

**African Institute Of Energy Governance
(AFRIEGO) v Attorney General (Consitutional
Petition 15 of 2020) [2024] UGCC 30 (9 May 2024)**
[2024] UGCC 30

Source: ulii.org · Research copy typeset by Esheria. Not court-issued or certified.

Corant: Buteera, DC,J, Bamugemereire, Mutangula Kibeedi, Mulyagor{a & Kihika, JJCC

a I

AFRICAN INSTITUTE FOR ENERGY GOVERNANCE
(AFIEGO) :::::::::::::::::::::::::::::::::::::: PETITIONER

VERSUS

ATTORNEY GENERAL :::::::::::::::::::: RESPONDENT

O

O

JUDGMENT OF IRENE MULYAGONJA, JCC

This petition was brought under Articles 137 (3)(a) and (b), a(a) and (b), and 50(1) and (21 of the Constitution of the Republic of Uganda, 1995, and the Constitutional Court (Petitions & References) Rules, 2005. The petitioner alleged that certain provisions of the National Environment Act were inconsistent with or in contravention of Articles 39 and 245 of the Constitution.

Background

25 30 The petitioner is a company limited by guarantee which focuses on good energy governance, accountability and environmental preservation. The background to this petition, as deduced from the affidavit in support thereof, is that at present there is a lot of pollution in the country. Further that this is a fact that was acknowledged by the National Environment Management Authority ("NEMA" or "the Authority") in its National State of the Environment Report, 2014.

tu

5 The petitioner states that under the National Environment Act, a technical committee constituted by the board governing NEMA is empowered to entertain applications for "a pollution licence from entities intending to carry out pollution," or whose activities have that effect, by issuing a licence permitting the holder to carry out an activity which pollutes land, water or air, in excess of the standards or guidelines prescribed in the National

o

o

,

Environment Act, "the impugned Act."

The petitioner further contends that NEMA should concentrate on more stringent measures to prevent and avoid pollution, and that relaxing the law to allow pollution could be abused, especially in the wake of the discovery of additional resources leading to increased industrialisation, mostly in the oil sector. That the issue of "pollution licences" under the impugned Act encourages project developers to seek for them as opposed to devising means to avoid pollution. Further that with evolving technology, diligent industries can effectively tame any sort of pollution and the law ought to encourage that, as opposed to condoning environmental degradation.

The petitioner referred to jurisdictions in the United States of America and stated that in those jurisdictions, pollution is strictly legislated against and principles aimed at avoiding it have been established. That as a result, the respondent should borrow a leaf from such jurisdictions and enact more stringent laws and adopt tighter methods and approaches aimed at preventing and avoiding pollution. The petitioner is therefore aggrieved that the National Environment Act

contravenes the constitutional imperatives for a good and healthy environment on the following grounds:

1. Sections 81(3)(b), 82(1) and 83(1)(d) of the National Environment Act, 2019 which empower the National Environment Management 30

⁵ Authority (NEMA) to issue licenses to entities authorising them to pollute the environment are inconsistent with Articles 39 and 245(a) of the Constitution of Uganda.

2. That section 83(2)(a) of the National Environment Act, 2019 which empowers NEMA to issue a license to an entity intending to pollute the environment in the absence of an environmental impact study over the likely dangers of the activity to the environment is inconsistent with Articles 39 and 245(a) of the Constitution of Uganda.

The petitioner therefore sought the following remedies from this court

- (a) A declaration that sections 81(3)(b), 82(1) and 83(1)(d) of the National Environment Act, 2019 are inconsistent with Articles 39 and 245(a) of the Constitution in as far as they deprive the affected persons of the right to a clean and healthy environment.
- (b) A declaration that section 83(2)(a) of the National Environment Act, 2019 is inconsistent with Articles 39 and 245(a) of the Constitution in as far as it deprives the affected persons of the right to a clean and healthy environment.
- (c) Such other relief/reliefs as this court deems fit.
- (d) No order be made as to costs.
- The petition was supported by the affidavit of Doreen Namara, a Legal Officer employed by the petitioner, dated 21st August 2020. 25

The respondent opposed the petition. In his answer it was stated that the impugned provisions are not inconsistent with the Constitution as alleged but were intended to ensure a clean and healthy environment by effectively controlling pollution. That the impugned provisions empower NEMA to

³ 1

a

a

D

issue "pollution control licenses" and NEMA does not authorize entities to pollute the environment as it is insinuated by the appellant.

Further, that Section 83(2)(a) of the National Environment Act does not disregard the requirement for an environmental impact study but rather ensures that an environmental and social impact assessment is conducted upon considering the circumstances stipulated therein, to wit: the nature of the activity requested and the pollution likely to result from that activity. That the objective of this provision is to ensure a clean and healthy environment by effectively controlling pollution. That as a result, the petitioner is not entitled to any of the orders, declarations and reliefs sought in the petition, or at all. The Answer was supported by the affidavit of Oburu Odoi Jimmy, a Principle State Attorney in the respondent's Chambers, dated 31st August 2020.

Representation

\$10\$

At the hearing of the petition on 2nd March 2023, counsel for the petitioner was absent but the petitioner was represented by Mr. Aryamanya 20 Brighton, a Legal Officer employed by the petitioner, and Dickens Kamugisha, the Chief Executive Officer. Mr. Hilary Nathan Ebila, a State Attorney in the respondent's Chambers represented the respondent.

The court directed the parties to file documents and submissions that had not yet been filed by the hearing date and the petition was adjourned for 25th judgment on notice on the basis of the written submissions.

In his submissions, counsel for the petitioner framed 5 issues for determination but they can be reduced into the three issues that counsel for the respondent framed in his submissions, as follows:

$\mathbf{A}$

Ixon.

- Whether sections 81 (3) (b), 82 (1) and 83 (1) (d) of the National Environment Act are inconsistent with and/or in contravention of Articles 39 and 245 of the Constitution.
- Whether section 83 (2) (a) of the National Environment Act is ii. inconsistent with or in contravention of Articles 39 and 245 (a) of the Constitution.
- Whether the petitioners are entitled to the remedies claimed. iii.

