persons or groups of persons for the redress of the violation of their inalienable rights should be governed by the procedure under O.ir.8CPR. The procedure cannot govern them simply because they do not share the concerns of violating their rights with those who bring action on their behalf. "

A subsequent case, the Kaveera suit (supra) also followed the reasoning in the Non-Smokers case on distinguishing representative suits from public interest litigation.

There is a strategic reason for using such "an outsider" in public interest litigation as opposed to representative suits in some matters. In the case of **SIRAJI WAISWA-V-KAKIRA SUGAR**, [H.C.C.S No. 69 of 2001] the Plaintiffs brought an O.1r.8 representative action to restrain the Defendants from depriving them of their woodlots in the Butamira Forest.

The Court ruled that the suit was effectively and fully withdrawn by the lead Plaintiff when he signed a notice of withdrawal, even though he did so improperly without the full consent of the parties he was representing. The situation was remedied by the woodlot farmers filling a fresh suit and having all of them remain as independent plaintiffs.

If however the civil society groups that backed the woodlot farmers had in the first place, brought the action themselves on behalf of the woodlot farmers, this could have been

avoided and it is submitted, the trial would have proceeded much faster.

3. "The applicant did not give statutory notice"

This refers to the requirement under the Civil Procedure (Limitation and Miscellaneous Provisions) Act 1967 as amended that a 45-day notice be issued before commencing any proceedings against the Government, or any scheduled corporation.

This was another ground of objection in the Non-Smoker's rights case. Fortunately the matter had already been adequately laid to rest in the previous decisions of **RWANYARARE -V-ATTORNEY GENERAL** [Misc. Application No. 85 of 1993] and **OKECHO-V-ATTORNEY GENERAL**. [Misc. Application No. 124 of 1999].

In the **RWANYARARE**, (1993) (supra) Court considering the equivalent Article of the 1967 Constitution and The Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992, found that the Civil Procedure (Limitation and Miscellaneous Provisions) Act 1967 did not apply to actions to enforce human rights. The Learned Judge found that it would be incompatible with human rights enforcement.

4. "The matter is Res Judicata"

Certainly it would appear from the wording of S.7 Civil Procedure Act (Cap.65) that the doctrine of Res Judicata therein prescribed, does apply. The doctrine provides that once a matter has been heard and determined by a competent court, it cannot be tried again. Explanatory note no. 6 under this section, provides that

"where persons litigate bonafide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall for the purposes of this section be deemed to claim under the person so litigating"

It is however suggested that the construction would be stretching the interpretation of the section to cover a form of action not anticipated by nor created by the Civil Procedure Act (Cap. 65). Public interest litigation is a creature of the 1995 Constitution and it cannot be limited by earlier Act that is premised on requirements of *locus standi*.

However attractive that argument may be the practical problem arose in **HON. NORBERT MAO-V-ATTORNEY GENERAL** [Constitutional Petition No.1 of 2002]. In that case, the Petitioner brought the action on behalf of 21 persons from his constituency for declarations under Article 137 and for redress under Article 50, arising from an incident in which UPDF officers attacked a prison and forcibly took away 20 prisoners and killed one in the process.

Unknown to the petitioner another action had been filed and had proceeded to judgment. **HON. RONALD REGAN OKUMU-V-ATTORNEY GENERAL** [Misc. Application No. 0063 of 2002] had been filed in the High Court of Gulu under Article 50 seeking similar reliefs.

The Constitutional Court dismissed the petition on the plea of res judicata and in accordance with that doctrine, ignored the petitioner's pleas that there were important constitutional declarations sought that had not been and could not be addressed in the lower court. The doctrine of Res Judicata, allows a litigant only one bite. It prevents a litigant, or persons claiming under the same title from coming back to court to claim further reliefs not claimed in the earlier action. Accordingly Hon Mao, like the Dickensian character Oliver Twist, could not ask for more.

5. A respondent?

The 1992 Rules require that the Attorney General be served. It is not the same thing as requiring that he be named as a party. In considering similar provisions under Article 137, in **SERUGO** (supra) the Court ruled that a petition could be made exparte, although the Attorney General could be joined at the instance of the Court.

