



Advocates Coalition for Development and Environment

ENHANCING THE ROLE OF COURTS IN PROMOTING FOREST JUSTICE



Lessons from the Matiri Court Cases

• Ronald Naluwairo

ACODE Policy Briefing Paper Series No. 37



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List of Acronyms

ACODE	Advocates Coalition for Development and Environment
CAO	Chief Administrative Officer
DAO	District Agriculture Officer
DFO	District Forest Officer
DPC	District Police Commander
NFA	National Forestry Authority
RDC	Resident District Commissioner

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I. INTRODUCTION

Despite concerted efforts by government and non-government actors, Uganda continues to suffer from unprecedented rates of deforestation and forest degradation. Current statistics indicate that in the last 25 years, Uganda lost more than half of its forest estate. According to the State of Uganda's Forestry Report 2016, Uganda's forest cover reduced from 4.9 million hectares in 1990 to 1.8 million hectares in 2015 translating into a loss of 3.1 million hectares¹. This rate of loss of forest cover has serious consequences for the lives and livelihood security of many Ugandans. For the most part, this unprecedented loss of Uganda's forest cover is attributed to the increasing number of forest disputes, crimes and illegalities in the forest sector. This raises the question of settlement of forest-related disputes.

Courts of law are one of the major mechanisms for settling forest-related disputes in Uganda. However, increasingly, many stakeholders are concerned about the way courts handle and dispose of forest-related disputes². 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.

The major objective of this paper is to provide recommendations in form of lessons that can enhance the role of courts of law in ensuring forest justice/justice for forests³. The paper is part of a larger study comparing access to justice in the forest sector in Uganda and Tanzania.

The paper largely uses desk review of three court cases: Omuhereza Rwakaboyo & 119 others v The National Forestry Authority (herein after referred to as "Omuhereza 1");⁴ Omuhereza Rwakaboyo & 119 others v The National Forestry Authority (herein after referred to as "Omuhereza 2");⁵ and Kalubanga Patrick and 40 others v National Forestry Authority (herein after referred to as "the Kalubanga case").⁶ All together, these three cases shall be referred to as "the Matiri cases" since they concern disputes over Matiri central forest reserve⁷ between National Forest Authority (NFA) on one hand and alleged encroachers

¹ Republic of Uganda (2016). STATE OF UGANDA'S FORESTRY, Ministry of Water and Environment, Kampala, para. 151.

² In many forest governance platforms that ACODE has convened in the last three years, stakeholders raise different issues concerning the way courts handle and dispose of forest cases.

³ "Forest justice/justice for forests" is used loosely in this paper to refer to court decisions or rulings that uphold the integrity of forests by promoting their conservation and sustainable management.

⁴ HCT-01-CV-MA-0060 of 2009.

⁵ Civil Application No. 0308 of 2014.

⁶ HCT-01-LD-MA-0062/2013.

⁷ Matiri central forest reserve is one of Uganda's 506 central forest reserves that are 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.

of forest reserves on the other.⁸ This paper analyses these cases and the lessons they offer for enhancing justice for forests.

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 partly 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. Moreso, a number forest disputes between local communities and NFA over Matiri central forest reserve have ended up in the courts of law.

This paper is divided into 4 sections. Section 1 is the introduction and Section 2 provides the facts of the Matiri cases in some substantial detail. From the facts in Section 2, Section 3 draws the lessons for enhancing the role of courts in ensuring forest justice. Section 4 is the conclusion.

⁸ 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.

2. FACTS OF THE MATIRI 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 suit land 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 were 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 order of 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), 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 lands 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 orders of injunction failed to maintain the status quo as at 4/09/2009. Matiri central forest 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 on land outside Mukonomura enclave whether protected by the former court orders or not 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 an 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 3 below.

3. LESSONS FOR ENHANCING FOREST JUSTICE

3.1 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.

3.2 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.

3.3 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.

Indeed from his visit, he noted a number of things 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”.⁹ 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.

⁹ Applicants had alleged that in carrying out a certain survey, the government surveyor had ignored a 1998 declaration boundary or mark.

3.4 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.¹⁰ 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 encroachers through damages than it is to NFA if the forests are destroyed. Thus, in *Omuhereza 1*, while ordering all people who settled on land 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.

¹⁰ See for instance *Haco Industries (K) Ltd v Ddungu F W* (HTCT-00-CC-MA-0253 OF 2005) [2005] UGCOMMC 21 (11 May 2005), *Per Egede Nielsen v Preben Rosenkilde & 2 ors* (MISCELLANEOUS APPLICATION 241/2014) (2014) UGCOMMC 213 (5 June 2014); and *Stanbic Bank Uganda Ltd v Joseph Aine and others* (HCT-00-CC-MA-0305-2005) [2005] UGCOMMC 29 (19 June 2005).

3.5 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.

3.6 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.

4. CONCLUSION

Through the lens of the Matiri cases, this paper was concerned with lessons/recommendations for enhancing the role of courts in promoting forest justice and the sustainable management of Uganda's forest resources. 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.

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