Analysis and Determination

The right to a clean and healthy environment is guaranteed by Article 39 of the Constitution of Uganda. As a corollary to Article 39, Article 245 enjoins Parliament to enact laws to provide for measures to protect and preserve the environment. It is my view that the two provisions of the Constitution must be read together, according to the principle that the entire Constitution has to be read together as an integral whole, with no particular provision destroying the other but each sustaining the other; the rule of harmony, completeness and exhaustiveness that was 20\$

articulated in *P. K. Ssemwogere & Another v. Attorney General*, Supreme Court Constitutional Appeal No 1 of 2002; and *Attorney General of Tanzania v. Reverend Christopher Mtikila* [2010] EA 13.

My understanding of the petitioner's grievance here is therefore that while Parliament was enjoined by Article 245 of the Constitution to make laws for the protection and preservation of the environment to ensure the enjoyment of the right that is guaranteed by Article 39, when Parliament enacted sections 81 (3) (b), 82 (1) and 83 (1) (d) of the National Environment Act, it failed in its duty to do so. Instead, through the impugned provisions Parliament gave the mandate to NEMA to issue "pollution licences" to persons "intending to pollute the environment" to do so on the basis of the said licenses.

Dear.

\$10\$

S

The other limb of the complaint, as I understand it, is that by the enactment of section 83 (2) (a) of the impugned Act, Parliament empowered NEMA to issue licences to persons/entities to pollute the environment in the absence of environmental impact assessment studies, thus failing to ensure the protection and preservation of the environment; and this is contrary to the imperatives in Articles 39 and 245 of the Constitution. 5 10

The question to be addressed in this petition therefore hinges on the interpretation of Article 245 (2) (a) of the Constitution; that is: Whether sections 81 (3) (b), 82 (1), 83 (1) (d) and 83 (2) (a) of the National Environment Act are inconsistent with or in contravention of Article 245 (2) (a) of the Constitution, and by necessary implication, Article 39 of the Constitution. I propose to dispose of the petition by addressing the 3 issues that were framed by counsel for the respondent in the same order. The submissions of counsel will be considered immediately before resolving each of the issues. 15

il Whether sections 81 (3) (b), 82 (1) and 83 (1) (d) of the National Environment Act are inconsistent with and/or in contravention of Articles 39 and 245 of the Constitution. 20

Submissions of counsel

o

a

25 30 Counsel for the petitioner submitted that according to the impugned provisions of the National Environment Act, a person or entity whose activities are likely to pollute land, water or the air, in excess of the standards or guidelines issued under the Act, may apply to NEMA for and may be granted a license authorising them to pollute the environment. He contended that since Article 39 of the Constitution guarantees the right to a clean and healthy environment to every Ugandan, the impugned

⁵ provisions are inconsistent with it, in as far as they empower NEMA to authorise the violation of the right.

He went on to submit that Article 237 (2) (b) of the Constitution enjoins the state to take measures that are aimed at preserving the environment, including enacting laws aimed at achieving that goal. Further, that Objective XXVII of the National Objectives and Directive Principles of State Policy in the Constitution (herein referred to as "the National Principles of State Policy") obligate the respondent to protect the environment and to ensure that land, air and water resources are managed in a sustainable manner to promote development. He explained that the said principles are meant to guide the interpretation of the Constitution or any other law, as well as in taking any policy decisions for the establishment and promotion of a just free and democratic society, as it is stated in Objective I thereof. 15

a

o

Counsel further submitted that the respondent is under the obligation to follow the guidance in the National Principles of State Policy for the purposes stated therein to be realised. That as a result, all law making should take heed of the intents in the said principles. He referred to the decision in *Amooti Godfrey Nyakana v. NEMA & Others*, Supreme Court Civil Appeal No. 05 of 2011, where it was held (Katureebe, CJ) that the said principles are justiciable. 20

- He then asserted that in the interests of the present and future generations, any law that has the effect of condoning the contamination of the environment ought to be declared null and void to the extent of its inconsistency with the Constitution. He urged court to observe the spirit of Article 2 (21 of the Constitution; and relied on the decision in *ACODE v. 25*
- Attorney General, Miscellaneous Cause No. 1 of 2009, where it was emphasised that the right to a balanced and healthful ecology carries with 30

I

,

- ⁵ it the correlative duty to refrain from impairing the environment. He then submitted that by expressly permitting environmental pollution, the impugned provisions are in direct violation of the rights guaranteed in the Constitution.

- Counsel went on to draw the attention of the court to the African Charter on Human and Peoples' Rights, which provides that all peoples have a right to a general satisfactory environment favourable to their development. He referred to the decision in *Social Economic Rights Action Centre (SERACI) & Centre for Economic & Social Rights v. Nigerian*, Communication No. 155/96, where the Nigerian Government was found liable for the violation of the right to health and a clean environment because of the pollution of the soil, water and air, which harmed the health of the Ogoni people. He added that the African Commission emphasised that the right to a clean and safe environment is critical to the enjoyment of other human rights. 10 15

o

o

- He further relied on the decision of the Supreme Court of the Philippines in *Opesa v. Secretary of the Environment and Natural Resources*, 33 ILM 173 (1994), where the court observed that if the environment is not guarded jealously, the day would come when all else would be lost, not only for the present generation but also for those to come. 20
- In reply, counsel for the respondent submitted that sections 81 (3), 82 (1) and 83 (1) (d) are not inconsistent with Articles 39 and 25 of the Constitution, because they provide for pollution control licenses that ensure a clean and healthy environment by effectively controlling the pollution thereof. 25