The Constitutional Court has power to entertain a petition that does not name a respondent but may of its own motion join the Attorney General.

Lack of a respondent does not in itself make the petition incompetent. **[DR. JAMES RWANYARARE & BADRU WEGULO- V-ATTORNEY GENERAL**
(Constitutional Appeal No.1 of 1999) **PAULO SSEMWOGERE-V-ATTORNEY GENERAL** (Constitutional Appeal No.1 of 2000)]

In **ZACHARY OLUM & JULIE RAINER KAFIRE** [Constitutional Petition No.6 of 1999] the Court took issue with the Attorney General raising a preliminary objection that the petition did not show any liability of Government and that consequently the petition did not disclose a cause of action against the Attorney General. Court followed earlier decisions of **SSEMWOGERERE & OLUM-V-ATTORNEY GENERAL** and **RWANYARARE & ANOTHER** [Constitutional Petition No.5 of 1999], which held that in matters of great public interest, the Attorney General should be made a party even by Court on its own motion. Court therefore found it remarkable that the Attorney General would seek to be struck out of a petition seeking to strike down a provision of law concerning an important organ of state.

In **B.A.T –V- TEAN** an attempt was made to argue that a private organisation cannot be named as a respondent in an action for enforcement of human rights. It was argued that as between private citizens only municipal law could be enforced. The premise for this is the theory of vertical versus horizontal application of the Constitution that the Constitution applies as between citizen and state and not as between private citizens.

Unfortunately the point was not addressed. It however seems settled by Article 20(1), which provides that all shall be bound by the Constitution.

As was stated in **SARAH LONGWE** this would be tantamount to saying that a private organisation.

6. "There is no cause of action"

This argument arises from the fact that there is no liability in the usual sense on the part of the Attorney General for say an Act of Parliament breaching the Constitution. In this light, judged by the ordinary standards for disclosure of a cause of action", there would be none.

However the subtle distinction was made in **SERUGO** (supra), by Mulenga JSC between a cause of action in an ordinary civil suit and a cause of action in a constitutional petition. He stated;

*"A petition brought under this provision (Article 137), in my opinion sufficiently discloses a cause of action, if it describes the act or omission complained of and shows the provision of the Constitution with which the act or omission is alleged to be inconsistent with or which is alleged to have been contravened by the Act or omission and prays for a declaration to that effect. It seems to me therefore that a cause of action in tort or contract as described in **AUTO GARAGE-V-MOTOKOV**. Thus apart from the drafting requirement introduced through the Rules under Legal Notice No.4 of 1996, that the Petitioner be described as "aggrieved" it is not an essential element for the petitioner's right to have been violated by the alleged inconsistency or contravention."*

7. "The affidavit in support is defective leaving the application without evidence"

In **CHARLES MUBIRU-V-ATTORNEY GENERAL** [Constitutional Petition No.1 of 2001] the petitioner contended that the statutory law relating to the grant of bail were unconstitutional. The petitioner was released on bail before the determination of the petition and it was accordingly withdrawn. The Court however chose to deliver a ruling on preliminary objections raised earlier one of which was an objection to the affidavit in support of the petition.

It was contended that the affidavit in support of the petition offended O.17r.3 (1) CPR which provides that save in interlocutory applications, an affidavit must be restricted to such facts as the deponent is of his own knowledge able to prove. It was argued that the affidavit was therefore defective since it included matters on information and belief.

The Court ruled that the affidavit offended O.17r.3 (1) and was therefore defective and ordered it to struck out. The Court then concluded

"...clearly on the face of it, the provisions of S.14(A)(1) of the T.LD as amended appear to conflict with Article 23(6)(a) of the Constitution. This Court therefore would have had jurisdiction in this aspect of the petition, if the petition was supported by evidence. As we have found the petition lacked evidence and could not be entertained".

In all likelihood, following the liberal line on affidavits adopted in **KIIZA BESIGYE-V-YOWERI KAGUTA MUSEVENI** [Election Petition No. 1 of 2001] it is unlikely that his point would still be decided the same way.

