



Advocates Coalition for Development and Environment

ENHANCING ACCESS TO JUSTICE IN UGANDA'S FORESTRY SECTOR

**A Comparative Study of Uganda
and Tanzania**



Ronald Naluwairo | Anna Amumpiire
ACODE Policy Research Series No. 82, 2017



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List of Acronyms

ACCU	Anti-Corruption Coalition, Uganda
ACODE	Advocates Coalition for Development and Environment
AIA	Access to Information Act
CAO	Chief Administrative Officer
CSOs	Civil Society Organisations
CFM	Collaborative Forest Management
DAO	District Agriculture Officer
DFO	District Forest Officer
DPC	District Police Commander
FAO	Food and Agricultural Organisation
FSSD	Forest Sector Support Department
LC	Local Council
MANRUIA	Matiri Natural Resource Users and Income Enhancement Association
NFA	National Forest Authority
RDC	Resident District Commissioner
TFCN	Tanzania Forest Conservation Network
TFS	Tanzania Forest Services

List of Statutes

Tanzania

The Access to Information Act No. 6 of 2016.
The Constitution of the United Republic of Tanzania of 1977
The Environmental Management Act of 2004
The Forest Act, No. 14 of 2002
The Land Act, Cap 113 R.E. of 2002
The Land Disputes Courts Act, Cap 216 R.E. of 2002
The Natural Resources Act, Cap 259 R.E. of Tanzania.
The Village Land Act, Cap 114 R.E. of 2002

Uganda

Access to Information Act 2005
Constitution of the Republic of Uganda 1995
National Environment Act 1993
National Forestry and Tree Planting Act 2003
National Forestry and Tree Planting Regulations 2016

List of Cases

Edward Ronald Sekyewa t/a HUB for Investigative Media v. National Forestry Authority
MISC. CAUSE No. 73 of 2014

Edward Ronald Sekyewa t/a HUB for Investigative Media v. National Forestry Authority
MISC. CAUSE No.74 OF 2014

Kalubanga Patrick and 40 others v. National Forestry Authority HCT-01-LD-MA-0062/2013

Omuhereza Rwakaboyo & 119 others v. The National Forestry Authority HCT-01-CV-MA-0060 of 2009

Omuhereza Rwakaboyo & 119 others v. The National Forestry Authority Civil Application
No. 0308 of 2014

Executive Summary

This is a comparative analysis of access to justice in the forestry sector in Uganda and Tanzania. Although the concept of access to justice is broad and encompasses many aspects, this study focused on only four aspects namely: (i) tenure rights of forest-adjacent communities; (ii) access to forestry information; (iii) liability for forestry harm; and (iv) courts as forest dispute settlement mechanisms. The analysis reveals that although Uganda is strong in some areas, it is generally weak with respect to many issues of access to justice that were examined. Although Tanzania was also found to be generally weak on issues of access to justice as examined, it offers some lessons for improving access to justice in Uganda's forestry sector.

On the tenure rights of forest communities, the only legally recognised right in Uganda is the right to cut and take dry wood or bamboo for personal domestic use. A range of rights in the extended bundle of rights including management rights, exclusionary rights and alienation rights are neither legally recognised nor protected. The right to cut and take dry wood or bamboo is provided for in a very ambiguous manner which cannot offer any meaningful protection. Tanzania's forest legislation does not offer any better approach. Under Uganda's Collaborative Forest Management (CFM) however, local communities, a forest user group or association of forest user groups who enter into a CFM Agreement with NFA could negotiate for and access negotiated benefits from the respective central forest reserves. Access to the benefits is subjected to conditions in the CFM Agreement and can only legally happen during the subsistence of a CFM Agreement. Available statistics indicated that there were very few forest adjacent communities or members of forest user groups legally accessing benefits under the CFM arrangements. Out of Uganda's 506 central forest reserves, there were only 49 CFM Agreements concluded in respect to only 20 central forest reserves.

Concerning the question of liability for forest harm and other matters connected thereto, the comparative analysis showed that Uganda's forest legislation was lacking in five major aspects. First, it does not criminalize certain acts which are harmful or pose threats to forests. For instance, attempts to commit forest crimes and aiding or abetting commission of a forest crime are not criminal acts in Uganda. Second, by not providing minimum sentences and providing for only maximum sentences for convicts of forest crimes, it gives a lot of discretion to judicial officers. This is not good for forest justice. Third, the penalties for the different forest crimes are generally weak and do not serve as a strong deterrent. Fourth, unlike Tanzania's Forest Act which places the burden of proof in prosecution of certain forest crimes on the accused, Uganda's forest legal framework follows the tradition of "he who alleges must prove". Last, unlike Tanzania's forest law, Uganda's forest law lacks a reward system and does not offer rewards to persons who assist law enforcement officers with information that can lead to successful prosecution of forest crimes.

With respect to the right of access to forest information, Uganda's forest legal framework is strong and compares well with Tanzania's forest legislation. The major challenge though is with the practice. Evidence has shown that the actual realisation and enjoyment of the right of access to forest information is affected by many factors. These include lack of a manual of functions and index of records by the FSSD and NFA, general lack of up-to-date information on forest issues, delays and in other cases non-response to requests for forest information, and at times blatant refusal by the public mandated forest bodies to provide requested information without any legal justification.

Against the findings summarised above, the following recommendations are proposed to enhance access to justice in Uganda's forest sector.

Recommendations to Parliament

- **Introduce more forest crimes** with respect to acts or omissions that may cause harm or threats to Uganda's forests. Aiding or abetting commission of a forest crime; attempting to commit a forest crime, and being found in possession of forest produce with respect to which an offence was committed should be criminalized. Forest legislation and the AIA should also make it an offence for a public official to refuse requests for access to information without any legal justification.
- **Increase penalties for forest crimes:** To have a strong deterrent effect, Parliament should increase penalties for all forest crimes to among other things reflect the economic value of the offence and increase the penal effect. A study to inform this process is highly encouraged.
- **Establish minimum sentences for each forest crime.**
- **Establish a reward system and provide rewards** to persons and forest adjacent communities that provide information leading to successful apprehension or prosecution of persons who commit forest crimes and illegalities. Like is the case with Tanzania's forest legislation, Uganda's forest law could provide for payment of up-to 50% of any fine imposed to such informers. A reasonable percentage of about 10% of the revenues from the sale of confiscated illegal forest produce should also be given to the persons/local communities that provide information leading to the confiscation of such produce.
- **Extend the right of access to forest information even to foreign nationals** as long as the information they seek is not proprietary and does not compromise Uganda's sovereignty and national security. Except in such instances, there is no serious justification why access to forest information should be restricted to only nationals. It is appreciated that, this recommendation would require amending the

Constitution of Uganda.

- **Legally provide for more tenure rights for forest adjacent communities** beyond the right to dead wood or bamboo. These rights should include the right to collect and use minor forest products (not amounting to timber and trees), and the right to carbon credits associated with the relevant forest reserves.
- Provide for clear and effective remedies in case of violation of the tenure rights of forest communities. The remedies should include restitution, indemnity, compensation and reparation.

Recommendations to Judicial Officers (Judges and Magistrates)

- Dispose of forest disputes in a timely manner. The longer it takes to resolve forest disputes, the more the forests suffer at the hands of wrong doers.
- Always resolve the balance of convenience in applications for temporary injunctions and interim orders of injunctions in favour of the protection of forests. It is always easier for any damage or loss to individuals to be compensated for by way of damages but the damage to natural forest reserves is always likely to be irreparable and irreversible.
- Exercise judicial activism where the ends of forest justice demand so.
- Always visit the *locus in quo* in case of forest boundary-related disputes.
- Do not allow technicalities to stand in the way of saving forests.

Recommendations to Civil Society Organizations

- Advocate for forest legal reforms to enhance access to justice basing on the above recommendations being made to Parliament.
- Support NFA and FSSD to build capacity of their staff on legal issues concerning access to justice.
- Monitor compliance of forest-mandated agencies with the law and policies governing issues of access to justice in the forestry sector.