He further submitted that sections 81 (3), 82 (1) and 83 (1) (d) were passed by Parliament from the National Environment Bill, 2017. Further that the object of the Bill was to repeal the National Environment Act, Cap 153, and replace it with a law addressing the concerns in the existent Government Policy. He explained that the Bill was among others to ensure that there is legislation on emerging issues, like the growing challenges around climate change, biodiversity, management of hazardous chemicals, and to offset and provide for strategic environmental assessments; provide for environmental concerns about petroleum activities which were new to Uganda; establish an environmental protection force and tribunal and provide for enhanced penalties for offences related to environmental degradation, among other things. That it was with these objectives that the impugned statute was enacted. 10 15

o

i

a

o

Counsel further submitted that Parliament passed the National Environment Act to cure the defects in the old law. He observed that all the impugned provisions fall under Part VII of the Act, which provides for the control of pollution and environmental emergency preparedness. He referred to section 81 thereof, which provides for pollution control licenses and submitted that

the license is a measure to promote sustainable development by controlling pollution for environmental conservation. He further submitted that the issue of such licenses by NEMA is in tandem with Objective XXVII, Articles 39 and 245 of the Constitution. 20 25

Counsel for the respondent relied on Vellore Citizen's Welfare Forum v. Union of India & Others (1996) wherein the Supreme Court of India discussed the concept of sustainable development as it has evolved in international law. He pointed out that the court adopted the definition of "sustainable development" that was espoused in the report by the World Commission on Environment and Development (the "Brundtland Report",

M -1

⁵ as "development that meets needs of the present without compromising the ability of the future generations to meet their own needs. " He explained that the pollution control license is indeed a precautionary measure to guard against environmental degradation in line with the precautionary principle espoused in the Vellore case. That the precautionary principle recognizes the limitations of science in accurately predicting the likely environmental impacts and thus calls for precautions in making environmental decisions where there is uncertainty. 10

{

o

O

Counsel further submitted that other jurisdictions have adopted pollution control as a precautionary measure in the quest to achieve sustainable development. That a pollution control license as a precautionary environmental measure envisages that in order to meet the development goals of the country the license ensures that pollution is controlled within certain limits, thus preserving the environment without interfering with development goals. 1.5

He went on to submit that environmental conservation is of paramount importance to the Government of Uganda. That Uganda is a signatory to the Rio Declaration of 1992 in which world leaders committed to ²⁷ principles intended to guide countries for future sustainable development. He referred to Principle No. 4 of the Declaration on the challenge between the integration of development and preservation of the environment by stating that in order to achieve sustainable development, environmental conservation shall constitute an integral part of the development process and cannot be considered in isolation from it. He further explained that in a bid to achieve the ends of the Rio Declaration, the Government integrated provisions like section 81(3)(b) of the NEMA Act into our national laws. 20 25 30

¹⁰ tu

Counsel then asserted that Section 81 of the impugned Act which provides $\$ \text{mathsf{S}} \$$ for pollution control licenses is in tandem with Objective XXVII, Articles 39 and 245 of the Constitution and that the issue of pollution control licenses under Section 81(3)(b) of the Act

does not contravene Article 39 and 245 of the Constitution. He went on to refer to section 81(5) of the Act and explained that this provision requires the technical committee to be 10 satisfied that the licensee is capable of compensating the victims of pollution, should it occur, and cleaning up the environment. He relied on the '*Polluter Pays Principle*' as it was interpreted by the Court in the **Vellore Citizens case** (supra), that the absolute liability for harm to the environment extends not only to compensating the victims of pollution but 15 also applies to the cost of restoring the environment if degraded, as a part of sustainable development.

He further referred to section 82 of the impugned Act and submitted that it only provides for who may make the application for a pollution control license and the procedure for the application. That as a result, it does not violate Articles 39 and 245 of the Constitution.

\$20\$

With regard to section 83 (1) (d) of the Act, which provides that the technical committee may grant or reject the application for a license, counsel explained that the committee is appointed by the Board of the Authority pursuant to Section \$81(1)\$ and \$(2)\$ of the Act with the authority to issue and reject the grant of pollution control licenses. That the licenses are not unconstitutional because they are a measure to ensure that in the process of achieving development goals, pollution is controlled within certain limits in order to preserve the environment for sustainable development. That the licenses are not a defence for polluting the environment as the petitioner asserts.

Iron.

\$\overline{11}\$

⁵ He concluded that the irnpugned sections of the National Environment Act are in tandem with Objective XXVII, Articles 39 and 2a5(a) of the Constitution; they thus operationalize the purpose of the said provisions of the Constitution. He invited this court to find that sections 81(3)(b), 82(1) and 83(1)(d) of the National Environment Act are not inconsistent u'ith Article 39 and 245(a) of the Constitution.

\

o

Resolution of Issue ¹

It is a cardinal principle of statutory interpretation that u,here rvords or phrases are clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense. Another principle which is just as important is that where the language of the Constitution or a statute sought to be interpreted is imprecise or arnbiguous a liberal, general or purposeful interpretation should be given to it, as it was affirmed by the court in Attorney General v. Major General David Tinyefunza, Supreme Court Constitutional Appeal No. 1 of 1997.

In the same case, Mulenga, JSC, at page 20 of his opinion, explained the depth of Article 137 of the Constitution which provides for the jurisdiction of this court when he opined that:

o

"Under clause (3) the Constitutional Court is empowered to do more than "interpret" in the sense of "giving meaning to words" of provisions of the Constitution. Under paragraph (a) of Clause (3) the Constitutional Court is empowered to, and may "interpret" provisions of an Act of Parliament or any other law in order to determine whether such Act or other law is inconsistent with some provision of the Constitution even if the latter is so clear that there is "no question" as to its interpretation. Similarly, under paragraph (b) the Court is empowered and may assess, analyse, evaluate the import of an act or omission by any person in order to determine whether such act or

to b

omission is in contravention of a provision of the Constitution without having to interpret or give meaning to that provision."

In the instant case therefore, it will be necessary to interpret and get to the import of the impugned provisions before it is determined whether they are inconsistent with or in contravention of the stated provisions of the Constitution.

Starting with section 81 (3) (b) of the National Environment Act, which the petitioners front as the main objective of filing this petition, it is my view that it cannot be interpreted on its own but must be placed within the context of the whole of section 81. I therefore deemed it necessary to lay down the whole of the provision for purposes of clarity of the analysis here; it provides as follows:

81. Pollution control licences.

- (1) The Board shall appoint a technical committee on control of pollution in accordance with section 21, composed of such persons as the Board may determine.
- (2) The Executive Director shall be the chairperson of the technical committee on control of pollution.
- (3) The technical committee on control of pollution appointed by the Board under subsection (1) shall—

(a) consider applications for pollution licences;

- (b) issue pollution licences; and
- (c) perform any other functions assigned to it by the Board.