However also worthy of comment is that the Constitutional Court, after observing a law in apparent contravention of the Constitution and governing such a fundamental right to liberty and to bail when charged with an offence, still chose to let the matter lie! Is this not countenancing an infringement of rights to continue? Even in ordinary civil matters the dictum is that Courts should not suffer illegalities [**CARDINAL EMMANUEL WAMALA NSUGUBA -V- MAKULA INTERNATIONAL HCB**]

8. "The suit is time barred"

Rule 4(3) of the Constitutional Court Rules 1996 requires that a petition be filed within 30 days of the breach of the Constitution complained of.

The irony of a limitation provision for constitutional actions was well articulated by **ODER JSC** in **SERUGO** (supra) where he stated;

"It is certainly an irony that a litigant who intends to enforce his right for breach of contract or for bodily injury in a running down case has far more time to bring his action than one who wants to seek a declaration or redress under Article 137 of the Constitution"

From an initially very strict position on this requirement the Court has now moved to mitigate its harshness. The case of **ATTORNEY GENERAL-V-DR. JAMES RWANYARARE** [Misc. Application NO.3 of 2002 arising from **CONSTITUTIONAL PETITION NO.7 OF 2002**] gives a full review of the Court's approach on the 30-day limit.

They refer to what can only properly be called lamentations of the Supreme Court on the harshness of the 30-day rule made in the case of **SERUGO** (supra). The Justices of the Court noted that the 30-day rule had the effect of stifling the constitutional right to go to the Constitutional Court rather than encouraging it and they called on the appropriate authority (who is in fact the Chief Justice) to do something.

The **RWANYARARE** case then reviews the post **SERUGO** cases where the Constitutional Court took steps to modify and mitigate the harmful effects of Rule 4. In its decisions in **ZACHARY OLUM** (1999), **MUGERWA-KIKUNGWE** (2000), **ALENYO** (2001) **NAKACHWA** (2002), the Court adopted the position that the 30 days would begin to run from the day the petitioner perceives the breach of the Constitution. Their Lordships felt that this would "*make the rule workable and encourage, rather than constrain the culture of constitutionalism*"

The question in **RWANYARARE** was when does the perception that an Act of Parliament has breached the Constitution take place? The Court found that for a mature mentally normal person the date of perception of breach of the Constitution by an Act of Parliament would be the date when the Act comes into force because of the presumption

of knowledge of the law and the old adage that "ignorantia juris nemien excusat" However, clearly the Court still remains uncomfortable with their own interpretation. They go on to ponder the fate of infants and unborn children who may grow up to find that the continuing effect of a constitutional breach by an Act of Parliament contravenes their rights and freedoms or even threatens their very existence. The Court concluded on this note after reviewing part of the preamble to the 1995 Constitution.

"It seems to us that a Constitution is basic law for the present and future generations. Even the unborn are entitled to protection from violation of their constitutional rights and freedoms. This cannot be done if the 3D-day rule is enforced arbitrarily. In our view Rule 4 of Legal Notice No.4 of 1996 poses difficulties, contradictions and anomalies to the enjoyment of the Constitutional rights and freedoms guaranteed in the 1995 Constitution of Uganda. We wish to add our voice to that of the Supreme Court that this rule should be urgently revisited by the appropriate authorities"

What happens if what is being challenged is existing law, like in the case of the **UGANDA ASSOCIATION OF WOMEN LAWYERS-V-ATTORNEY GENERAL** [Constitutional Petition No.2 of 2003] where FIDA and 5 other persons are challenging the constitutionality of the Divorce Act (Cap. 215). When does the perception of breach occur? [This case is still pending and no further comment can be made on it] It nonetheless demonstrates the folly of the Constitutional Court's "case by case" approach advocated in **NAKACHW A**.

Perhaps the most comprehensive attack on the rule has been made by maybe its most frequent victim. **PETER WALUBIRI** in his book Constitutionalism at Crossroads argues extensively why the 30-day should be done away with. Interestingly one of the lines of his attack is that the Chief Justice had no power to rule limiting access to the Courts.

This debate on the word "interpretation" has implications for Article 50 actions. In **SERUGO Justice Oder** stated that declarations cannot be made without interpretation of the constitutional provisions which the Act or Statute complained of allegedly contravenes.