An effective justice system must be accessible in all its parts. Without this, the system risks losing its relevance to, and the respect of, the community it serves. Accessibility is about more than ease of access to sandstone buildings or getting legal advice...¹

1. Introduction

Although the last two decades have witnessed a vibrant international discourse on environmental governance, in Uganda and other East African states, little attention has been given to issues of access to environmental justice in general, and access to justice in the forest sector in particular. This is in spite of the role that access to justice plays in ensuring the sustainable management of natural resources and guaranteeing the livelihood security of natural resource adjacent and dependent communities. This is also the case, in spite of the unprecedented deforestation and forest degradation happening in the country. The rate at which Uganda and other countries in East Africa are losing their forest cover is alarming. Klopp observes that, compared to many countries in the world, East African countries show high overall rates of deforestation.² It is reported that between 2005 and 2010, Uganda's forest area reduced by 28.5 per cent.³ And between 1990 and 2005, Uganda's total forest cover declined by 27 per cent.⁴ Recent statistics indicate that the country is losing an estimated 200,000 hectares of forests annually.⁵ This rate of forest and tree cover has serious implications not only for the livelihood security of the forest adjacent communities but also national growth and development.

This report analyses the state of access to justice in Uganda's forestry sector in comparative perspective with Tanzania and provides recommendations on what needs to be done to enhance the same. The study focuses on only four aspects of access to justice i.e., recognition and protection of tenure rights of forest communities, liability for forest harm, access to forest information and courts as forest dispute settlement mechanisms.

¹ Robert McClelland (2009).

² Klopp J M (2012). "Deforestation and democratization: patronage, politics and forests in Kenya," *Journal of Eastern African Studies* 6(2)352.

³ UBOS, 2014.

⁴ Ibid. See also Republic of Uganda (2013), *The National Forest Plan 2011/12-2021/22*, Ministry of Water and Environment, Kampala, p. vii.

⁵ Republic of Uganda (2016), *State of Uganda's Forestry*, Ministry of Water and Environment, Kampala., p.i.

1.1 Objectives of the study

The overall goal of this study was to assess the state of access to justice in Uganda's forestry sector and make appropriate recommendations. The study has four specific objectives.

- a) To examine the concept of access to justice and its relevance to Uganda's forest sector
- b) To assess the adequacy of Uganda' forest legislation and the practice with respect to: access to forest information; the protection and enjoyment of tenure rights of public forests adjacent communities; and liability for forest harm
- c) To examine selected court-decisions on forest-dispute issues and draw lessons for enhancing the role of courts in promoting access to justice
- d) To recommend measures for improving access to justice in Uganda's forestry sector.

1.2 Research design and methods

The study was largely qualitative and exploratory in nature but not totally devoid of quantitative techniques. The study adopted a comparative approach i.e., analysing the state of access to justice in Uganda's forestry sector in comparison to Tanzania. The major reason for the comparison was to establish whether Tanzania had better legal guarantees and practices that could provide lessons for enhancing access to justice in Uganda's forestry sector. Data was collected using 3 qualitative methods i.e., desk review, key informant interviews and focus group discussions. Desk reviews included reviewing literature on access to justice in natural resource management and content analysis of the forest legislation in Uganda and Tanzania. Details of the laws, regulations and documents reviewed are provided in the list of statutes. Desk review also included analysis of some court decisions in forest-related disputes. The major objective of analysing the court decisions was to establish how courts as one of the major forest-dispute settlement mechanisms handle cases and to draw lessons for enhancing the role of courts in ensuring justice. Key informant interviews were conducted mainly with: government officials working in the key forestry agencies and institutions in Uganda and Tanzania; law enforcement officials in the forestry sector in Uganda and Tanzania; representatives of civil society organisations in Uganda and Tanzania working on forest governance-related issues; and local leaders of forest adjacent communities. Interviews were conducted using an interview guide. Focus group discussions were mainly conducted with members of the communities adjacent to Matiri central forest reserve in Uganda and Ngumburuni forest reserve in Rufiji of Pwani region in Tanzania. The aim of the focus group discussions was to get to know the individual personal experiences and the practical issues concerning access to justice in the forestry sector.

The adjacent communities to Matiri central forest reserve were purposively selected basing on knowledge and information about several boundary disputes between NFA and some local communities. Also, the fact that Matiri central forest reserve is one of the few central forests reserves in Uganda where there were forest user groups that had a CFM Agreement with the NFA. Adjacent communities to Ngumburuni forest reserve in Tanzania were chosen largely for similar reasons. A total of 10 focus group discussions were held. All the focus group discussions had between 6-10 participants and were conducted in local languages. It was deliberately ensured that in villages where there were members in CFM, the focus group discussion would include both CFM and non-CFM members. After obtaining consent, questions were asked on the key thematic issues.

1.3 Organisation of the report

This report is organised in 5 sections. Section 1 is the introduction. This section provides a brief context in which this study is undertaken, the objectives and the research design and methods. Section 2 analyses the concept of access to justice and its relevance to Uganda's forestry sector. Section 3 presents and discusses the major findings along 3 aspects of the study i.e. access to forest information, protection of tenure rights of forest adjacent communities, and liability for forestry harm. Using 3 court case studies concerning Matiri central forest reserve in Uganda, Section 4 discusses lessons for enhancing the role of the courts of law in ensuring forest justice and access to justice in the forestry sector. The conclusion and major recommendations are presented in Section 5.

2. Access to Justice and its Relevance for Uganda's Forestry Sector

Before addressing any other aspects of this study, it is important to briefly explore the concept of access to justice and its rationale for Uganda's forestry sector. The concept of "access to justice in the forestry sector" derives from the notion of "access to environmental justice". Together with the access rights to environmental information and participation in decision-making concerning environmental matters, access to environmental justice is internationally recognised as key in ensuring environmental democracy and sustainable development.⁶ But what does "access to justice" mean in

⁶ These three access rights are strongly interrelated and none of them can succeed without the other two. See Pring G & Pring C (2009). *Greening Justice: Creating and Improving Environmental Courts and Tribunals*, The Access Initiative, p.7.

the context of forest governance? Why is access to justice in the forest sector important?

The United Nations Development Programme (UNDP) conceives “access to justice” from a human rights perspective as “...the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards”⁷. The Access Initiative (TAI)⁸ also defines “access to environmental justice” as “the ability of citizens to turn to impartial and independent arbiters to resolve disputes over access to information and participation in decisions that affect the environment or to correct environment harm”. From the above definitions, access to justice in the forest sector as a derivative from environmental justice can be defined as the ability of citizens or other legal persons to seek and obtain a remedy from impartial and independent arbiters over disputes concerning: access to forest information; participation in decision making processes that affect the use and management of forests; and harm/destruction occasioned or likely to be caused to forests.

Access to justice in the forest sector is principally concerned with four major issues: citizens and other legal persons being able to challenge decisions that deny them access to information in the hands of public authorities concerning the use and management of forests; ensuring public participation in decision-making concerning the use and management of forests; preventing and or remedying harm caused to forests; and effective enforcement of environmental laws and policies that ensure the conservation and sustainable use of forest resources.⁹

Effective access to justice in the forest sector requires that the public should have adequate access to forest information in possession of public bodies. It also requires protection of the right of the public to participate in decision making processes concerning the use and management of forests. It further requires protection of the tenure rights of forest adjacent communities and the protection of the forests from unnecessary destruction/harm. Finally, effective access to justice in the forestry sector requires existence of a variety of functional independent and impartial redress mechanisms (formal and informal) for resolving forest disputes. These mechanisms should be capable of offering effective remedies and should be accessible and affordable by majority of the people.¹⁰

⁷ UNDP(2005). *Programming for Justice: Access for All- A Practitioner’s Guide to a Human Rights-Based Approach to Access to Justice*, UNDP Regional Office in Bangkok, p.5.

⁸ TAI is a global partnership of Non-Governmental Organizations (NGOs) working to increase public access to information, participation, and justice. It mainly focuses on ensuring the effective implementation of the three access rights under the Rio Declaration.

⁹ For the major concerns of access to environmental justice generally, see Pring & Pring, *supra* note 6.