- (4) A person shall not carry out an activity likely to pollute the air, water or land in excess of any standards or guidelines prescribed or issued under this Act except under and in accordance with α pollution control licence.
- (5) The technical committee shall not issue a pollution control licence unless it is satisfied that the licensee is capable of compensating the victims of the pollution and of cleaning the environment in

Ixon.

S

\$10\$

⁵ accordance with the "polluter pays principle" as provided for under this Act.

{Emphasis addedl

The petitioner's complaint is that clause 3 (b) above empowers the technical committee on control of pollution to issue "pollution licenses," and it is true that the provision was couched in those terms. Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean. The main principle that applies to such situations is that if the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute. We thus often begin by looking at the ordinary or reasonable understanding of a statute's text based on our own experience and understanding of language and grammar. 10 15

In this case, while it is true that clauses 3 (a) and (b) of section 83 of the impugned Act refer to "pollution licenses," we cannot come to the conclusion that it was the intention of the legislature to licence entities or people to pollute the environment by issuing such licenses. We must therefore have recourse to other rules of interpretation in order to discern the meaning of the impugned clause.

Scalia and Carnerr explain that in the interpretation of statutes and other legal instruments, there is a principle that the text is supreme. The Supremacy of Text Principle posits that, "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." The treatise goes further to state that: 25

a

o

"Of course, words are given meaning by their context, and context includes the purpose of the text. The difference between textualist interpretation and

a tu

^IAntonin Scalia & Eryan A. Garner; Reading Law: the interpretation of legal texts; Thomson/West

so-called purposive interpretation is not that the former never considers purpose. It almost always does. The subject matter of the document (its purpose, broadly speaking) is the context that helps to give words *meaning—that might cause draft to mean a bank note rather than a breeze.* And even beyond that, it can be said more generally that the resolution of an ambiguity or vagueness that achieves a statute's purpose should be *favored over the resolution that frustrates its purpose.* ..."

In this case, section 81 (1) of the National Environment Act provides for the purpose which the technical committee was meant to achieve and it is the control of pollution. It therefore cannot be reasonably inferred that the intention of the Parliament was to enable the technical committee to license persons or entities to pollute the environment, as the petitioners contend. This is especially so because the heading to the provision specifically states that its intention was to provide for "pollution control" licenses."

Moreover, Scalia and Garner (supra) further advert to the cannon that, " \$A\$ 20 *textually permissible interpretation that furthers rather than obstructs the document's purpose should be favoured."* They refer to the decision of the Supreme Court of Texas in Citizens Bank of Bryan v. First State Bank, 580 S. W 2d 344,348 (Tex, 1979), where it was stated that,

$\$S$

\$15\$

"... if the language is susceptible of two constructions, one of which will *carry out and the other defeat [its] manifest object, [the statute] should receive the former construction."*

Interpreting the impugned provision to mean that Parliament meant to legislate for the purpose of licensing people and entities to pollute the environment would defeat the intendment that is expressed in the long 30 title of the Act that it is:

> An Act to repeal, replace and reform the law relating to environmental management in Uganda; to provide for the management of the environment for sustainable development; to continue the National

Dison

Environment Management Authority as a coordinating, monitoring, regulatory and supervisory body for all activities relating to environment; to provide for emerging environmental issues including climate change, the management of hazardous chemicals and for strategic environmental offsets; to provide biodiversity assessment; to address environmental concerns arising out of petroleum activities and midstream operations, to provide for the management of plastics and plastic products; to establish the Environmental Protection Force; to provide for enhanced penalties for offences under the Act; to provide for procedural and administrative

matters; and for related matters.

Scalia and Garner (*supra*) further state that the imperative of harmony among provisions is more categorical than most other canons of construction, because it is invariably true that intelligent drafters do not contradict themselves. Hence there can be no justification for needlessly rendering provisions to be in conflict with each other if they can be interpreted harmoniously. On that basis therefore, the expression in the heading of section 81 of the Act that the provision relates to "pollution" control licenses', which is carried through to subsections (2) and (5) must be taken to apply to subsections 3 (a) and (b) of the provision as well.

Sections 82 (1) and 83 (1) (a) carry the same idea embodied in section 81 25 that the licenses issued are to control pollution, not to simply allow it to thrive or happen. For the avoidance of doubt, they provide as follows:

82. Application for a *pollution control licence*.

- (1) An application for a pollution control licence to carry on an activity which is likely to pollute land, water or air in excess of the standards or guidelines prescribed or issued under this Act shall be made to the committee in a manner prescribed by regulations.

83. Consideration of the application by the technical committee.

\$16\$

- (1) Upon receiving the application for a pollution control licence under section 82, the technical committee shall—

Ixon.

\$\cdots\$

\$10\$

S

(a) within thirty days, notify persons who may be affected by the proposed activity of the applicant and invite them to make representations;

{Emphasis added}

The issue of licenses is based on specified parameters referred to as standards or guidelines in section 82 (1) and these are specifically provided \$10\$ for in regulations and guidelines made under the Act, as it is provided for under each sub-category of pollution that is envisaged, such as: the National Environment (Management of Ozone Depleting Substances & Products) Regulations; National Environment (Waste Management) Regulations; National Environment (Wetlands, riverbanks and lakeshores 15 Management) Regulations; National Environment (Mountainous and Hilly Areas Management) Regulations; and National Environment (Audit) Regulations; among others.

Poignantly, it is not enough to interpret particular provisions of a statute without reading the whole of it in order to discern the meaning of specific provisions thereof. The 'Whole Text Cannon' requires interpreters of a legal instrument to read the whole of it as it was advanced in **K Mart Corp. v. Cartier, Inc.**, 486 U. S. 281, 291 (1988) (per Kennedy, J.), that in ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole. Scalia and Garner (supra) refer to the writings of Sir Edward Coke where he explained the Cannon in 1628 as follows:

S

$\ddot{}$

"[I]t is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best **expresseth the meaning of the makers.** ... **If any section [of a law] be* intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of the other.**"

Iron.

