TRADING NATURAL WEALTH FOR FICTION

A Legal Opinion on the Proposed Degazettement of Pian Upe Wildlife Reserve

GODBER W. TUMUSHABE

LEGAL SERIES #1

NOVEMBER 2003

Introduction

Pian Upe Wildlife Reserve (PUWR) was gazetted as a wildlife reserve in 1964 under Statutory Instrument (SI) 220. It is listed in the Sixth Schedule to the Game (Preservation and Control) Act[2]. Although the Game (Preservation and Control) Act was repealed by the Uganda Wildlife Statute, the Sixth Schedule was saved by *Section 94(1)(a)* of the Statute. Consequently, PUWR now has a status of a wildlife reserve and forms part of the public trust resources protected under *Article 237* of the Constitution and *Section 45* of the Land Act, 1998.

Pian Upe Wildlife Reserve is Uganda's second largest protected area with a total land area of 2,043 sq. km. It is located in the southwestern corner of Nakapiripirit District in the Karamoja region. The reserve is primarily made up of savannah and wetland ecological systems. It is endowed with important wildlife species such as the topi, hartebeest, eland, zebra, leopard, lion, buffalo, Rothschild's giraffe, Bright's gazelle and others. It holds the last population of the Roan antelope, which is threatened by extinction in Uganda. The reserve wetlands are also an important stopover for migratory birds from Europe and are, therefore, being considered for higher-level protection under the Ramsar Convention.

The area comprising PUWR is also important for the maintenance of local pastoral livelihoods. The reserve, in keeping with its legal status, provides pasture and water for hundreds of thousands of Karamojong livestock during the dry season.

Over the last decade, the Government of Uganda has adopted a consistent pattern[3] of considering protected areas as lands available for private appropriation especially when dealing with foreign private investments. This pattern is well established with reference to the degazettement of Namanve Forest Reserve in 1997, and the proposal to degazette and the subsequent award of a permit to turn Butamira Forest Reserve into a sugar cane plantation and the efforts in the late early 2000 to degazette a series forest reserves on Bugala Islands of Lake Victoria. In all these cases, Government has conducted itself as the proponent of the investment projects, trading wealth for fiction - a scenario that is tantamount to the abuse of the public trust protected under the 1995 Constitution.

This brief provides an independent analysis of the legal issues surrounding the proposed degazettement of Pian Upe Wildlife Reserve for private commercial agricultural interests, and challenges what is slowly becoming a dominant notion within Government that protected areas are available "to dish out" to private and corporate interest in complete disregard of the beneficiary interest of the Ugandan people. It is argued that the proposed degazettement of part of Pian Upe Wildlife Reserve is consistent with this growing pattern of abuse of public trust.

The Illegality of Degazettement

Since January 2003, efforts have been made to degazette part (1,903 sq. km) of PUWR. According to official correspondence[4] from the office of the Prime Minister, this constitutes 75% of the current land area of PUWR. In February 2003, the National Environment Management Authority (NEMA) gave its opinion[5] to the Ministry of Tourism, Trade & Industry (MTTI) on the proposed degazettement. In his communication, the Executive Director of NEMA brought to the attention of the Permanent Secretary of the MTTI the legal requirements for an environmental impact study (EIS) for any such proposed degazettement, including any major change of land use.[6] NEMA correctly argued that "the submission of the terms of reference for an EIS by M/S African Integrated Development Co. Ltd, as a developer can only come after a decision has been taken on the proposed land use change based on the EIS done by the lead agency." Lastly, NEMA gave its interpretation of the relevant provisions of the law, which confirm our earlier arguments in the case of Butamira Forest Reserve[7] and noted as follows:

> ***"Lastly, our understanding of the Constitution, the Land Act, 1998 and the Uganda Wildlife Statute, 1996 when read together is to the effect that alienation (for that matter degazettement) of a Game Reserve or National Park is not permitted. What the above laws permit is the issuance of permits, concessions or licenses in Game Reserves and National Parks, among the other reserved natural resources."***