¹⁰ For detailed indicators and elements of access to justice in the environment and natural resources sector and forest sector respectively, see TAI (2006). *The Access Initiative Assessment Toolkit: Evaluating the Foundations of Environmental Governance and WRI, Governance of Forests Initiative (GFI) Guidance Manual: A Guide to Using the GFI Indicator Framework*. See also Davis C, Williams L, Lupberger S, and Daviet F (2013). *Assessing Forest Governance: The Governance of Forests Initiative Indicator Framework*, World Resources Institute, pp.63-64

Access to justice is important for forest governance for a number of reasons. First, it is internationally recognised as key in ensuring the sustainable use and management of natural resources including forests. Second, it is important for protecting the rights and guaranteeing the livelihood security of the forest adjacent communities. The ability to access justice enables these poor and vulnerable communities and persons to protect their rights against infringement by other persons and entities. Third, access to justice in the forest sector is also essential in holding relevant government agencies, private individuals, companies and other duty bearers accountable in as far as the management and utilisation of the forest resources is concerned. It is for these among other reasons that this study was undertaken to enable the promotion of greater access to justice in Uganda's forestry sector.

3. Analysis of Findings

This section analyses the adequacy of Uganda's forest law and practice with respect to guaranteeing access to justice. The analysis focuses on only three elements of access to justice i.e., access to information, protection of tenure rights of forest adjacent communities; and liability for forest harm. The analysis is based on qualitative indicators/parameters internationally accepted as key in assessing access to justice.

3.1 Access to Forest Information

Effective access to justice in the forest sector requires that the general public should have adequate access to forest information in the custody of public bodies. Besides promoting transparency and accountability, access to information as a key aspect of access to justice is very important in empowering the citizenry to effectively participate in the management of their country's forest resources.¹¹

There are a number of elements/indicators internationally used to assess adequacy of the law in guaranteeing access to information. To ensure effective access to information, the law should not only explicitly provide for the right of access to information but should also provide for clear procedures of how to gain access to the information in possession of public forest bodies.¹² It should also define the type of forest information that should be made publicly available, and in case of classified or confidential information, it should explain why such information is kept confidential.¹³ Additionally, the law should clearly specify or designate responsible officers in the public forest bodies to handle requests for access to information and should provide a timeframe within which requests for

¹¹ See Foti, J., et al (2008). *Voice and Choice: Opening the Door to Environmental Democracy*. Washington, D.C.: The Access Initiative / World Resources Institute, p.x.

¹² Davis C, Williams L, Lupberger S, and Daviet F (2013), *supra* note 10.

¹³ *Ibid*.

information should be responded to. Fees and other legally prescribed requirements associated with accessing information in possession of the public forest bodies should be reasonable and not prohibitive.¹⁴ The other important element in measuring adequacy of the law in guaranteeing access to information is whether or not the law provides for the right of appeal in case one is not satisfied with the response from the public forest body with respect to his/her request for information.¹⁵ The key question to ask now is – to what extent does Uganda’s forest law meet these requirements in comparison with Tanzania’s forest law?

In Uganda, the law governing access to forest information is the Constitution of the Republic of Uganda 1995, the National Environment Act 1995, the National Forestry and Tree Planting Act 2003 (herein after referred to as “the Forestry Act”) and the Access to Information Act 2005 (AIA). In the case of Tanzania, access to forest information is governed by the Constitution of the United Republic of Tanzania 1977, the Environmental Management Act 2004, the Forest Act 2002 and the Access to Information Act 2016.

As a whole, Uganda’s forest legal framework is generally strong with respect to issues of access to information and compares well with Tanzania’s legal framework. The major challenges as will be discussed later, are with the practice/implementation of the law. As is the case with Tanzania’s forest law, Uganda’s forest law provides for the right of access to information, procedure for accessing the information, timeframe within which requested information must be given and the right of appeal. Uganda’s forest legal framework like Tanzania’s also designates responsible officers in the public forest bodies to handle requests for access to information.

In no uncertain terms, Section 91 (1) of the Forestry Act explicitly provides that,

Every citizen has a right of access to any information relating to the implementation of this Act, submitted to or in the possession of the State, a local council, the Authority or a responsible body.

Although the Forestry Act restricts the right of access to only information in respect of its implementation, the AIA which governs issues of access to information in the possession of Government and all public bodies generally allows for access to all information in possession of public bodies. In this respect, the AIA provides that,

Every citizen has a right of access to information and records in possession of the state or any public body except where the release of the information is likely to prejudice the security or sovereignty of the state or interfere with the right of privacy of any other person.¹⁶

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Section 5.

It is notable that the right of access to information provided for in Uganda's forest legislation is not restricted to information in possession of the State, authored by the State or its agencies. It suffices that the information sought regardless of its origin or authorship is in possession of the State, its organs or agencies. This is very important for access to justice. It enables the general public to have access to as much information as there is in possession of the public bodies.

The AIA places the responsibility of ensuring that the records of a public body are accessible on the Chief Executive Officer of that body.¹⁷ In Uganda's forestry sector, this means that the Commissioner of Forestry and the Executive Director of the National Forest Authority (NFA) hold such responsibility. To facilitate access to information, the AIA requires information officers of public bodies to prepare a manual of functions and index of records.¹⁸ The procedure to access information is well stipulated in the Forestry Act. It provides that a person desiring information from a public body shall apply to that body and shall be granted access to the information on the payment of prescribed fees, if any in a prescribed manner.¹⁹ Read in conjunction with Section 10 of the AIA, the application for access to forest information should be made to the Chief Executive Officer of the relevant public forest body.²⁰ Section 11 of the AIA provides the details that must be included in the application for access to the information. The AIA also requires that the information officer to whom a request for access is made should within 21 days after the request notify the person requesting access to information of the decision reached regarding the request.²¹ Since public bodies are expected to have an index of information records, this timeframe is reasonable. Section 37 of the AIA provides the right to lodge a complaint before a Chief Magistrate for persons dissatisfied with decisions on their request for information.

There are two major weaknesses of Uganda's forest legislation with respect to the issue of access to information. First, although it explicitly provides for the right of access to information, it does not provide for any offence with respect to public officials who deny applicants information requested for without any lawful reason. Section 46 of the AIA which could be applicable only deals with a person who: a) destroys, damages or alters a record; (b) conceals a record; or (c) falsifies a record or makes a false record, with intention to deny the right of access to information. It does not cover cases of outright denial of the right of access to information without legal justification. Given the impunity with which some public officers act, making it an offence to deny applicants information requested for without any lawful excuse would deter such impunity and enhance access to justice.

¹⁷ Section 10.

¹⁸ Section 7.

¹⁹ Section 91 (2).

²⁰ Under Section 10, Chief Executive Officers of public bodies are the information officers of their agencies. They are charged with the duty of ensuring that records of the public body they are in charge of are accessible to public.

²¹ Section 16.

Second, as informed by the constitutional position and the AIA, Uganda's forest legislation restricts the right of access to forest information to Ugandan citizens only.²² The rationale for restricting the right of access to forest information to only Ugandan citizens is problematic from the perspective of the broader objective of that right - which is to promote efficient, effective, transparent and accountable governance. Foreign nationals including regional and international organisations play important roles in promoting transparency and accountability in the forest sector. Within certain limitations, they should also enjoy the right of access to forest information. Out of 14 representatives of the NGOs interviewed in Uganda, 10 respondents did not think that the restriction of the right of access to forest information serves any useful purpose. Three (3) out of 4 officials interviewed from FSSD and NFA also felt that the restriction was not necessary. The one official who insisted that the right of access to information should be restricted to citizens argued that the foreign nationals can always access the information they want through the citizens.

Although it can generally be concluded that Uganda's law is fairly strong, there are serious gaps and challenges in practice that affect the actual realisation of the right of access to information in Uganda's forestry sector. First, both NFA and FSSD which are the principal public forest bodies do not have the manual of functions and index of records to facilitate access to information as required by law. At NFA, each department has its own list of information and records.²³ At FSSD, one of the officials interviewed acknowledged that while the Department has a lot of information, the lack of a manual of functions and index of records makes it difficult even for fellow staff to know what information is available and in whose custody it is.²⁴ Second, a lot of information held by NFA and FSSD is incomplete and not up-to-date.²⁵ For instance, with respect information about local forest reserves, one of the officials interviewed from FSSD admitted that they have very scanty information. He stated that while FSSD regularly sends templates to the local governments to get up-to-date information, most local government officials do not oblige.

... it is also not routine to get information from local governments. District Forest Officers do not respond to requests for information; they also do not have computers, some do not even know where the local forest reserves are so it creates a challenge of availability of and up-to-date information," he argued.

Third, some respondents in Uganda complained of non-response and/or delay in responding to their requests for information and getting informal oral responses to their requests for information. Regarding the former, one of the respondents shared that after

²² Article 41 (1) of the Constitution provides that "Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person".