In that regard, the contention that the impugned provisions of the National S Environment Act enable the licensing of certain persons or entities to pollute the environment without consideration for the rights of citizens must be answered by the provisions of the Act which specifically prohibit pollution, such as section 78 thereof which provides as follows:

78. Prohibition of pollution.

\$10\$

\$25\$

- (1) A person shall not cause pollution or initiate anything that may occasion a risk of pollution, except in accordance with this Act and any other applicable law.
- (2) Subject to subsection (1), a person whose activities are likely to cause pollution shall put in place measures to prevent the pollution from occurring, including by use of best available techniques and best environmental practices.
- (3) Where any law permits venting or flaring of gases and other particulate matter into the atmosphere for normal operational purposes or emergency situations, the person who vents or flares shall take measures to minimise the pollution caused by the flaring or venting.
- (4) For the avoidance of doubt, the venting or flaring referred to in subsection (3) shall be in compliance with the air quality standards prescribed under this Act.

- (5) Notwithstanding subsections (1) and (2), the Authority may issue a licence for the control of pollution, in accordance with this Act and regulations made under this Act for activities likely to cause pollution.

{Emphasis added}

It is also important to note that there are particular provisions of the same Act which provide for the import, control and management of hazardous chemicals, waste management, management of plastics, as well as the management of processes in the oil industry. Further to that, there are some provisions of the Act which set down actions in the eventuality of 35 pollution. For instance, section 79 provides as follows:

Incor.

79. Measures to take in event of pollution.

\$(1)\$ Subject to section \$78(1)\$, where pollution has occurred contrary to this Act, regulations made under this Act, any other applicable law, environmental standards or conditions of a licence issued under section 78(5), the person responsible for the pollution shall—

- (a) take the necessary action to stop further pollution and minimise the impacts of the pollution on human health and the environment;
- (b) give notice of the pollution to the Authority and the relevant lead agency in the manner prescribed by regulations;
- (c) take steps to mitigate any damage or nuisance resulting from 15 the pollution or from measures to counteract it;
- > (d) take steps to clean up and restore the environment as near as possible to its original state; and
- (e) pay compensation for the damage caused in accordance with this Act and any other applicable law.

As to whether the impugned provisions are in contravention of or inconsistent with Articles 39 and 245 (a) of the Constitution, the two provisions of the Constitution are as follows:

39. Right to a clean and healthy environment.

Every Ugandan has a right to a clean and healthy environment. 25

245. Protection and preservation of the environment.

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.

It will be recalled that the two provisions have been considered together in this judgment as necessarily connected to each other. The petitioner's 35

Ivon:

\$10\$

\$\mathsf{S}\$

complaint is that the sections 81 (3) (b), 82 (1) and 83 (1) (d) of the National \$\mathsf{S}\$ Environment Act contravene the two provisions in as far as they deprive the affected persons of the right to a clean and healthy environment.

It is my view that the allegations have not been borne out by any evidence adduced by the petitioner in this matter. Neither has the petitioner proved that the said provisions empower NEMA to issue licenses to pollute the environment. The petitioner simply misinterpreted the impugned provisions. They also sought to have court consider them as though they stand alone, contrary to known principles of statutory interpretation.

Having analysed the said provisions within the context of the whole of the impugned statute, I would find that Parliament carried out its mandate pursuant to Article 245 (a) of the Constitution when it enacted sections 81 (3) (b), 82 (1) and 83 (1) (d), because they are measures that were put in place to protect the environment and so achieve the imperative in Article 39 of the Constitution. The impugned provisions are therefore not in contravention of and/or inconsistent with Articles 39 and 245 (a) of the 20 Constitution.

ii) Whether section 83 (2) (a) of the National Environment Act is inconsistent with and/or in contravention of Articles 39 and 245 (a) of the Constitution.

Submissions of Counsel 25

\$10\$

Mr Aryamanya for the petitioner addressed his 2nd and 4th issues together. But specifically with respect to section 83 (2) (a) of the National Environment Act, he submitted that the said provision empowers NEMA to issue a license to an entity intending to pollute the environment in the absence of an environment impact study over the likely dangers of the activity to the environment. That to that extent the provision is

Ixon

is inconsistent with Articles 39 and 245 (a) of the Constitution for failure to protect the environment from degradation.

a

a

I

He further submitted that Article 245 of the Constitution enjoins Parliament to pass a law providing for measures intended to protect the environment from abuse, pollution and degradation. He contended that Section 83(2)(a) of the National Environment Act gives discretion to NEMA to dispense with the requirement for an environment impact assessment, which is unconstitutional.

20 He relied on *Advocates Coalition for Development and Environment v. Attorney General*, Miscellaneous Cause No. 1 of 2004, in which the court considered the importance of an environment impact assessment and stated that it is conducted to determine the possible negative and positive impacts that a project may have on the environment. Further, that it is done before the project starts in order to evaluate its socio economic benefits to the citizens and is vital in planning for sustainable development. He then submitted that an environmental impact assessment is a necessary guide for the decision as to whether the proposed project should be carried out in the particular area or to guide on measures to be taken to avert danger to the environment.

30 He went on to argue that section 83 (2) (a) of the National Environment Act, which allows NEMA to choose whether or not such a study ought to be carried out prior to issuance of such a license cannot, by any stretch of the imagination, be in tandem with Article 245(a) of the Constitution, because it does not preserve the environment but rather endangers it. Further that an environment impact assessment is a very crucial requirement that must be fulfilled before making decisions relating to the

tu

/

21

⁵ environment and the impugned provision ought to have been couched in mandatory terms.