It is perhaps on this basis that the Attorney General in the Non-Smokers rights case argues that before an Article 50 action can proceed, it must first go to the Constitutional Court for the requisite interpretation to be done and declarations then issued and that it is only after that the enforcement can be done under Article 50.

This argument was advanced in the Non-Smokers rights case and fortunately summarily dismissed with the Principle Judge a distinction between "interpretation" and "application" of the Constitution.⁷

9. An alternative remedy?

⁷ Misc. Application No. 39 of 2001. Ruling dated 5th July 2002.

The Constitutional Court has dismissed actions before it, which it felt, were best to alternative remedies. This was the case in the cases of In **RWANYARARE-V-ATTORNEY GENERAL** [Constitutional Petition No. 11 of 1997] and also **KABAGAMBE-V-UEB** [Constitutional Petition No.2 of 1999]. In the latter case a petition was dismissed because the Court felt that it was disguised wrongful dismissal case better handled by a competent court under Article 50 and 129.

Also in **KARUGABA-V-ATTORNEY GENERAL** [Constitutional Petition No. 11 of 2002] the Petitioner sought to challenge Rule 15 of the Constitutional Court Rules 1996 which provided for the abatement of any petition after the death of a sole petitioner. The Rule had been applied to this effect in **NAKACHWA** (supra). It was argued that the right to bring an action was "*property*" of the petitioner as a *chose in action* and could therefore not be taken away from the Petitioner's estate (simply by fact of the petitioner's death) The Court found that the right of a citizen to petition the Constitutional Court for declarations (as opposed to redress) was a special right which was extinguished by the petitioner's death. The petitioner's claims for redress could be saved and continued in a competent court under the Law Reform (Misc. Provisions) Act 1974.

That may well be but how can this and the **KABAGAMBE** decision be reconciled with the dicta in **ALENYO** where the same Court clearly stated;

"... it is not relevant either that there is a remedy available to the petitioner elsewhere. That alone cannot deprive the Court of jurisdiction specifically conferred on it under Article 137. "

In **SARA LONGWE-V-INTERCONTINENTAL HOTELS** [1993] 4 LRC 221, while considering the argument on alternative remedies, the Court held;

"I must also state that it is true that most of not all the rights which have been provided for by the Bill of Rights are also covered by personal or private law such as the law of torts or commercial law. But that state of affairs does not deprive an aggrieved of his choice, whether to proceed under the Bill of Rights or under another branch of the law. The golden choice in this regard is the aggrieved person's".

The same position was reached in **PUNBUM-V-ATTORNEY GENERAL** [1993] 2 LRC 317, where it was held that it was no defence to a constitutional action that there are alternative remedies. A complainant was free to choose the most beneficial method legally open to him or her to prosecute his or her case.

It is certainly preferable that the citizen be free to choose his remedy. Should he seek the solace of a Constitutional Court declaration rather than the remedy of a civil suit the so be it.

10. Costs

So far parties in public interest litigation appear to have been content with not seeking costs orders in their favour and the Courts have been "largely" pleased to oblige. This

may have been a matter of strategy and prudence.

However as far back as **EDWARD FREDRICK SSEMPEBWA-V-ATTORNEY GENERAL** [Constitutional case No.1 of 1987] there is authority to support the proposition that where a matter is brought bonafide in the public interest seeking clarification on important matters of law, that the costs be paid to the petitioner in any event. This is so in other jurisdictions as far flung as Australia.

In **KARUGABA** (supra) in their separate judgments, all Judges of the Court made no order as to costs "on the grounds of public interest", however without further explanation.

E. THE FUTURE

“Speak up for those who cannot speak for themselves, for the rights of all who are destitute, speak up and judge fairly; defend the rights of the poor and needy”

Proverbs 31:8-9

Several civil society organizations have submitted a joint memorandum on proposed amendments to Article 50 to facilitate public interest litigation. Some of the proposals address issues of costs and filing fees. There is also a proposal to extend Article 50 jurisdiction to the lower courts.

The potential of public interest litigation to force issues that the Government is unwilling to legislate or otherwise act upon, will come to naught if the Judiciary is unwilling to take bold steps in this new direction.