²³ Interview with Director Corporate Affairs, NFA.

²⁴ Interview with a Senior Forest Officer at FSSD. He requested to keep his name anonymous.

²⁵ It should be stressed that Section 5 (2) of the AIA emphasizes that information and records to which a person is entitled to have access to shall be accurate and up-to-date so far as is practical.

making endless follow-ups in vain, he had to “sit at NFA almost for a whole day” until he was given part of the information he wanted. Regarding the latter, two respondents complained about the difficulty of crosschecking the authenticity of information given by word of mouth and the challenge of relying on it and referring to it in any research. There are also issues of durability of this information considering that it is imbued on the mental memoires of the givers who could naturally forget some facts and details.

Fourth, there are a number of requests for information made to the public mandated forest bodies that are blatantly denied or ignored without any justifiable reason. Two examples will suffice to illustrate this point. In *Edward Ronald Sekyewa t/a HUB for Investigative Media v. National Forestry Authority*,²⁶ the applicant requested for information regarding procurement of equipment for prohibiting, controlling and management of fires in 506 central forest reserves. This request was ignored by the Executive Director of the Respondent. The major issue was whether the Respondent was lawfully justified to refuse the request for access to information sought by the applicant. At the hearing, counsel for the respondent argued that the applicant being a private entity ought to have disclosed the reason and purpose for which the information was required since there was a possibility of jeopardizing public interest in case the information was misused.

Relying on Section 6 of the Access to Information Act,²⁷ His Worship Boniface Wamala rightly ruled that the reason for which the information is required and the belief of the officer supposed to provide the information as to the purpose for which the information is required are irrelevant considerations. He argued that whether the applicant had given any specific reasons or not, the application had to be considered on its merit. His Worship took strong exception to the fact that the Respondent never made response to the Applicant’s request for information even when the applicant followed up his request after 5 months with a letter. “If the problem was non-disclosure of the purpose of information, the Respondent would have written back to the Applicant communicating so,” argued His Worship Wamala.

In *Edward Ronald Sekyewa t/a HUB for Investigative Media v. National Forestry Authority*,²⁸ the Applicant lodged with the Executive Director of the Respondent a request for access to information regarding *the implementation and operationalization of Forestry Information System under Priority 8 of the Respondent’s Business Plan 2009 -2014* on 2nd September 2013. The Executive Director of the Respondent failed and/or refused to give a decision on the Applicant’s request within the statutory period of 21 days after receipt of the request form. The main issue was whether the Respondent was lawfully justified to refuse the request for access to the information sought by the Applicant. The respondent argued that after due considerations, they declined to grant the Applicant’s request because the information requested for was available on the

²⁶ MISC. CAUSE No. 73 of 2014.

²⁷ Section 6 of the AIA provides that a person’s right of access to information is not affected by any reason he gives for requesting access; or the information officer’s belief as to what the person’s reasons are for requesting access.

²⁸ MISC. CAUSE No.74 OF 2014.

organization's website and was accessible to the public and that the non-release of the information did not prejudice the Applicant. The Respondent never communicated its decision to the applicant in spite of his notice of reminder.

His Worship Boniface Wamala agreed with counsel for the applicant that the Applicant's request was specific and precise. It was about the "steps that had been taken to establish the forestry information system as indicated under Priority 8 of the Respondent's Business Plan (2009 - 2014) and confirmation of the operational status of the Forestry Business Plan 2009 - 2014." This information was not on the Respondent's website. What was on the website was the Respondent's Business Plan (2009-2014). Most important, His Worship held that, even if the information actually requested for was on the organization's website, the Respondent was still duty bound to respond to the Applicant's request and deliver the information in one of the modes anticipated by the Access to Information Act.²⁹

In the final analysis, His Worship Wamala ruled that by simply declining and keeping quiet upon receiving the Applicant's request, the Respondent was not in compliance with the clear provisions of the law. The Respondent was therefore not justified to refuse his request for access to the information sought.

These two cases point to the fact that even with a good law, there may be impediments to the actual realisation of the legally protected right. These can range from inadequate appreciation of the law and poor attitude among the duty bearers to the lack of adequate human and financial resources.

In conclusion, Uganda's forest legislation is fairly strong with respect to guaranteeing the right of access to forest information. The actual realisation and enjoyment of this right is however affected by many factors that need to be addressed including non-compliance with the legal provisions guaranteeing access to forest information by the duty bearers and at times blatant refusal by the duty bearers to provide the information.

3.2. Recognition and Protection of Tenure Rights of Forest Adjacent Communities

One of the key parameters used to assess the adequacy of forest legislation in guaranteeing access to justice is the extent to which it recognizes and protects the tenure rights of communities living adjacent to public forests. Recognition and protection of the rights of forest communities is important not only because of the role that these communities play in the sustainable management of forest resources but also because they suffer most from the negative effects of living near these forests. For instance, members of the local communities living near Matiri central forest reserve

²⁹ Under Section 16 of the AIA, the officer to whom the request is made is obliged to respond to the request in a given manner whether the request is granted or denied.

complained of vermin animals that destroy their crops and illegal loggers who steal their crops. Justice and equity demand therefore that the tenure rights of the forest adjacent communities should be recognised and adequately protected. Under the extended bundle of rights, forest tenure rights include access rights, user rights (extraction rights), management rights, exclusion rights and alienation rights.³⁰ Although the national forest legal framework need not necessarily recognise and protect all the tenure rights in the extended bundle of rights, it should provide for rights that are of adequate scope depending on the particular context of a given country.

There are 9 major criteria used internationally to assess the adequacy of national legal frameworks in protecting and promoting tenure rights of forest adjacent communities. These are: scope of the tenure rights; duration of the rights; clarity and consistency of the rights; recognition of customary tenure rights; number and nature of restrictions on how the rights can be exercised/enjoyed; legal guarantees against unilateral extinction of the rights; enforcement mechanisms; nature and scope of remedies in case of violation of tenure rights; and gender sensitivity and non-discrimination rights.³¹ Taking these factors into consideration, a critical analysis shows that Uganda's forest legislation is generally weak with respect to the protection of forest tenure rights of forest adjacent communities. Tanzania's forest legal framework is not any better.

Unlike Uganda, Tanzania's principal forest legislation does not provide for any explicit tenure rights for the forest communities. Tanzania's Forest Act instead establishes an elaborate system for investigating and determining claims to such rights as may arise out of customary law.³² In the case of Uganda, Section 33 (1) of the Forestry Act states inter alia that, "Subject to the management plan, a member of a local community may, in a forest reserve or community forest, cut and take free of any fee or charge, for personal domestic use in reasonable quantities, any dry wood or bamboo".

From the above provisions, it is clear that unlike in Uganda, any tenure rights that forest communities are entitled to in Tanzania should arise out of customary law. The rights provided for in Uganda's forest legislation are not tied to customary law. It is also observable that unlike Tanzania's forest legislation which generally leaves open the list of rights that forest communities are entitled to subject only to custom, Section 33(1) of the Forestry Act is clear that the only legally recognized and protected tenure right of forest adjacent communities is the right to dry wood or bamboo.

³⁰ For a detailed discussion of the extended bundle of forest tenure rights, see Larson, A.M., and Dahal G.R (2012). Forest tenure reform: New resource rights for forest-based communities. *Conservation and Society* 10(2): 77-90. See also Larson, A.M., D. Barry and G.R. Dahal (2010). New rights for forest based communities: Understanding processes of forest tenure reform. *International Forestry Review* 12(1): 78-96. See further Schlager, E. and E. Ostrom (1992). Property rights regimes and natural resources: A conceptual analysis. *Land Economics* 68(3): 249-262.

³¹ See generally, Davis C, Williams L, Lupberger S, and Daviet F (2013), supra note 10. See also FAO (2011). Framework for Assessing and Monitoring Forest Governance, The Program on Forests, Rome. See further FAO (2012). *Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Rome.

³² See Sections 24 and 25

Even then, the right to dry wood or bamboo is provided for in a very ambiguous manner which makes its interpretation and application problematic. Following on Section 45 of the National Environment Act,³³ Section 33 (1) of the Forestry Act states that “Subject to the management plan, a member of a local community may, in a forest reserve or community forest, cut and take free of any fee or charge, for personal domestic use in reasonable quantities, any dry wood or bamboo”. Read together with Section 45 (5) of the National Environment Act this means that the only traditional use of forests which is indispensable to the local communities and which is compatible with the principle of sustainable development is the right to dry wood or bamboo. The law does not recognise and protect the customary tenure rights of forest communities beyond access to dry wood or bamboo.