He further contended that the impugned provision disregards the need to determine the possible dangers that a project may pose to the environment. Further, that for a law to be held to be in tandem with Article 245 (a) of the Constitution, the same must be water tight, leaving no gap through which environmental pollution can ensue. He referred to *Amooti Godfrey Nyakana v. NEMA & Others* (supra) wherein Bart Katureebe CJ, stated that since the provision under consideration was about the protection of human rights, the court would be guided by the principle that the Constitution, and particularly that part which protects and entrenches the fundamental rights and freedoms, must be given a generous and purposive interpretation to

realize the full benefit of the right guaranteed. Further that both purpose and effect are important in determining constitutionality. He referred to Attorney General v Salvatori Abuki; SCCA No I I1998 to the same effect. 10 15 20

o

a

Counsel for the petitioner further submitted that whereas the purpose of the National Environment Act was to ensure the protection and conservation of the environment, the effect/impact of the impugned provisions is disastrous to the environment in the sense that it promotes, or does not effectively prevent pollution and environmental degradation. He relied on Uganda Electricity Transmission Company v. Desamaline Incorporation Ltd; Miscellaneous Cause No. 181 of 2004, where the court applied the precautionary principle.

He went on to assert that the respondent ought to enact and enforce precautionary and stringent laws to ensure environmental conservation and preservation, as opposed to relaxing the same and that the impugned 30

⁵ provisions ought to be nullified. He concluded that the petitioner is entitled to the remedies prayed for in the petition.

In reply, Mr Ebila for the respondent submitted that section 83 of the National Environment Act gives discretion to the Authority to dispense with the requirement for an environmental and social impact study. That this arises from the interpretation of the word 'may' used in the provision. He explained that the distinction between mandatory compliance and directory effect of language in a statute depends upon the manner in which the provision is couched and its object, purpose and effect. Further, that it is the duty of the court to try and get at the real intention of the legislature by carefully analysing the whole scope of the statute or section or phrase under consideration. That the meaning and intention of the legislature would govern the design and purpose the Act seeks to achieve, as it was held by the Supreme Court of India in *Sarla Goel & Others v. Kishan Chand*; 2009 AIR SCW 6549; 2009 (71 SCC 658.

o

o

He went on to submit that the language of the provisions of the Act should be read in relation to the intention behind it. That section 83 (2) of the National Environment Act gives the technical committee the discretion to examine the nature of the activity in order to ascertain whether or not to require that an environment and social impact study be carried out, in line with the purpose of the Act as a whole. And that if in the opinion of the technical committee the project under consideration requires such a study, it becomes the duty of the committee to demand that it be carried out before the grant of a license. He opined that the provision therefore did not do away with the requirement for an environment and social impact study, as it is alleged by the petitioner. 20 25 30

I

- Counsel further explained that not all activities or projects require an environmental and social impact study to be carried out. He relied on Principle 17 of the Rio Declaration which stipulates that environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on
- the environment and are subject to a decision of a competent national authority.

He then submitted that NEMA, through the technical committee is a competent authority to determine whether the nature of the proposed activity is likely to have a significant adverse impact on the environment and thus require a study. He referred to Schedule 5 of the National Environment Act which provides for projects for which an environment and social impact study is mandatory. He explained that in exercising its discretion on whether or not to require the environmental and social impact study to be done, the technical committee is guided by Schedule 5, as well as the National Environment (Environment and Social Assessment) Regulations, 2020.

He invited this court to find that section 83 (2) (a) of the National Environment Act does not contravene Articles 39 and 245(a) of the Constitution.

Resolution of Issue 2

The petitioner's complaint about section 83 (2) (a) of the National Environment Act, as I understand it, is that it ought to have been mandatory to carry out an environmental and social impact assessment/study for all development projects before they are licensed but this provision makes it discretionary. That the discretion given to NEMA to determine whether such a study or assessment ought to be conducted

\$1ko.\$

is contrary to the provisions of Articles 39 and 245(a) of the Constitution. On the other hand, the respondent opines that there is sufficient protection according to the provisions of the Act as it stands.

The principle has already been stated that in the interpretation of the provisions of the Constitution, it may be necessary to first of all interpret a provision of the statute said to be inconsistent with a provision or provisions of the Constitution before coming to a decision whether it is indeed so {See Attorney General v David Tinjefuza (supra)}.

It will therefore once more be necessary to set down the impugned provision within its context based on the canon that the court must give the plain meaning to the words of an instrument before applying any other principle of interpretation. Section 83 of the National Environment Act provides as follows:

83. Consideration of the application by the technical committee.

(If Upon receiving the application for a pollution control licence under section 82, the technical committee shall-

- (a) within thirty days, notify persons who may be affected by the proposed activity of the applicant and invite them to make representations;
 - (b) consider representations made by the relevant lead agency;
 - (c) consider the application having regard to all the representations received by the technical committee under paragraph (a) and (b); and
 - (d) grant or reject the application.
- (2) The technical committee may, before granting or rejecting an application under subsection (1)-
- (a) require that an environmental and social impact assessment be conducted in accordance with Part X of this Act, having regard to the nature of the activity requested and the pollution likely to result from that activity; and 2.. fugt
- o
- a
- (b) request the applicant to furnish further information relating to the plant location, material or technology design.
- (3) Where the committee rejects an application for a pollution control licence, it shall state in writing its reasons for the rejection.

It is clear from the provision that clause 2 (a) of section 83 does not stand alone. Instead, it is dependent on the results of the process in subsection \$10\$ (1). The decision whether or not to carry out an environmental and social impact assessment (hereinafter also referred to as "ESIA") is dependent on the representations made by the lead agency and the persons who may be affected by it, as it is provided for in clauses (a) and (b) of subsection \$1\$ 15 thereof.

Section 2 of the National Environment Act defines an ESIA as follows:

"environmental and social impact assessment" means an analytical process that systematically examines the likely environmental and social impacts of a proposed project, evaluates alternatives and designs appropriate mitigation, management and monitoring measures, taking into account interrelated socio-economic, cultural and human health impacts, both beneficial and adverse;"

The purpose thereof is given in section \$110(1)\$ of the Act which provides as follows:

$\$ \mathsf{S} \$$

110. Purpose of environmental and social assessments.

- (1) The purpose of environmental and social assessments undertaken under this Act and regulations made under this Act is to evaluate environmental and social impacts, risks or other concerns of a given project or activity, taking into account the environmental principles set out in section 5(2).

