# Recent Developments in Environmental Jurisprudence Affecting Water in Africa

by Emmanuel Ugirashebuja

Dr. Emmanuel Ugirashebuja is the President of the East African Court of Justice and a member of the Interim Global Judicial Institute on the Environment.

This Comment is a compendium of select recent cases pertaining to water in Africa, and details how these cases have contributed to the interpretation of the legal framework within which water is utilized and protected as a "common good." The most notable issues dealt with in these cases include the use and protection of water as a common good; how other rights, such as the right to property, interface with the use and protection of water; and important jurisdictional questions on the most appropriate forum for adjudicating water disputes when faced with two competing jurisdictions.

## I. Environmental Protection of Water Vis-à-Vis Property Ownership Rights

For a period of time, it was accepted that certain things such as running water were *res communes*, which meant that "no one could own them, but the use of them belonged to or could be appropriated by certain individuals."[1] This doctrine was acceptable as long as unpolluted freshwater was abundant. However, in present times, there is an unprecedented demand for earth's natural resources, including freshwater. This has led to pollution, deforestation that has ultimately led to desertification, food insecurity, famine, and the growing need for freshwater.

Clearly, one of the most pressing issues relates to the utilization of freshwater. A number of authors have rightly held that unlike other natural resources such as oil, there is no substitute for water.[2] Humans utilize water for purposes that include drinking, washing, and industrial applications such as production of hydroelectric power, irrigation, animal husbandry, and waste disposal. Despite the basic necessity for water, two-thirds of the world's population experience water scarcity for at least one month per year, and about 500 million people live in areas "where water consumption exceeds the locally renewable water resources by a factor of 2."[3] The high demand for water as a result of population growth and increase in consumption per capita has led to overexploitation of the resource or even depletion in extreme cases, as well as significant diminishing of water quality.

As a result of competing interests in utilization of water, the tendency nowadays, as will be illustrated in the selected case law, is to find that water is a community asset that is protected and conserved as a natural resource in the broader interests of society. Two cases discussed below will illuminate how courts have dealt with cases involving the right to ownership of property and how this right is treated where it conflicts with the conservation of water.

### A. Nyakaana v. National Environment Management Authority (NEMA) of Uganda

The case of *Nyakaana v. National Environment Management Authority (NEMA) of Uganda*[4] presented an important issue pertaining to protection of the environment where it conflicts with individual property rights in the area of conservation of wetlands, among other issues. There was no dispute as to the facts of the case: the appellant was registered as the proprietor of land categorized as leasehold. He had obtained a lease from the Kampala City Council with the objective of constructing a house. However, in the midst of this, environmental inspectors of NEMA (the authority), carried out an inspection of Nakivubo wetland

1. The doctrine emanated from Roman law. *See* 2 Roscoe Pound, Jurisprudence 449 (1959).
2. Riccardo Petrella, The Water Manifesto: Arguments for a World Water Contract 55 (2001); Hubert Savenije & Pietervan der Zaag, *Water as an Economic Good and Demand Management: Paradigms With Pitfalls*, 27 Water Int'l 98-104 (2002).
3. United Nations World Water Assessment Programme, The United Nations World Water Development Report 2017—Wastewater: The Untapped Resource 2 (2017).
4. Nyakaana v. National Env't Mgmt. Auth. (Constitutional Appeal No. 5 of 2011), [2015] U.G.S.C. 14, *available at* https://ulii.org/node/25385 (last visited Jan. 12, 2018) (The copy of the judgment is neither paginated nor paragraphed for ease of reference in the subsequent discussion.).

and concluded that the appellant's house was situated in the wetland.

It is noteworthy that the appellant had secured all the required approvals for the construction. After several meetings between the two parties, the appellant was issued a restoration order by the authority, which required him among other things to demolish the structure within 21 days, and failure to do so would lead to its demolition by the authority. The appellant did not heed the order, and his house was razed.

The said wetland, in the description of the Supreme Court,

> drains into Lake Victoria which has immense ecological and economic importance not only to the City but to the Country and the region as a whole. Such a wetland should call for properly planned and controlled utilization so that the Constitutional requirement to use the resources for sustainable development is realized.

The appellant filed a petition before the Constitutional Court,[5] challenging among other things the constitutionality of the legal basis relied upon by the authority in effecting the demolition of his property. He argued that the demolition contravened, among other provisions, his right to property embodied in Article 26 of the Constitution of Uganda.[6] The Constitutional Court ruled in favor of the authority, leading to the appeal to the Supreme Court.