What amounts to dry wood is not defined. The right to dry wood or bamboo is moreover subject to a number of limitations. First, going by the strict wording of Section 33 (1), at any one particular moment, a member of a forest community is entitled to either dry wood or bamboo and not both. Second, the dry wood or bamboo must be for personal domestic use. This means that one cannot take some dry wood or bamboo for their neighbour or ailing mother. Third, members of the forest communities are required to cut and take only reasonable quantities. What amounts to reasonable quantities and who determines it is not clear. Fourth, the right to cut and take dry wood or bamboo is not automatic as it is subject to the management plan of a forest reserve or community forest.

However, it is often argued that beyond the right to dead wood or bamboo, there are other rights that forest communities can have and enjoy under the Collaborative Forest Management (CFM) framework provided for under the Forestry Act such as access to forest products and participation in the management of the forest resources. This is however not correct. Neither Section 15 of the Forestry Act which provides for CFM nor the CFM Guidelines provide for any forest tenure rights for forest adjacent communities. What is not contestable though is that under the CFM Framework, forest adjacent communities can enjoy some benefits from the forest reserves. Unlike rights which are legal entitlements, these benefits are not automatic. According to the CFM Guidelines, the benefits and roles of the different stakeholders under a CFM Arrangement are supposed to be negotiated and agreed upon in a CFM Agreement between and among the different stakeholders especially the forest user groups and NFA.³⁴ Some members from Matiri central forest reserve adjacent communities formed a forest user group called Matiri Natural Resource Users and Income Enhancement Association (MANRUIA) and entered into a CFM Agreement with NFA. This CFM Agreement dated 9th February 2016 lists a number of benefits for the members of MANRUIA. These include: access to

³³ Section 45 (5) of the National Environment Act states that “Traditional uses of forests which are indispensable to the local communities and are compatible with the principle of sustainable development shall be protected”.

³⁴ The CFM Guidelines define a “Collaborative Management Agreement” as an agreement signed under the Forestry Act for the purposes of defining a legally binding agreement between the lead agency and a partner for the utilization and management of a forest/ forest resource.

poles; access to forest foods like mushrooms and wild yams; access to craft materials like papyrus and palm leaves; access to dry dead wood; access to herbal medicine; fish farming and bee keeping.

A number of observations can be made about CFM arrangements as a source of forest benefits for the forest adjacent communities. First, under the current legal framework, it is only members of the forest adjacent communities who form themselves into forest user groups and enter into a CFM Agreement with NFA who can access benefits. To-date, out of the 506 central forest reserves in Uganda, there are only 49 CFM Agreements in respect of only 20 central forest reserves. This means that beyond the right to deadwood or bamboo, majority of the communities living near Uganda's central forest reserves are not legally accessing any forest benefits. Second, benefits under the CFM Agreements are negotiated largely between NFA and the representatives of the CFM group. This means that the benefits mostly depend on the negotiation capacity of the representatives of the CFM groups. Majority of the CFM groups lack this capacity. Third, there are a number of preconditions for the enjoyment of the benefits. For instance, under the CFM Agreement between NFA and MANURIA, members can only access fuel wood (deadwood) twice a week on Tuesdays and Saturdays. Many respondents considered this an unnecessary restriction. It was argued for instance that the elderly depend on their grandchildren who go to school on Tuesdays to collect fuel wood which means that they would only have one day and fuel wood collected in one day is not enough to take them through the whole week. Fourth, according to the Forest Regulations, CFM Agreements are entered into for an initial period of 5 years, which may subsequently be extended where the parties are in compliance with their obligations and where there is no objection by either party.³⁵ Arguably, this means that the benefits lapse with the expiry of the Agreement. The fact that renewal is not automatic makes things worse.

In conclusion, Uganda's forest legislation is weak with respect to the protection of forest tenure rights of forest adjacent communities. However, under the CFM arrangements, depending on their negotiation capacity, local communities or members of forest adjacent communities who form forest user groups and enter into a CFM Agreement with NFA can access certain negotiated benefits from the central forest reserves. Accessing the benefits is subject to agreed conditions in the CFM Agreement and this only happens during the subsistence of the Agreement.

3.3 Liability for Forestry Harm

Effective access to justice in the forestry sector requires that the forest legal framework should prove a comprehensive list of crimes in respect of harm or potential threats to forests. Additionally, the forest legal framework should prescribe strong and deterrent sentences for those who commit forest crimes and illegalities. The law should also not unnecessarily

³⁵ See Regulation. 29, The National Forestry and Tree Planting Regulations 2016.

protect government officials when they make reckless decisions that negatively cause harm or threaten the integrity of forests. Effective access to justice also requires forest legislation to provide for some incentive/rewards to members of the forest adjacent communities and other persons who aid in apprehending and successfully prosecuting offenders involved in committing forest crimes and illegalities. These persons need to be rewarded for two major reasons. First, they put their lives and those of their families at risk. Second, the reward can act as incentive for many people who have information about persons committing forest crimes and illegalities to provide the information to the relevant authorities for action. This is good for forest justice.

With respect to the above areas of assessment, Uganda's forest legislation generally scores low marks. Although it contains a fairly comprehensive list of forest crimes, there are gaps that need to be addressed. For instance, compared to Tanzania's forest legislation there are some acts which are harmful or pose serious threats to Uganda's forests which constitute crimes in Tanzania which are not criminalised in Uganda. For instance being found in possession of forest produce with respect to which an offence was committed,³⁶ and aiding or abetting commission of certain forest crimes.³⁷

The penalties provided for in Uganda's forest legislation in respect to commission of forest crimes are also weak. Most of the penalties are not commensurate with the economic value of the crimes. As such, they are not helpful in deterring people from committing forest crimes and illegalities. One example will suffice to illustrate this point. According to Section 43 of the Forestry Act, a person found guilty of cutting, taking or removing forest produce from a forest reserve or community forest without a license is liable to a fine not exceeding thirty currency points or to imprisonment for a term not exceeding three years, or both.³⁸ This means that even if one is found to have illegally cut trees worth billions of money, the maximum penalty one risks suffering is a fine not exceeding thirty currency points or imprisonment for a term not exceeding three years, or both.

Another weakness of Uganda's forest legislation with respect to penalties for forest crimes is that it prescribes the maximum and not minimum sentence.³⁹ This is unlike Tanzania's Forest Act 2002 which for the majority of forest crimes provides for both the minimum penalty and maximum penalty.⁴⁰ The problem with Uganda's approach is that it gives a lot of discretion to the judicial officers in determining the final penalty imposed in any particular case. Evidence shows that the judicial officers often give very lenient sentences notwithstanding the fact that the maximum sentences provided for are themselves weak.⁴¹ This is not good for forest justice.

³⁶ This is a criminal offence according to Section 88 of Tanzania's Forest Act 2002.

³⁷ See for instance Section 33 (4) of Kenya's Forests Act.

³⁸ According to the first schedule to the Forestry Act, a currency point is equivalent to twenty thousand shillings. Thirty currency points is the equivalent of 600,000 Uganda Shillings which is about \$200.

³⁹ For an overview of penalties under Uganda's principal forest legislation, see ACCU (2015), *When the Law Costs Conservation Efforts: A Critical Analysis into the Penalties under Uganda's National Forestry and Tree Planting Act 2003*, Policy Briefing Paper Series No. 2.

⁴⁰ See for instance Sections 84, 85, 86, and 89.

⁴¹ *Supra* note 39.

Connected to the issue of penalties, there is growing evidence that where the offence committed attracts a fine or imprisonment or both, the magistrates normally go for the fines and not imprisonment. And where they go for imprisonment, the sentences imposed are very short.⁴² Since the maximum fine that can be imposed is so low, many of the convicts do not find any challenges in paying the fines. In fact, in a number of regional forest governance platforms convened by ACODE, police officers and prosecutors often argue that when attending court hearings, many suspects anticipate being fined if found guilty and often come with enough money to pay off the fine immediately.