In her affidavit in support of the petition, Ms Doreen Namara states, in paragraphs 22 and 23, that whereas NEMA reserves the right to direct an applicant (under section 83 (2) (a), to carry out an ESIA, the requirement

Iver.

is not mandatory. She then asserts that in all cases where the activity to be carried out affects the environment, the requirement for the ESIA ought to be mandatory. And that any legislation that provides to the contrary cannot be held to be in line with the Constitution.

However, section 83 (2) (a) of the Act is actually not the main provision that determines whether an ESIA shall be done or not. Instead, subsection (21) of section 10 provides that NEMA shall categorise projects under Part X based on: the nature and scale of the proposed project or activity; documented impacts of similar or related projects or activities previously undertaken in Uganda; and the anticipated magnitude of the environmental, social, economic and cultural impacts of the proposed project or activity. 10 15

To that end, the Act categorises activities that require the developer to submit a project brief and others where the developer must carry out an ESIA. A project brief is defined in section 2 of the act to be "a summary statement of the likely environmental impacts of a proposed project referred to in section 12. " Section 12 of the Act then provides as follows:

I-Lz. Projects for which project briefs are required.

(1) A developer of a project set out in Schedule 4 to this Act shall undertake an environmental and social impact assessment by the date specified in the schedule.

(2) The developer of a project set out in Part I of Schedule 4 to this Act shall submit a project brief to the Authority in the manner prescribed by regulations.

(3) A developer of a project set out in Part II of Schedule 4 shall submit a project brief to the lead agency in the manner prescribed by regulations. L.*

J

o

t

(4) Where there is more than one lead agency, the lead agency to which the project brief is submitted shall consult with the other lead agencies in the consideration of the project.

- (5) Where the Authority, in consultation with the lead agency, is satisfied that the project referred to in subsection (2) is likely not to have significant adverse impacts on human health or the environment or that the project brief contains sufficient mitigation measures to cope with the anticipated impacts, it may approve the project.
- (6) Where the Authority finds that the project in subsection (2) is likely to have significant adverse impacts on the environment or that the project brief does not disclose sufficient mitigation measures to cope with anticipated impacts, the Authority may reject the project or may require the developer to undertake an environmental and social impact assessment.

[Emphasis added]

The submission of project briefs under this provision is mandatory, as it is denoted by the word "shall" in subsections \$(1)\$, \$(2)\$ and \$(3)\$ thereof.

Apparently, it was anticipated that there are projects that do not require an ESIA but which still deserve attention of the Authority to ensure that the impacts on the environment are controlled. Such projects listed in 25 Schedule 4 of the Act include: the lighter and less intrusive aspects in transport, transportation equipment and related infrastructure, communication facilities; exploration and power generation, transmission and distribution infrastructure; utilisation of water resources and water supply; housing and urban development; agriculture, livestock, range 30 management and fisheries; food and beverage industry; nature conservation, hotel, tourism and recreational development; mining and extraction of non-mineral products and upstream and midstream petroleum activities and operations. For such projects, the project briefs

are submitted to the Authority. 35

Ixa

$\$S$

$\$20$

There is another category of projects for which project briefs have got to be $\$S$ submitted to the lead agency. A "lead agency" is defined in section 2 of the Act as, "a ministry, department, agency, local government or public officer in which or in whom the functions of control or management of any segment of the environment are vested." However, the projects in this category are dealt with by the lead agency in consultation with the Authority. Such \$10\$ activities are listed in Part 2 of Schedule 4.

In paragraph 29 of her affidavit in support of the petition, Doreen Namara stated that with the surging industrialisation in the country, the intent of section 83 (2) of the Act may be taken advantage of by project developers, so obliterating the environment, which can in effect wipe out generations. However, it is evident from the National Environment Management Act that this possibility has been taken care of in the law because there are projects for which the ESIA is mandatory, as it is provided for in section 113 of the Act which is as follows:

113. Categorisation of projects for purposes of environmental and social impact assessments.

- (1) A developer of a project set out in Schedule 5 shall
 - (a) conduct an environmental and social impact assessment by way of scoping;
 - (b) prepare terms of reference for an environmental and social impact study;
 - (c) and undertake an environmental and social impact study as prescribed by regulations.
- (2) A developer of a project proposed to be located in or near the environmentally sensitive areas listed in Schedule 10 may be required scoping, prepare terms of reference \$ \quad \textbf{for} \quad \$ undertake \$an\$ to environmental and social impact study and undertake \$an\$ environmental and social impact study as prescribed by regulation.

Iron

- (3) Subject to Schedules 5 and 10, a project or activity set out in Schedule 11 is exempt from an environmental and social impact assessment, unless the Authority determines that the project or activity is likely to have cumulative negative impacts on human health or the environment.
- 4) The environmental and social impact assessment undertaken under this section shall assess the potential impacts of individual projects and their contribution to the total cumulative effect.

{Emphasis added}

The activities referred in subsection (1) of section 113 are definitely ones that are most likely to have deleterious environmental and social impacts 15 when implemented in an area. I believe those were the main activities that were of concern to the petitioners here.

It is thus mandatory that ESIA be conducted before such projects are licensed by the Authority as it is shown in subsection 1 of section 113 of the National Environment Act. These include the often controversial areas \$20\$ of: exploration and power from solar and geothermal sources, generation of power from peat; hydropower generation facilities including dams; and high voltage electricity transmission. In the chemical industries, they include manufacture and formulation or repackaging of industrial and agro chemicals; and assembling plants. For the avoidance of doubt the 25 new activities in petroleum operations are well provided for as upstream, midstream and downstream. The transportation and storage of hazardous waste is also adequately provided for.

S

It is pertinent to note that subsection 4 of section 113 of the Act ensures that where the ESIA are conducted, it must be shown that the total cumulative impact as well as that of the single project is taken care of. It should also be noted that the only activities that are exempted are provided

Jam

⁵ for in section 1 13 (3) but this is not to exclude the discretion of the Authority to demand that they submit ESIA, if need bc.

The National Environment Act also provides for pcnalties where developers purport to implement projects that would have required ESIA and project briefs before they are licensed to do so. Section 157 of the Act provides for offenccs and penalties for such illegalities as follows:

LS7. Offences relatng to environmental and social impact aaaesaments and environmental risk assegsments.