It is important to note the unanimity in the interpretation of the effect of *Article 237(2)(b)* of the Constitution and *Section 45* of the Land Act by both NEMA and the Attorney General. In March 2003, the Permanent Secretary of the MTTI sought[8] a legal opinion from the Attorney General about the proposed degazettement of PUWR. In his advisory opinion[9], Attorney General Francis Ayume, after addressing himself to the provisions of *Article 237(2)(b)* of the Constitution and *Section 45* of the Land Act, opined as follows:

> ***"The implication [of this position] is that government is trustee and as such its powers to deal with such natural resources are not absolute; rather they are subject to the interests and wishes of the people of Uganda. In fact, Section 45(4) of the Land Act goes further to expressly prohibit Government or a local government from leasing or otherwise alienating any of the aforementioned resources. The effect of this is that any act of Government or a local government which ultimately results in the transfer of any of the natural resources specified in Article 237(1)(b) of the Constitution and Section 45(1) of the Land Act will be unlawful."***

The Attorney General further confirms our analysis in the case of the proposed degazettement of Butamira Forest Reserve by arguing that the only way that Government or a local government can deal with protected natural resources is by way of a permit, concession or license as stipulated in *Section 45(5)* of the Land Act. But even then, he rightly cautions, that *Section 45(5)* of the Land Act "does not vitiate the prohibition in *Sub-Section (4)* that is to say not to lease out or otherwise alienate the afore-mentioned natural resources. In order for concessions, licenses, or permits to be lawfully granted, they must be in respect of a business related to wildlife management or one which has an impact on wildlife management and conservation areas…The proposed activity by the investor in commercial crop farming does not fit in what is envisaged in *Sub-Section (5)* of *Section 45* of the Land Act."[10]

It is important to note that the three allowable instruments (concessions, permits and licenses) through which natural resources can be used have two important dimensions that conform to *Article 237(2)(b)* of the Constitution. First, the legal status of the trust property remains intact and the investor is given user rights of a limited duration. On the contrary, degazettement destroys the proprietary interests of the beneficiary (the people of Uganda) disenfranchises them and diminishes any opportunities for access to the resource. This is because, after degazettement, the Government becomes the landlord and will be able to allocate land as it wishes.

Secondly, because concessions, permits or licenses do not give you absolute ownership and the land continues to vest in the original owner (the people of Uganda), Government is able to impose sustainable development conditions on the holder of such rights. Given that Uganda's natural resources are its foundation for economic growth and the basis of livelihood for the majority of its people, the right to regulate how these resources are accessed and appropriate must remain a cornerstone of national policy and practice.

Abusing Due Process of the Law

Both NEMA and the Learned Attorney General seem to have misdirected themselves on the right process of dealing with natural resources within the ambit of the legal provisions that they have rightly cited. In its opinion[11], NEMA argues that the right procedure to follow is for the Lead Agency to first undertake an EIS focusing on the proposed change of land use. This implies that once the Lead Agency has undertaken the EIS and a decision has been made to change the land use of the area, the developer can go ahead to do an EIA for the proposed development. However, this can be a correct legal position only if you "vitiate" the prohibition in *Section 45(4)* of the Land Act. As long as this prohibition exists and the only allowable application of such resources is by way of concessions, permits or licenses, "any act of Government or a local government which

Supported by the Rights, Equity and Protected Areas Programme of CARE International in Uganda.

ultimately results in the transfer of any of the natural resources specified in *Article 237(1)(b)* of the Constitution and *Section 45(1)* of the Land Act will be unlawful."[12]

On the other hand, the Learned Attorney General has opined as follows:

"The only other option (other than by way of concession, permit or license) for consideration is for the Minister responsible for wildlife to exercise his powers under Section 94(2) of the Uganda Wildlife Statute to proceed to amend the Sixth Schedule to the Game (Preservation and Control) Act, by striking Pian Upe off the list of areas gazetted as wildlife reserves so that it ceases to be covered by Article 237(1)(b) of the Constitution and Section 45(1) of the Land Act, 1998. The Minister does so by way of a Statutory Instrument with prior approval of Parliament signified by its resolution under Section 94(2) of the Uganda Wildlife Statute, 1996."[13]

We respectfully disagree with the Learned Attorney General's advice for at least three main reasons. Firstly, the ownership status of natural resources including game reserves is established and protected under *Article 237(2)(b)* of the Constitution. We have argued elsewhere that the absolute protection provided for under the Constitution was based on the proposals of Ugandan citizens submitted to the Odoki Constitutional Commission.[14] In its report, the Odoki Commission recommended that "the Constitution should vest the ownership, control and right of exploitation of important natural resources including land, water, minerals, oil and forests in the people of Uganda, with the State as the guarantor of the peoples' interest"[15]. *Article 237(2)(b)*, in our view, is a social contract between the people of Uganda and the State to protect the resources mentioned thereunder and guarantees their permanent availability for public uses. Any derogation from that position without changing the provisions of this contract is tantamount to the abuse of the trust vested in the State by the people of Uganda. Contrary to the opinion of the Learned Attorney General on this particular matter, the only option, we argue is for the State to seek to alter that social contract by way of seeking an amendment to *Article 237(2)(b)*.

Secondly, Parliament cannot change the status quo by amending *Section 45(4)* of the Land Act. In its wisdom, Parliament sought to further the protection granted to natural resources under the Constitution by limiting the trust powers of Government under *Section 45(4)*. This restriction ought to be seen in the light of the findings and recommendations of the Odoki Constitutional Commission in which it recognized the concern by the people of Uganda that the State had previously used its position to abuse and misuse natural resources. Consequently, it is only Parliament that can alter this position by way of amendment to *Section 45(4)* of the Land Act. We argue though that given the constitutional logic of *Article 237*, the only way that Parliament can make its actions legitimate is to go back to the substance of *Article 237(2)(b)* and address the social contract issues contained in that article.

Thirdly, we disagree with the validity of an amendment to the Schedules to the Game (Preservation and Control) Act by way of a Statutory Instrument. It is argued that by *Section 45(4)* of the Land Act, the powers of the Minister under *Section 94(2)* of the Uganda Wildlife Statute were vitiated if the effect of such an amendment is to lease out or otherwise alienate any of the natural resources covered by *Article 237(2)(b)* of the Constitution and *Section 45(1)* of the Land Act. To the extent that the revocation of the Schedules to the Game (Preservation and Control) Act by way of a Statutory Instrument would effectively amend substantive provisions of the Land Act and go against the spirit and constitutional logic of *Article 237(2)(b)*, we find untenable the Attorney General's interpretation of the powers of the Minister under the Wildlife Statute.

It should be noted that issues of change of land use are issues that are within the remit of public policy agencies such as the NEMA and the Uganda Wildlife Authority (UWA) in the case of Pian Upe Wildlife Reserve. However, it is apparent that these agencies are performing their statutory mandates under undue pressure and influence of the political structures of Government.

This observation is borne by the level of involvement of the Prime Minister's office. In a May 15, 2003 letter to Ambassador Bujeldain Abqalla of Libya, in which he communicated the decisions of a meeting he convened on May 12, 2003, Prime Minister Apollo Nsibambi gave a detailed plan on how the degazettement process would be handled. First, he suggested that the Attorney General would give his legal opinion on the legality of degazetting PUWR by 20th May 2003.[16] He informed Ambassador Abqalla that the Minister of Tourism, Trade & Industry would prepare a Cabinet Memo, which would be with the Cabinet Secretariat by September 1, 2003, and Cabinet would be expected to give its approval by 5th September 2003.