Uganda's forest legislation is also weak with respect to the issue of rewards/incentives for informers. It does not provide for any reward to persons that help law enforcement officers with information leading to the apprehension and/ or successful prosecution of people involved in committing forest crimes and illegalities. This is unlike Tanzania's forest legislation which provides for rewards. Section 99 (1) of the Tanzania's Forest Act 2002 provides that "The Director may award any amount not exceeding one half of any fine imposed for an offence against this Act to any person who may have supplied such information as may have led to the conviction of an offender".

Another critical area related to the question of liability for forest harm, where Uganda's forest law is weak, is the burden of proof in forest crimes. Burden of proof is a rule of evidence that places the responsibility upon a party to a case to prove or disprove certain facts. Unlike Uganda which follows the tradition of "he who alleges must prove", for some forest crimes, Tanzania's Forest Act 2002 places the burden of proof on the accused. For instance, Section 84 (2) provides that, "If any person, without lawful excuse, *the burden of proof of which shall be on him* is found within, or in the vicinity of any forest reserve or has in his possession any implement for cutting, taking, working or rendering any forest produce, he shall be guilty of an offence against this Act".⁴³ For this offence, all that the prosecution needs to prove is that the accused was found within or in the vicinity of the forest reserve or had in his possession the stated implements. This makes the prosecution's case much lighter. Given the circumstances under which many forest crimes in Uganda are committed i.e., at night and in the thickest of the forests where it is difficult to get and collect evidence,⁴⁴ Tanzania's approach serves the interests of forest justice better.

⁴² Ibid.

⁴³ Emphasis added

⁴⁴ See for instance revelations made by Mugenyi Kamisafu (CID officer Masindi) in his presentation entitled "Challenges affecting investigations of forestry crimes" made at regional forestry governance forum at Hotel Bija, Masindi. Presentation is on file.

4. Courts as Forest Dispute Settlement Mechanisms: Lessons from the Matiri Court Cases

Courts of law are one of the major mechanisms for ensuring access to justice. Increasingly however, many stakeholders in Uganda are concerned about the way courts in Uganda handle and dispose of forest-related disputes.⁴⁵ The concerns range from time taken to dispose of cases, to handling of evidence, interpretation of the law and facts and award of damages and penalties. Using three court cases concerning Matiri Central Forest Reserve in Uganda, this section analyses the way Uganda courts deal with forest cases and makes recommendations in form of lessons learnt to enhance the role of courts of law in ensuring access to justice and forest justice.

The cases under review are: *Omuhereza Rwakaboyo & 119 others v The National Forestry Authority* (herein after referred to as “Omuhereza 1”);⁴⁶ *Omuhereza Rwakaboyo & 119 others v The National Forestry Authority* (herein after referred to as “Omuhereza 2”);⁴⁷ and *Kalubanga Patrick and 40 others v National Forestry Authority* (herein after referred to as “the Kalubanga case”).⁴⁸ All together, these three cases shall be referred to as “the Matiri cases” since they concern disputes over Matiri central forest reserve⁴⁹ between National Forest Authority (NFA) on one hand and alleged encroachers of forest reserves on the other.⁵⁰

Only Ugandan court cases have been focussed on. This is largely because of the ease to access the court decisions and also because it was difficult to get similar court decided cases on forest disputes in Tanzania. The Matiri cases were chosen as case studies because they were identified by many respondents interviewed as the major court cases involving forest disputes between NFA and the local communities in Kyenjojo district. Matiri central forest reserve was chosen also because of the geographical focus of the project that supported this study and partly because it is the major central forest reserve in the project focus area. More so, a number of forest disputes between local communities and NFA over Matiri central forest reserve have ended up in the courts of law.

⁴⁵ See for instance reports of ACODE-organised forest governance forums.

⁴⁶ HCT-01-CV-MA-0060 of 2009.

⁴⁷ Civil Application No. 0308 of 2014.

⁴⁸ HCT-01-LD-MA-0062/2013.

⁴⁹ Matiri central forest reserve is one of Uganda’s 506 central forest reserves that is under management of NFA. It is located in Kyenjojo district and is part of the Matiri forest sector which comprises six central forest reserves, namely Matiri, Ibambaro, Kitechura, Buhungiro, Rwensambya and Nkera.

⁵⁰ NFA is the Government agency mandated to develop and manage Uganda’s central forest reserves. See Section 54 (1) (a) of the National Forestry and Tree Planting Act.2003.

4.1 Facts of the Matiri Court Cases

In Omuhereza 1, the plaintiffs claimed that they were the owners of the suit land in Matiri central forest reserve. They claimed that they had stayed there over a long period of time and that they had developed the land under contention in certain respects including construction of homesteads, establishing a trading centre, agricultural and mixed farming, and establishing ancestral and burial grounds. For some reasons, the plaintiff was opposed to the survey and reopening of the boundaries of Mukonomura enclave in Matiri central forest reserve and the fresh marking of internal and external boundaries of the central forest reserve. On 4th September 2009, they got an interim injunction restraining the defendant (NFA) from interfering with the suit land, alienating, gazetting, developing, controlling, managing or cultivating the suit land, planting trees or carrying out construction works or any other activity thereon, until the hearing and determination of the main application for a temporary injunction or until further orders from court. The interim order was confirmed by the judge who heard the main application and who subsequently granted a temporary injunction. The injunction was however to protect only the “boundary of activities” as at 4/09/2009. For this purpose, the High Court ordered the District Forest Officer (DFO), District Agriculture Officer (DAO), and District Police Commander (DPC) together with a representative of the Chief Administrative Officer (CAO) Kyenjojo district to establish the “boundary of activities” as at 4/09/2009. The High Court also ordered a survey and opening up of the boundaries within a specified period of time. The court orders were never executed. The plaintiffs continued with farming activities and cut more trees. NFA forest guards arrested and prosecuted some of the plaintiffs for illegal encroachment.

Both parties went back to court accusing each other of violating the court order. The plaintiffs denied any fresh encroachment and claimed that they were carrying out their activities within the land where court allowed them to stay as at 4/09/2009. On 4th October 2013, the parties entered a consent order before the Assistant Registrar. According to this order, Kyenjojo District administration was again tasked to establish the “boundary of activities” of the plaintiff as at 4/09/2009. Any activities beyond the interim order of 4/09/2009 would not stand protected and NFA would act to recover any areas encroached upon. NFA claimed that the plaintiffs continued to cut down trees, harvest timber and burn charcoal and opened up new gardens in total breach of the consent order, a claim the defendants denied. On 6th October 2013, NFA filed a survey report with Court showing the recent update of true boundaries of Mukonomura enclave. The Plaintiffs rejected it.

Before making his ruling, Justice Batema visited the land in issue and noted a number of things among which was that the plaintiffs had adamantly rejected the findings of the government surveyor and instead showed him false boundaries based on colours painted on trees by forest study groups. The judge also noted that in the middle of Matiri central forest reserve is a private piece of mailo land known as Mukonomura enclave

and that all encroachment on the forest arose out of absence of a clear boundary. It was further observed that the Court injunction failed to maintain the status quo as at 4/09/2009. Matiri central reserve had been heavily encroached upon by the plaintiffs and other people and there were freshly opened gardens in the middle of the forest, and trees had been cut for timber and charcoal. Court also observed and noted that all houses and constructions in the suit land were temporary in nature.

In his ruling dated 25/07/2014, Justice Batema ordered for the lifting of all court orders of injunction and held that NFA was free to plant trees and protect and preserve the forest. All people who settled in lands outside Mukonomura enclave whether or not protected by the former court orders were given one month from the date of the ruling to harvest their crops and peacefully move out of the suit land. It was observed that their continued stay and cutting of the forest for timber and charcoal was causing irreparable damage to NFA and that court would have no forest to hand over to the NFA if it won the case. NFA was ordered not to interfere with the lawful stay and activities of the residents of Mukonomura enclave and the residents of Mukonomura enclave were ordered not to encroach on Matiri forest reserve as per the provisional boundaries established by the government surveyors in their report dated 6/10/2013.

Although the one month's notice to vacate especially in respect of people who were protected by the former court orders may be considered inadequate, in the circumstances, it was the right decision to make if forest justice was to be achieved. The lessons for judicial officers from this ruling are discussed in the next section.