Article 26 states as follows:

> (1) Every person has a right to own property either individually or in association with others.
>
> (2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except when the following conditions are satisfied—
>
> (a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and (b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for—
>
> (i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and
>
> (ii) a right of access to a court of law by any person who has an interest or right over the property.

In the view of the appellant, this article afforded him an absolute right of property that can only be tampered with through a procedure of expropriation that should follow the conditions established by the provision.

In reviewing the provision, the Supreme Court read it alongside the following articles of the Constitution:

> 237 (1): Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution.
>
> (2) Notwithstanding clause (1) of this Article . . .
>
> (b) the Government or a local government as determined by Parliament by law shall hold in trust for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and tourist purposes for the common good of all citizens.
>
> 242: Government may, under laws made by Parliament and policies made from time to time, regulate the use of land.
>
> 245: Parliament shall, by law, provide for measures intended—
>
> (a) to protect and preserve the environment from abuse, pollution and degradation;
>
> (b) to manage the environment for sustainable development; and
>
> (c) to promote environmental awareness.

After engaging in the task of reading the Constitution as a whole and by application of purposive interpretation[7] with the view of reconciling the right to property with the relevant provisions expressed above, the Court concluded:

> [A]lthough one has a right to own land through one of the systems of land tenure listed in the Constitution, there may be situations which necessitate the government either to take over that land, or to regulate its use for purposes of promoting and protecting the environment for the common good of all the people of Uganda.[8]

5. The Constitutional Court in the Ugandan judicial system is the Court of Appeal that is one tier below the Supreme Court of Uganda. For the petition, see Amooti Godfrey Nyakaana and NEMA and Others, Constitutional Petition No. 03/05, Constitutional Court of Uganda, judgment delivered on Aug. 20, 2015.
6. Uganda Const. art. 26 (1995).
7. *See Nyakaana*, [2015] U.G.S.C. 14. The Court held:
   > Since the appeal involves the issue of protection of fundamental human rights, we shall also be guided by the principle that the Constitution and particularly that part which protects and entrenches fundamental rights and freedoms must be given a generous and purposive interpretation to realize the full benefit of the right guaranteed, and both purpose and effect are important in determining constitutionality.
8. *Id.*

The reasoning of the Court in this case highlighted the all-encompassing nature of the duty of the state to protect the environment. The Court held that "the cardinal principles" of "precaution" and "polluter-pays" "must be adopted and applied if the State is to carry out its Constitutional mandate to protect the environment for citizens, while at the same time promoting sustainable development."[9]

A corollary of the principles developed by the Court is that the state has a positive duty to protect the environment so that community interests are not prejudiced, even if it is at the expense of curtailing certain individual property rights. The Court held in this regard that if a person owns land "and that land contains a wetland, his ownership does not preclude the Government from protecting that wetland," if it is done within the law.[10]

### *B.* African Commission on Human and Peoples' Rights v. Republic of Kenya (The Ogiek Case)

The focus of the *Ogiek*[11] case was the right to communal ownership of land in the face of the need to protect the environment. The case was instituted at the African Court on Human and Peoples' Rights, which is a continental court whose mandate is to ensure protection of human and peoples' rights in Africa.

The Ogiek community was evicted from their land in the Mau Forest Complex in Kenya,[12] which they had inhabited "since time immemorial," and the government's justification for evicting the community was the preservation of the natural ecosystem in the public interest.[13] The applicants contended that they possessed the right to communal ownership of land as provided for in Article 14 of the African Charter on Human and Peoples' Rights: "The Right to property shall be guaranteed. It may only be encroached in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."[14] As the Court rightly opined, "Article 14 envisages a right to property including land provided that such restriction is in the public interest and is also necessary and proportional."[15]

The African Court in this case came to the same conclusion as in the Ugandan Supreme Court *Nyakaana* case, discussed in Part I.A., that the right to ownership of the property is not absolute; rather, it may be truncated where the public/community interests are in peril. The African Court emphatically stated that "the restriction of the Ogiek population to preserve the natural environment of the Mau Forest Complex may in principle be justified to safeguard 'the common interest' . . . ."[16] However, the Court observed that the restriction to the right to property should not only be in the public/community interests and provided for by the law, but that it should also be "necessary and proportional to the legitimate interest sought to be attained by such an interference."[17] Applying this test, and on the basis of the available evidence,[18] the Court concluded that "the continued denial of access to and eviction from Mau Forest of the Ogiek population cannot be necessary or proportionate to achieve the justification of preserving the natural ecosystems of the Mau Forest."[19]

From the two cases discussed above, jurisprudence is emerging that the right to property is not absolute, and that it can be interfered with in the preservation/conservation of the natural environment, including water and wetlands, in the interest of the community/society. However, such interference should not be justified by a state's mere assertion of the existence of a common interest, but should be triggered by a genuine and legitimate need to protect the common interest. Such interference should be within the law, and should be proved to be necessary and proportional to the legitimate objective being sought.