However, the most curious element of the process described by the Prime Minister is the proposed involvement of the Movement Parliamentary Caucus. It was proposed that after Cabinet approval of the Cabinet Memo, the Minister of State for Investment[17] would ask the Chairman of the Movement Parliamentary Caucus, Lieutenant Kinobe, "to arrange for a meeting of the Caucus so that Members of Parliament may fully understand and support the project." We argue strongly that issues of change of land use have nothing to do with whether you are a member of the Movement Parliamentary Caucus. The involvement of any caucus of Parliament would be necessary if Government realized that what it needs to do is to seek to alter the social contract with the people of Uganda embedded in *Article 237(2)(b)*.

However, in this case, change of land use is purely a policy matter that ought to be based on very scientific and socio-economic considerations as enumerated in an environmental impact assessment. That EIA can only be valid, in the case of PUWR, only after addressing the trust-beneficiary questions highlighted above and in the advisory opinion of the Attorney General. And unless the constitutional position is altered, referring the proposed degazettement of PUWR to the Movement Parliamentary Caucus is like addressing it to a "wrong forum."

Conclusion

Unless the social contract contained in *Article 237(2)(b)* of the Constitution between the State and the people of Uganda and the limits of exercise of trust authority imposed by Parliament under *Section 45(4)* of the Land Act are revisited, any attempt to degazette PUWR is tantamount to an abuse of trust powers and the due process of the law. The final disposition of this matter is therefore another test of the Government with respect to compliance with laws governing natural resources and promotion of good governance.

NOTES

[1] Executive Director, Advocates Coalition for Development and Environment (ACODE)

[2] Cap 226 of the Laws of Uganda.

[3] See UWS Wildlife Series #3.

[4] See letter of May 15, 2003 from Prime Minister Apollo Nsibambi to Ambassador Bujeldain Abqalla, the Libyan Ambassador to Uganda (Letter Ref. ADM / 239 / 309 / 01)

[5] See NEMA / 4.5, February 28, 2003. Accordingly, this letter was in response to a letter dated 13th February 2003 from M / S African Integrated Development Co. Ltd and another letter dated January 8, 2003 (UIA / ED / 1 / 2003) from the Uganda Investment Authority. The researchers have not had access to these two correspondences.

[6] See section 16 and 17 of the Uganda Wildlife Statute, 1996; section 20-23 and 3rd Schedule to the National Environment Statute, 1995; and the Environmental Impact Assessment Regulations, 1998.

[7] Tumushabe, G.W., et al., (2001): Sustainable Utilizing our Natural Heritage: Legal Implications of the Proposed Degazettement of Butamira Forest Reserve. ACODE Policy Research Series, No. 4, 2001.

[8] See letter reference WC / 121 / 02 of 31st March, 2003.

[9] See letter reference MJ / AG / 87 dated May 19, 2003.

[10] It is important to note that the Attorney General's opinion vindicates our position in the case of Butamira Forest Reserve where we have maintained that the change of land use by way of a permit is an illegal act that does not confirm to the legal standard of protection of natural resources provided under *Article 237(2)(b)* of the Constitution and *Section 45* of the Land Act.

[11] Ibid. NEMA / 4.5

[12] Per Learned Attorney General Francis Ayume. Ibid. Ref. MJ / AG / 87.

[13] Ibid. MJ / AG / 87. The Learned Attorney General ends his letter by a caution that it would require a lot of lobbying to secure parliamentary approval.

[14] Tumushabe, G.W., et al. Ibid

[15] See Report of the Uganda Constitutional Commission, para 23.63 cited in Tumushabe, G.W., et al, 2001.

[16] The legal opinion of the Learned Attorney General is contained in a letter dated a day before May 20th ie. May 19 th 2003 (See letter ref. ADM / 239 / 309 / 01.

[17] Minister Sam Kutesa.

DESIGNED AND PRINTED BY
Uganda Wildlife Society - Darwin Publishing Unit
Plot 51 Kanjokya Street , Kampala, P.O Box 7422 Kampala Uganda, Tel: (256- 41) 530891