In Omuhereza 2, the plaintiffs appealed to the Court of Appeal against Justice Batema's ruling summarized above. They applied for a temporary injunction seeking to restrain the respondents (NFA), their agents or anybody claiming authority from them from entering and trespassing on the suit land until the determination of Civil Appeal No. 162 of 2014 which was said to be pending before the Court of Appeal. The grounds for the application were that there was a pending appeal which had over-whelming chance of success and that if the application was not granted, the appeal would be rendered nugatory and the applicants would suffer substantive and irreparable damage. That it was just and equitable to grant the application.

In his ruling dated 14th October 2014, Justice Kenneth Kakuru of the Court of Appeal first noted that the applicants' notice of appeal upon which the application was premised was lodged out of time according to the rules of court. Nevertheless, "taking into account the checkered history of this case, and the peculiar issues it raises," he was inclined to invoke the provisions of Rule 42(2) of the rules of the Court of Appeal to grant a consequential extension of time within which the notice of appeal ought to have been filed. He then proceeded to determine the application as if the notice of appeal had been lodged in time. Contrary to the applicants claim that they had filed Civil Appeal No 162 of 2014, Justice Kakuru found that there was no such appeal. Civil Appeal No.162 of 2014 was a different case altogether involving different parties.

Finding no merit in the application, Justice Kakuru dismissed it with costs. In dismissing it, he observed that the orders sought in the application were more or less the same as those the applicant intended to seek in the appeal itself, namely staying or setting aside the order of Justice Batema issued on 25th July 2014. “I am hesitant to grant an order whose effect is to grant the relief sought in the intended appeal,” he stated. He argued that granting such order would have the effect of reversing the decision of the High Court without hearing the parties on that decision.

According to ruling, Justice Kakuru also found that the applicants did not establish that if their application was not granted they would suffer irreparable loss and damage. In fact, their counsel conceded that any loss or damage could be compensable by damages. He noted further that the applicants had not established that the intended appeal had any likelihood of success.

He found the balance of convenience to be in favour of the respondent. He argued that the applicants could be compensated for any damages or loss resulting from the order of the learned Judge but the damage to the natural forest reserve on the other hand would likely be irreparable and irreversible. As will be discussed in the next section, this ruling equally has important lessons for judicial officers in terms of enhancing their role in particular and courts of law in general in ensuring forest justice.

In Kalubanga, in November 2013, the applicants successfully applied for interim orders of injunction against NFA from evicting them. In this application, they applied for a declaratory order, an injunction to maintain the status quo and general damages and costs. They argued that unless and until the boundaries of the forest reserve were opened and ascertained, they ought not to be evicted on a mere presumption that they were occupying a forest reserve. Justice Batema who heard the application visited the locus and found among other things that Mukonomura enclave where the applicants claimed to live was a private mailo land surrounded by Matiri central forest reserve. The judge found that the suit land was far away from the Mukonomura enclave and was in Matiri central forest reserve. He noted that unlike in Omuhereza 1, the applicants were not residents of Mukonomura enclave or immediate neighbours to the enclave. He further noted that they were clearly illegal encroachers who were degrading the forest and abusing court process. Against these observations, he dismissed the application with costs. In his ruling, he noted that the activities of the applicants were dangerous to the forest and were causing irreparable damage to NFA and all the citizens of Uganda. He directed NFA to ensure that all farming activities and the cutting of trees for timber and charcoal burning in the suit land were stopped henceforth.

The question to ask at this point is: From the facts of the Matiri cases summarised above, what lessons can judicial officers learn in terms of enhancing their role in promoting justice for forests? This is the major concern of the analysis in Section 4.2 below.

4.2 Lessons for Enhancing Forest Justice

4.2.1 Forest boundary disputes should be resolved expeditiously

Effective access to justice in the forest sector requires timely resolution of disputes. It took over five years before the ruling in Omuhereza 1 was delivered. While it is appreciated that there might have been some factors beyond Court which could have contributed to the delay in concluding this case, given the forest destruction that happens in even just one day, five years is a very long time to spend in addressing forest disputes. Indeed, the delay in resolving this dispute resulted in unprecedented depletion of Matiri central forest reserve by the plaintiffs and others to the extent that as Justice Batema observed in his ruling, “[only] a small strip of forest remains along the road-side on the Kyenjojo-Kampala highway”. This was bad for forest justice. For the sake of saving Uganda’s forests, it is critical that forest-related disputes are prioritised by the judicial officers, the judiciary and other law enforcement agencies.

4.2.2 Court orders concerning protection of forests should be executed quickly

In Omuhereza 1, it was noted that the earlier judge who granted the temporary injunction against NFA ordered the Kyenjojo DFO, DAO, DPC together with a representative of the CAO to establish the “boundary of activities” as at 4/09/2009 because the injunction was to protect only the “boundary of activities” as at that date. He also ordered the parties to cause a survey or opening up of the boundaries within a specified period of time not later than 30 days from 7th April 2010. None of these orders were executed. The plaintiffs and other persons took advantage of the non-execution of the court orders and encroached on more forest land and cut more trees for timber and charcoal burning. If the Kyenjojo district officials had established the “boundary of activities” as at 4/09/2009 and had done the survey and opening up of the boundary within the ordered time, perhaps Court would have revisited its earlier decision and given new directives that would have protected the forest. Regrettably, this was not done and the result was the unprecedented encroachment on the forest reserve.

4.2.3 Visiting locus in quo is important

The Matiri cases demonstrate that to ensure justice in forest-related disputes, it is always important for the trial judges/magistrates to visit the suit area. In Omuhereza 1, Justice Batema visited the suit lands. According to his ruling, he visited the suit lands to ascertain for myself the status quo and see if the court orders can be enforced

or not and take appropriate action... I also wanted to find out whether the boundaries of Matiri Central Forest reserve had been properly re-opened in the ordered survey.

He noted a number of things on this visit which were critical for the judicious resolution of the dispute. For instance, he observed that all the encroachment of the forest along the Mukonmura enclave arose out of the absence of a clear boundary. He observed that “All mark stones ...had been removed or destroyed and the plaintiffs failed to show court any old 1962 mark stones they had respected or a 1998 declaration boundary or mark stone which the government surveyor had ignored”.⁵¹ He also observed that houses and constructions in the suit land were temporal in nature.

Just like it was in Omuhereza 1, in Kalubanga, Court also visited the locus. In this case, the judge stated the reasoning of his visit as thus:

I chose to visit the locus in quo to see for myself the type of lawful settlement of the plaintiffs in the forest reserve. I did not want to listen to academic arguments and maintain a status quo of cutting trees and cultivating in a forest reserve which I thought was unlawful from the word go or gave no cause of action.

In this case, Court noted a number of things that informed its decision. For instance, it found that the suit land was far away from the Mukonomura enclave (the private mailo land in the forest) and was in Matiri central forest reserve. Court also noted that unlike in the case of Omuhereza 1, the claimants in Kalubanga were not residents of Mukonomura enclave or immediate neighbours to the enclave. To this effect, Court held that they were clearly illegal enrichers degrading the forest and abusing court process to get an injunction against NFA. In all the Matiri cases, the findings at the scene of the suit lands were very critical in enabling Court to reach informed and just decisions.

4.2.4 Irreparable damage and balance of convenience.

It is an established rule that in applications for temporary injunctions, applicants must convince court that they are likely to suffer irreparable damage if their application is not granted, and in case of doubt, that the balance of convenience should lie in their favor.⁵² A review of the Matiri cases point to an emerging principle that in cases involving forest boundary disputes/alleged encroachment on central forest reserves, NFA stands to suffer irreparable harm and the balance of convenience should often be resolved in its favor as custodian of Uganda’s central forest reserve resources. Although cases differ, it is generally and often much easier to compensate loss suffered by the alleged

⁵¹ Applicants had alleged that in carrying out a certain survey, the government surveyor had ignored a 1998 declaration boundary or mark.

