THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
Misc. Application No. 273 of 2008.
Arising out of H.C.C.S. **No. 144 of 2008.**

NATIONAL ASSOCIATION OF PROFESSIONAL ENVIRONMENTALISTS (NAPE) :::::::::::::::::::::::::::: **APPLICANTS**

VERSUS

HIMA CEMENT LIMITED :::::::::::::::::::::::::::::::::::: **RESPONDENT**

BEFORE: HON JUSTICE MUSOKE-KIBUUKA

RULING:

The applicant is a registered non –governmental organization. It was incorporated as a company limited by guarantee under the Companies Act. The applicant is involved in public policy research and advocacy work which inter alia, includes promoting the environment and defending the public interest in the management, conservation and preservation of Uganda's resources.

The respondent is also a limited company incorporated under the laws of Uganda. The applicant filed Civil Suit No. 114 of 208 against the respondent. In that suit the applicant,-a public interest litigant, seeks inter alia, an order for a permanent injunction against the respondent restraining the respondent, its workman and agents from carrying on any activities at Dura in Queen Elizabeth National Park.

The applicant then filed this application under Order 37 rules 1, 2 and 9, of the Civil Procedure Rules.
Following orders:-The Applicant seeks:

a) a temporary injunction against the respondent, it's employees, assignees, agents or workmen, restraining them from carrying out mining and any activity at Dura Quarry, in Queen Elizabeth National Park, until the hearing and determination of Civil Suit No. 114 of 2008; and

b) an order providing for the costs of this application. Several grounds upon which the application is based, are set out in the chamber summons.

They are that:-

1. the applicant has filed a suit against the respondent to restrain them from carrying out any activities at Dura in Queen Elizabeth National Park;

2. in November 2007, the defendant physically moved in Queen Elizabeth National Park and started a process of mining lime stone;

3. the defendant's activities include making roads in Queen Elizabeth National Park, drilling and preparations are going on for a full scale mining of lime inside park;

4. the defendant's actions violate both the citizen's right to a clean and healthy environment, article 237(2) of the constitution Section 44 (5) of the Land Act, the Wild Life Act and the National Environment Management Authority (NEMA) Act, and are therefore illegal;

5. the consequences of the above activities are that they are harmful to the environment and the people in the surrounding areas and wildlife in the National Park; and

6. the main suit has a great likelihood of success and if this application is not granted, it will be rendered nugatory;

7. the application was supported by affidavit of Frank Muramuzi who is an Executive Director of the applicant whose duties include daily running of the organization but specifically to implement its objectives and execute it's programmes.

In the affidavit in support Mr. Muramuzi averred that while that carrying out the applicant's activities they found out that the respondent was engaged in activities that were harming the environment. He averred that in November 2007, they had ascertained that the respondent had physically moved into Queen Elizabeth National Park, a Protected Area under the Uganda Wildlife Act(Cap 200) and started a process of mining limestone in contravention of the law.

Mr. Muramuzi avers further that on 6th March, 2008, they visited the area in question, at Dura inside the boundaries of Queen Elizabeth National Park, and confirmed the

presence of the respondent and the activities being carried out there in contravention of the law.

He attached the report made by them during that visit as annexture A to his affidavit.

The respondent's activities, at the time, included making roads in the park, drilling and preparations were going on for full scale mining of limestone inside of the Park.

Mr. Muramuzi averred that the National Environment Management Authority (NEMA) had no power or authority to issue an Environment Impact Assessment Certificate authorizing the defendant to carry out mining in a Protected Area. The Certificate so issued annexture (b) was therefore invalid and of no effect. Mr. Muramuzi averred.

He went on to aver further that the activities of the defendant violate both the citizen's rights to a clean and healthy environment to which they were entitled under the provisions of Article 237(2) of the Constitution of the Republic of Uganda, Section 44 (5) of the Land Act and several provisions of the Uganda Wildlife Act and the National Environment Act.

The application was opposed by way of an affidavit in reply deponed by one David Njoroge, the General Manager of the Respondent Company. The gist of his affidavit is that:-

1. the respondent was not drilling or constructing any road. Instead, the road was being constructed by the government and not the respondent as Mr. Frank Muramuzi states in his affidavit (para 10);

2. the respondent company intended to conduct mining at Dura in Queen Elizabeth National Park but had not started mining contrary to paragraph 5 and 8 of Mr. Muramuzi's affidavit;

3. the respondent, company's intended activity was not unlawful and the respondent had obtained all the necessary authorization and permits and conditions for conducting mining without harming the environment from the

relevant authorities and copies of the National Environment Management Authority and a certificate of approval of Environment Impact Assessment were hereto attached (Annexture AO);

4. the relevant authorities had put in place relevant conditions to safe guard the right to clean and healthy environment while granting the respondent the necessary authorization and the mining permit;

5. the respondent intends to mine limestone which process was not harmful to the environment and the respondent's parent company Bamburi Cement Limited, has carried out sustainable mining in other countries like Kenya in Mombasa at Haller Park which areas had been fully rehabilitated and was a major tourist attraction site;