A person who-

- (af undertakes an activity which requires an environmental and social impact asaessment or environmental risk assessment to be conducted before obtaining a certificate of approval or other approval required in accordance with the applicable law;
- (b) makes a false or misleading statement in the environmental and social impact statement or project brief;
- (c) fraudulently alters a project brief or an environmental and social impact statement contrary to thls Act;
- (d) prepares and uaea an environmental and social management and monitoring plan in place of an environmental and social impact assessmentl
- (ef under-declares the cost or value of the proposed project on submission of a project brief or environment impact statement;
- (f) fails to comply with the conditions stipulated in the certificate of approval of a project brief of environmental and social impact assesament or the approval required in accordance with the applicable law;
- (gf forges or alters a certificate of approval of a project brief or environmental and social impact aseessment,

commits an offence and is liable on conviction-

(if in the case of an individual, to a fine not exceeding one hundred thousand currency points or imprisonment not exceeding fifteen years or both; or

(ii) in the case of a body corporate, to a fine not exceeding five hundred thousand currency points.

tu ^a

o

l a

o

Judicial proceedings are provided for in Part XII of the Act and a court S which convicts a person of violation of provisions of the Act may order him/her to compensate for their wrong under section 144. Court may also order the convict to restore a fragile ecosystem that has been destroyed by a developer, in line with the 'polluter pays principle' referred to in section 81 $\mathsf{(5)}$ of the Act. 10

Finally, I would find that Parliament did not abdicate its responsibility under Article 245 (a) of the Constitution when it enacted section 83 (2) (a) of the National Environment Act. I say so because clearly the petitioner again misinterpreted the law and based her petition on only one provision which was challenged outside its context. As a consequence, it has not 15 been proved that section 83 (2) (a) of the National Environment Act is in contravention of and/or inconsistent with Article 39 of the Constitution either.

In conclusion, this petition fails and the petitioner is not entitled to any of the remedies that she prayed for. I would therefore dismiss it with no order 20 as to costs.

Dated at Kampala this q^{μ} day of γ^{μ} 2024.

25 Irene Mulyagonja

JUSTICE OF THE CONSTITUTIONAL COURT

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA Coram:

[Buteera, DCJ, Bamugemereire, Kibeedi, Mulyagonja & Kihika JJCC]

Constitutional Petition No. 15 of 2020

BETWEEN

ENERGY GOVERNANCE (AFIEGO) =====Petitioner

AND

Attorney General =====Respondent

JUDGMENT OF CATHERINE BAMUGEMEREIRE, JCC

I have had the opportunity to study, in draft, the Judgment of my sister Irene Mulyagonja, JCC.

I agree with her reasoning, findings and conclusions and would dismiss this petition in the terms spelt out in her judgment.

eaforeer

Catherine Bamugemereire Justice of the Constitutional Court

$\mathsf{9^4}$ - 1051204 $\mathsf{\$}$

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Buteera, DCJ, Bamugemereire, Mutangula Kibeedi, Mulyagonja & Kihika. JJCC

CONSTITUTIONAL PETITION NO 15 OF 2020

\$10\$

$\$S$

**AFRICAN INSTITUTE FOR ENERGY GOVERNANCE
(AFIEGO) ::::::::::::::::::::**

VERSUS

ATTORNEY GENERAL ::::::::::::::::::::

\$15\$

JUDGMENT OSCAR JOHN KIHICA, JCC

I have had the benefit of reading in draft the lead judgment of Lady Justice Irene Mulyagonja.

I agree that this petition fails and that the petitioner is not entitled to any of the remedies prayed for. The petition is therefore dismissed with no 20 order as to costs.

$\mathbf{1}$

Dated at Kampala this

OSCAR JOHN KIHICA JUSTICE OF THE CONSTITUTIONAL COURT

t

,

t

o

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

Coram: (Buteera, DC. I, Bamugemerelre, Kibeedi, Mulyagonja & Kihika JJCCI

CONSTITUTIONAL PETITION NO. 15 OF 2020

AFRICAN INSTITUTE FOR ENERGY GOVERNANCE (AFIEGO)=====PETITIONER

VERSUS

ATTORNEY GENERAL RESPONDENT

JUDGMENT OF RICHARD BUTEERI{. DEPUTY CHIEF JUSTICE

I have had the advantage of reading in draft the Judgment of my learned Sister Justice Irene Mulyagonja JCC.

I agree with her reasoning, findings and conclusions spelt out in her lead Judgment. I have nothing useful to add.

As Bamugemereire, Kibeedi and kihika JJCC members of this Coram also agree, this Petition stands dismissed with no orders to costs.

Dated this ., . . D.. .,Q, h d ay of /n .. 2024.

Richard Buteera DEPUTY CHIEF JUSTICE

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[Coram: Buteera. DCJ, Bamugemereire. Mutangula Kibeedi. Mulyagonia & Kihika, JJCC]

CONSTITUTIONAL PETITION NO 15. OF 2020**AFRTCAN |NST|TUTE FOR ENERGY GOVERNANCE (AFIEGO) PETITIONER****I VERSUS****ATTORNEY GENERAL RESPONDENT****JUQ-GMENT OF MUZAMIRU MUTANGULA KIBEEDI. JEC**

I have had the advantage of reading in draft the Judgment prepared by my sister, the Hon. Lady Justice Irene Mulyagonja, JCC. I agree with lhe reasoning and the Orders she has proposed. I have nothing useful to add.

lt- tT) D -/ Dated at Kampala this q day of '-:: (2024 {. ("\.'\ /ll \ri '\

Muzamiru Mutangula Kibeedi JUSTICE OF THE CONSTITUTIONAL COURT

J

t

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://ulii.org/akn/ug/judgment/ugcc/2024/30/eng@2024-05-09>

CASE PAGE <https://chat.esheria.ai/case-law/uganda/african-institute-of-energy-governance-afriego-v-attorney-general-constitutional-petition-15-of-2020-2024-ugcc-30-9-may-2024-unknown-topic-unknown-cour>

Prepared on 14 October 2026 · Esheria