⁵² See for instance *Haco Industries (K) Ltd v Ddunga F W* (HTCT-00-CC-MA-0253 OF 2005) [2005] UGCOMM 21 (11 May 2005), *Per Egede Nielsen v Preben Rosenkilde & 2 ors* (Miscellaneous Application 241/2014) (2014) UGCOMM 213 (5 June 2014); and *Stanbic Bank Uganda Ltd v Joseph Aine and others* (HCT-00-CC-MA-0305-2005) [2005] UGCOMM 29 (19 June 2005).

encroachers through damages than it is to NFA if the forests are destroyed. Thus, in Omuhereza 1, while ordering all people who settled in lands outside Mukonomura enclave to vacate the suit land, Justice Batema observed that it would be easier to hand back to them the forests if they won the main suit. Conversely, he noted that their continued stay and cutting of the forest for timber and charcoal was causing irreparable damage to NFA and that court would have no forest to hand over to the NFA if NFA won the case. Justice Batema regretted the initial court orders that granted a temporary injunction against NFA and observed that they did more harm than good and were a disservice to the nation. As he rightly put it, they crippled NFA and gave a free hand to plaintiffs to encroach upon the forest and probably opened floodgates to new encroachers and unscrupulous NFA and district officials to cut trees and trade in timber and charcoal.

Similarly, in Kalubanga, while holding that the applicants were causing irreparable damage to NFA and all citizens of Uganda, the Judge noted that the farming activities, cutting of timber and burning of charcoal were all incompatible with the growing, preservation and protection of the forest. “There is urgent need from yesterday to stop the settlement and activities of the plaintiff/applicants and throw them out of the gazetted forest land,” he observed.

In Omuhereza 2, while dismissing the application, Justice Kenneth Kakuru of the Court of Appeal found the balance of convenience to be in favour of NFA. He argued that the applicants could be compensated for damages or loss resulting from maintaining the ruling of the trial judge. On the other hand, he argued that the damage to the natural forest reserve was likely to be irreparable and irreversible.

4.2.5 Judicial activism is very important for forest justice

In the interest of saving forest reserves, judicial activism requires judicial officers to go beyond merely applying the law to the facts. It requires them to innovatively make decisions and recommendations that advance forest justice. The Matiri cases point to the fact that judicial officers in particular and Courts of Law in general can play an even bigger role in promoting sustainable management of forest resources through judicial activism.

In Omuhereza 1, beyond just interpreting the law and applying the law to the facts and issues at hand, Justice Batema noted that having private mailo land located in a forest reserve was one of the challenges to ensuring the integrity of Matiri forest reserve. He observed that the enclave harbors wrong elements who encroach on the forest and carry out activities that endanger the forest. To save this forest, he recommended that the NFA should buy out the Mukonomura enclave so that all land becomes a forest reserve. Unfortunately, at the time of writing this paper, no steps had been taken to buy out this enclave as recommended. Given the history of encroachments on Matiri

central forest reserve emanating from persons occupying Mukonomura enclave, there is no doubt that if implemented, Justice Batema's recommendation would substantially reduce cases of illegal encroachment and other forest crimes and illegalities in Matiri central forest reserve.

4.2.6 Technicalities should not stand in the way of saving forests

Article 126 (2) (e) of the Constitution of the Republic of Uganda provides inter-alia that "In adjudicating cases of both a civil and criminal nature...substantive justice shall be administered without undue regard to technicalities". Although meeting technical requirements is an important part of the justice system, if upholding technicalities poses serious threats/harm to forests, judicial officers should follow the constitutional command to administer substantive justice without undue regard to technicalities.

In *Omuhereza 2*, Justice Kenneth Kakuru could have dismissed the application as the applicants' notice of appeal was lodged out of time. But given the "checkered history of this case, and the peculiar issues it raises" as he put it, he decided to grant a consequential extension of time within which the notice of appeal ought to have been granted. He consequently proceeded to determine the merits of the application which he found lacking in material respects.

In sum, the Matiri cases provide six important lessons for enhancing forest justice. Resolving forest disputes and execution of court orders in a timely manner is a must if courts are to be counted on as key partners in promoting forest justice and sustainable management of Uganda's forest resources. The Matiri court cases also demonstrate the need for judicial activism in resolving forest disputes and the need for judicial officers to often visit the forest areas which are the subject of litigation.

Another key lesson for judicial officers is that in applications for interim orders of injunctions, it should be borne in mind that often, NFA (as trustee of Uganda's central forest reserves) stands to suffer irreparable loss and damage if the applications are ruled against it. Consequently, even the balance of convenience should often be resolved in favour of NFA/ protecting the forests.

Finally, the Matiri cases teach us that where necessary, in the interest of saving forests, substantive justice should be done without undue regard to technicalities. Along with other interventions, including continuous training of judicial officers on issues pertinent to access to justice in the forestry sector, if taken-on, these lessons can go a long way in enhancing the role of courts in promoting forest justice.

5. Conclusion and Recommendations

5.1 Conclusion

This study was primarily concerned with analysing the adequacy of Uganda's forest legal framework and practice in guaranteeing access to justice from a comparative perspective with Tanzania. Except with respect to the question of access to information, the analysis shows that Uganda's forest legislation is still generally weak with respect to the issues of access to justice that this study focused on. It is weak with respect to the question of protection of tenure rights of forest adjacent communities and liability for forest harm. There are also several gaps and challenges in practice which negatively affect access to justice in the sector. These include among others the lack of manual of functions and index of records in the forest-mandated agencies, arbitrary refusal to provide forest information on the part of some public officers, and lenient sentences given to convicts of forest crimes. Consequently, there are some lessons to learn from Tanzania. These lessons are provided in the subsection that follows in form of recommendations. Although improving Uganda's forest legislation is important in terms of enhancing access to justice in the forest sector, the non-legal factors affecting justice in the sector need to also be addressed. The next section provides the legal and other recommendations necessary for enhancing forest justice and access to justice in Uganda's forest sector.

5.2 Recommendations

Recommendations to Parliament

- **Introduce More Forest Crimes** with respect to acts or omissions that may cause harm or threats to Uganda's forests: Aiding or abetting commission of a forest crime; attempting to commit a forest crime, and being found in possession of forest produce with respect to which an offence was committed should be criminalized. Forest legislation and the AIA should also make it an offence for a public official to refuse requests for access to information without any legal justification.
- **Increase Penalties for Forest Crimes:** To have a strong deterrent effect, Parliament should increase penalties for all forest crimes to among other things reflect the economic value of the offence and increase the penal effect. Most forest crimes should attract a mandatory minimum imprisonment sentence of at least six months. This should be in addition to any minimum fines that courts may impose. The discretion of judicial officers in determining the final sentence to impose on convicts should also be reduced by prescribing the minimum rather than maximum penalties.

- Provide rewards to ordinary persons and forest adjacent communities that provide information which leads to successful apprehension or prosecution of persons who commit forest crimes and illegalities. Like is the case with Tanzania’s forest legislation, Uganda’s forest law could provide that up-to 50% of any fine imposed should be given to such informers. A reasonable percentage of about 10% of the revenues from the sale of confiscated illegal forest produce should also be given to the persons/local communities that provide information leading to the confiscation of such produce.
- Extend the right of access to forest information to foreign nationals as long as the information they seek is not proprietary and does not compromise Uganda’s sovereignty and national security. It is appreciated that in the first place, this recommendation would require amending the Constitution.
- Legally provide for more tenure rights for forest adjacent communities beyond the right to dead wood or bamboo. These should include the right to collect and use minor forest produce (not amounting to timber and trees), and the right to carbon credits associated with the relevant forest reserves.
- Provide for clear and effective remedies in case of violation of the tenure rights of forest communities. The remedies should include restitution, indemnity, compensation and reparation

Recommendations to Judicial Officers (Judges and Magistrates)

- Dispose of forest disputes in a timely manner. The longer it takes to resolve forest disputes, the more forests suffer at the hands of wrong doers.
- Always resolve the balance of convenience in applications for temporary injunctions and interim orders of injunctions in favour of the protection of forests. It is always easier for any damage or loss to individuals to be compensated for by way of damages but the damage to natural forest reserves is always likely to be irreparable and irreversible.
- Exercise judicial activism where the ends of forest justice demand so.
- Always visit the locus in quo in case of forest boundary-related disputes.
- Do not allow technicalities to stand in the way of saving forests.

Recommendations to NFA and FSSD

- Invest in producing and publicizing the manual of functions and index of records as required by law.
- Invest in training and capacity building of staff about the law governing access to information and issues of access to justice generally.
- Publicize the departmental or agency specific procedures for accessing forest information and the responsible officer to whom issues of access to forest information should be addressed.

Recommendations to Civil Society Organizations

- Advocate for forest legal reform along the recommendations made to Parliament above.
- Support NFA and FSSD to build capacity of their staff on legal issues concerning access to justice
- Monitor compliance of forest-mandated agencies with the law and policies governing access to justice.

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