6. the purported report attached was not signed and a figment of the deponent;

7. the activities of the respondent do not violate the right to a clean and healthy environment as whatever was being used in mining of limestone dissolved to form water which was not harmful to the environment and was not in contravention of the Constitution, the Land Act or the National Environment Act;

8. the Natural Resources Committee of Parliament had itself visited the site of the subject matter of this application, and had been satisfied with the measures put in place by the respondent company to prevent harm to the community and the environment; and

9. the activities would provide jobs to the nearby people stopping them from poaching and the respondent had invested over 100 million dollars. Therefore, if an order for injunction was granted the government and local government would be more inconvenienced as the respondent would have haltered work and it would be unable to remit revenue to the government and the Local Government.

During the hearing of the application, the applicant was represented by Mr. Kenneth Kakuru of Kakuru and Company Advocates. The respondent was represented by Mr. Bernabas Tumusingize of Ssebalu and Lule Advocates. Learned counsel for the applicant submitted that the applicant was seeking an order for preserving the status quo until the substantive suit would be determined. He

argued that mining limestone in the park contravened the law. He argued that Article 237, of the Constitution required that a Protected Area like Queen Elizabeth National Park ought to be preserved and could not be alienated for purposes that were not for ecological or touristic purposes.

Secondly, learned counsel argued that the activity of mining limestone in the National Park contravened Section 44 of the Land Act which prohibited government or a local government from leasing out or otherwise alienating the resources. He further submitted that although licences and permits could be granted for activities in the National Park, but they ought to be for ecological or touristic purposes.

Learned counsel for the respondent, Mr. Tumusingize, submitted that the activity of mining in the national park by the respondent, was legal and had complied fully with all the legal requirements.

The factors, a court of law must consider before granting or refusing to grant a temporary injunction are well known. The applicant must show that he has filed a head suit in the matter in which he or she has a *prima facie* case with probabilities of success. The applicant must also show that he or she would suffer irreparable injury, which cannot be adequately compensated by way of damages. Lastly, where the court remains in doubt, it may consider the balance of convenience. ***See Robert Kawuma Vs. Hotel International* SC *Civil Appeal No.8* of *1990 (unreported) and E.L. Kyimba Kaggwa Vs. Hajji Abdu Nasser Katende,* (1985} *HCB* 43.**

In the instant case, the applicant has shown the existence of a head suit; civil suit number 0114 of 2008. From the contents of the affidavits in support and the arguments put forward by counsel for the applicant, court can easily state that it is satisfied that a *prima facie* case has also been shown to exist in favour of the applicant. Be that as it may, when it comes to considering whether the applicant would suffer irreparable injury not capable of adequate atonement by way of damages, court is not satisfied that that is the case. Of course, it must be born in mind that civil suit No. 01114 is a public interest suit.

At the same time, it is a fact that a wide range of consultations were made with all stakeholders before the activities complained of by the applicant were undertaken. It is also a fact that the Uganda Wild Authority granted a mining permit with well considered and strict conditions to the applicant. And, ultimately, the National Environment Management Authority (NEMA) also granted the respondent a

permit containing relevant conditions to safeguard the right to a clean and healthy environment which is the heritage of the present and future generations of Ugandans and which, as I understand, is the core concern of public interest in the head suit.

As the Honourable Justice Akiiki Kizza, of this court, observed in ***Greenwatch And Advocates Coalition for Development and Environment Vs. Golf Course Holdings Ltd, Misc. Appl. No. 390* of *2001,*** (unreported) both those two bodies are public bodies which were put in place by the Government for them to ensure that private developers conform to the environmental requirements and standards laid down in the law. Both these bodies carried out intensive and strict investigations before granting the respective requisite permits. That fact must weigh heavily against the success of any application such as this one.

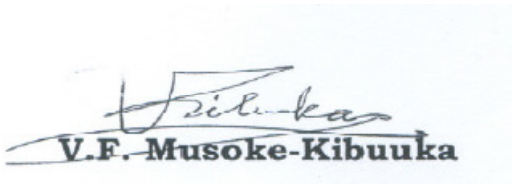
The court possesses no better expertise in those respective areas than the particularized expertise employed by those bodies. There is no claim that those bodies acted fraudulently or unlawfully in granting the respective permits.

The applicant says he seeks a temporary injunction aimed at preserving the status quo. Court is not sure what status quo the applicant wants to be preserved since in the averments made in support of the application it is stated that the respondent is already mining limestone and roads are being constructed in the National Park.

When court considers the balance of convenience, taking into account all the facts and circumstances of this case, court also finds that the balance of convenience tilts in favour of the respondent.

Accordingly, the application is dismissed. However, considering the fact that the application arises from a public interest litigation, court orders that each party bears its own costs in respect of this application.

The file is returned to the Deputy Registrar, Civil Division, for re-allocation for the purposes of hearing and determination of Civil Suit No. 01114 of 2008.



(Judge)
03/09/2012