## II. Piercing the Corporate Veil: The Principle of Forum Non Conveniens Rethought in Environmental Matters

"Piercing the corporate veil" in order to expose the ills of companies, especially their environmental degradation, has been the subject of some researchers and policymakers for quite some time.[20] One of the means at the disposal of companies, especially those involved in extractive industries in Africa, to protect themselves from possible litigation has been to structure the companies in such a way that

9. For a detailed discussion of the principles in the context of the judgment, see *id.* It is important to note that the Supreme Court of Uganda relied on *Vellore Citizen's Welfare Forum v. Union of India*, A.I.R. 1996 S.C. 2715, which considered the principles in detail.
10. *Id.*
11. African Commission on Human & Peoples' Rights v. Republic of Kenya, Application No. 006/2012 (2017), African Court on Human and Peoples' Rights (*Ogiek case*).
12. According to the African Wildlife Foundation:
> The Mau Forest Complex sits within Kenya's Rift Valley and is the largest indigenous montane forest in East Africa. It serves as a critical water catchment area for the country and is the source from which numerous rivers flow, many of them draining into bodies of water like Lake Victoria, which receives 60% of its water from Mau. These rivers exist as lifelines for much of western Kenya's wildlife and people.

*See* African Wildlife Foundation, *Mau Forest*, http://www.awf.org/landscape/mau-forest-complex (last visited Jan. 12, 2018).
13. *See supra* note 11, at ¶ 130.
14. African Charter on Human and Peoples' Rights art. 14, June 27, 1981, Organization of African Unity, No. 26363.
15. *Ogiek case*, Application No. 006/2012, ¶ 129.
16. *Id.* ¶ 188.
17. *Id.* In this case, the Court adopted an earlier test that it espoused in *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), that for there to be any interference of a freedom or right by a respondent state, such an interference should "be provided for by the law, within international standards pursue a legitimate objective and are proportionate means to attain the objective sought." *See id.* ¶¶ 125-166.
18. According to different reports prepared by or in collaboration with the respondent (the Republic of Kenya) on the situation of the Mau Complex, "the main causes of the environment are encroachments upon the land by other groups and government excisions for settlements and ill-advised logging concessions." *Ogiek case*, Application No. 006/2012, ¶ 130.
19. *Id.*
20. *See, e.g.*, Daniel Augenstein et al., University of Edinburgh, Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union (2010).

they are immune from any judicial review; and such that if the review is available, it will not be an effective one.[21] Such corporations' legal structures can pose a challenge to victims of environmental harm, who cannot obtain a remedy from these third-country subsidiaries due to either lack of funds or assets, or because access to justice or due process is not available or guaranteed in the third country; yet, the victims also cannot seek redress from the parent corporation jurisdiction due to the fact that the forum is not appropriate (forum non conveniens).[22]

In the recent case of *Lungowe v. Vedanta Resources Plc*[23] before United Kingdom (U.K.) courts, both the High Court and Court of Appeal grappled with the question of the appropriate forum to deal with a case involving 1,826 Zambian nationals (the claimants) against Zambia-based Konkola Copper Mines Plc (KCM) and its London-based parent, Vedanta Resources Plc. The claimants commenced proceedings alleging personal injury, damage of property, loss of income, and loss of amenity and enjoyment of land arising out of alleged pollution and environmental damage caused by the disposal of tailings and other effluent of Nchanga Copper Mine from 2005-2015 into the Kafua River and adjacent waterways. The claimants pleaded that they relied on the waterways as "their primary source of clean water for drinking, bathing, cooking, cleaning and other domestic and recreational purposes," and that the waterways are used to irrigate crops, sustain livestock, and as a source of fresh fish.[24]

From the onset, Vedanta and KCM challenged the jurisdiction of the U.K. courts on forum non conveniens grounds, and argued that the claims against Vedanta were launched illegitimately merely as a hook to obtain the English jurisdiction over KCM.[25] On their side, the claimants argued that "Article 4 of the Recast Brussels Regulations provides a clear and unqualified right to sue a United Kingdom domiciled company in the United Kingdom,"[26] and that "Article 4 allows for no discretion or qualification to that simple proposition."[27] The claimants relied on the *Owusu v. Jackson*[28] decision of the European Court of Justice (ECJ), which plainly made clear:

> [T]he doctrine of *forum non conveniens* has no role to play under Article 4, and that the Brussels Convention precludes a Court of a contracting State from declining the jurisdiction conferred on it by Article 4 on the ground that a court of a non-contracting State would be a more appropriate forum.[29]

The Court of Appeal, agreeing with Judge Coulson of the High Court, dismissed Vedanta's jurisdictional appeal, holding that the European Union (EU) law imposes mandatory jurisdiction on the English courts for claims against the English companies.[30] In other words, forum non conveniens cannot be used as a jurisdictional bar in the English courts so long as they are bound by the EU law and the jurisdiction of the ECJ.