We need a bold and courageous Judiciary to take the challenge of public interest litigation and through judicial activism to give life and vibrance to the Constitution.

We need judicial creativity to bring new thinking to old problems and seek new solutions. We also need judicial courage to follow on these new solutions to give full meaning to the Constitution.

The Courts should not plod on enforcing old laws that do not stand the test of Constitution; the laws of sedition; the Divorce Act; the death penalty are only some of the offending ones.

The courage demonstrated by the Bench in **OSOTRACO-V-ATTORNEY GENERAL** [H.C.C.S No. 1380 of 1986] is a good development. In that case the learned Judge declined to apply S.15 of the Government Proceedings Act (Cap. 69) prohibiting making of orders for recovery of land against Government on the grounds that it did not conform with the Constitution. He ordered the Attorney General to give vacant possession of suit property to the Plaintiff.

In **RWANYARARE-V-ATTORNEY GENERAL** (Constitutional Application No.6 of 2002 arising from Constitutional Petition No.7 of 2002)] the Court also found courage to

do away with the protections under the Government proceedings Act and to grant an injunction against the Government.

The Non-Smokers rights case was also path breaking by the trial Judge. As one commentator put it *"by courageous and liberal interpretation to the Constitution, this decision seems not only to have potentially opened wide the flood gates for public interest litigation in Uganda, but to have torn out the gate posts and cast them asunder."*⁸

In **LUB-V-LUB** [Divorce Cause No. 47 of 1997] the High Court applied Article 31 of the Constitution and found that even though the Petitioner had not proved desertion or cruelty, she would still be entitled to a divorce on proof of adultery.

However there are still very sad traces of restraint by the Bench. **LILLIAN TIBATEMA - EKIRIKUBINZA**⁹ highlights a number of cases where the Bench while identifying a human rights problem has still shied away from resolving it.

One such case is **UGANDA-V-HARUNA KANABI** [Criminal Case No. 997 of 1995] where the accused was charged with sedition and in the course of her judgment, the presiding Chief Magistrate of her own brought up the issue of the constitutionality of the charges. After expressing he doubt, the Court said

"This Court is not a constitutional court. It therefore lacks capacity to interpret the provisions of the constitution beyond their literal meaning. As such I am of the view that where the State having regard to its supreme law keeps on its statute books a law that makes it an offence to do a certain act and hence to limit the enjoyment of a specified freedom, this Court will accept that restriction as lawful and shall go ahead to punish any transgression of the same according to the existing law until such a time as the State deems it fit to lift such restriction after realizing that such restriction violates a certain right"

The Court went on to use the existence of the Constitution and the individuals right to freedom of expression as a point of mitigation!

The question is why the Court didn't refer the matter for interpretation. Why did it convict and sentence in light of what it felt was a contravention of the Supreme Law of the land. Even more strange is that on appeal to the High Court, again though not raised by the parties, the Court ruled the trial Magistrate's concerns on constitutionality and stated that it should have been referred to the constitutional Court. The Court declined to do so itself since, the matter was not brought up before it.

However, it is not for the Judiciary to go it alone. Even to the Bar, there is a call to action. George Bizos a leading South African Human rights lawyer said;

"It has been said that the Courtroom is the Last forum in which the oppressed can

⁸ Law Africa Commentaries

⁹ In her paper "The Judiciary and enforcement of Human Rights: Between Judicial Activism and Judicial Restraint [East African Journal of Peace and Human Rights vol. 8 No.2 2002]

... speak their minds. Our Jobs as lawyers is to facilitate that opportunity”¹⁰

In Uganda’s context this is doubly important. **DR. RWANYARARE’s** unrestricted access to the Courts should be seen as fundamental to the resolution of political disputes. AS seen before and continue to see, when out of choices aggrieved citizens go to the bush.

Bizos¹¹ has further advice for the Bar.

“Lawyers should do enough work to make a good living, but if they have a social conscience then they should not shun badly paid or even, if circumstances present themselves, they should in some cases work for nothing. If they do that, not only is it good for their country or community but it is also socially significant”

¹⁰ International Bar News September 2003.”Driven to defend the disadvantaged. A profile of George Bizos”.

¹¹ Ibid