Apart from Article 4 of the Recast Brussels Regulation, the courts also considered important underlying factors, including the track record of the subsidiary, its financial status, and the level of control of the parent corporation, as well as the possibility of the claimants accessing effective justice in Zambia, in determining whether the English courts would be an appropriate forum to entertain the matter on its merits. Based on Article 4 of the Brussels Regulation and the underlying facts, the Court of Appeal concluded, in agreement with the High Court, that the case would advance on the merits to the English courts.

It is evident that Article 4 of the Recast Brussels Regulation, which was fundamentally relied on in this judgment, has called into question the basic assumption founded on the principle of forum non conveniens. This article has significantly reduced the discretion of courts in European countries to identify the forum in which cases of this nature can be suitably tried in the interests of all the parties and the ends of justice. Article 4, the *Owusu* case in the ECJ, and this case in the English courts have ensured that the veil of forum non conveniens, which is sometimes used to shield corporations from the effective reach of justice in cases involving environmental degradation, has been pierced at least in Europe.

## III. Conclusion

The cases analyzed in this Comment are evidence that the legal regime governing protection of the African environment, including water, has over the years significantly improved, and as a result, courts have taken the cue and interpreted the available laws in favor of protection. It is clear from the *Nyakaana* and *Ogiek* cases that the courts are increasingly taking the view that where individual property rights are genuinely in conflict with community rights such as a clean environment, the community rights will take precedence—that is, that individual property rights are not absolute.

The jurisprudence of regional courts, as in the *Owusu* case in the ECJ, discussed in Part II, has the potential to

21. *See*, *e.g.*, *id*. at 61 ("The doctrine of separate legal personality can create significant obstacles for holding European Corporations responsible for human rights and environmental harm caused by their third-country subsidiaries, despite the fact that the former may have owned, controlled, directed or managed the latter.").
22. *Id*.
23. Lungowe v. Vedanta Resources Plc, [2017] EWCA (Civ) Civ. 1528; Lungowe v. Vedanta Resources Plc, [2016] EWHC (Civ) 975 (T.C.C.). Even though the cases were entertained by the courts in Britain, they concerned activities that had taken place in Zambia, an African State.
24. E.W.H.C. 975 (T.C.C.), at ¶ 15.
25. *Id*. at ¶ 51.
26. Article 4 of the Recast Brussels Regulation provides that "[s]ubject to the Regulation, persons domiciled in a member State shall, whatever their nationality, be sued in the Courts of the Member State." *See* Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), 2012 O.J. (L351) 1. Article 4 is a successor of Article 2 and its terms are similar.
27. *See Lungowe*, [2016] EWHC (QB) 975 (T.C.C.), ¶ 49.
28. Owusu v. Jackson, [2005], EWHC (QB) 801.
29. *Id*.
30. Lungowe v. Vedanta Resources Plc, [2017] E.W.C.A. Civ. 1528, ¶ 37.

shape the interpretation of principles relevant to the protection of water in national courts, especially where those judgments of regional courts are binding on national courts and where the regional legal framework enhances the protection. The East African Court of Justice has such jurisdiction.

It is also noteworthy that different courts in many different places are producing decisions relevant to the protection of the environment in general and water specifically. Such jurisprudence can be an inspiration to other courts that face cases of similar facts within similar legal frameworks. For example, the jurisprudence from courts of India has inspired other decisions such as the *Nyakaana* case in the courts of Uganda, discussed in Part I.A. This momentum of courts inspiring courts in other jurisdictions can be fully maintained if initiatives such as the Global Judicial Institute on the Environment (GJIE)[31] are fully supported.

31. The GJIE was launched in 2016 in Rio de Janeiro, Brazil, and has the mission of supporting the role of courts and tribunals in applying and enforcing environmental laws and in promoting the environmental rule of law. The GJIE is composed of actively sitting judges from around the world. It provides opportunities for collaboration, strengthens capacity, and provides research and analysis on topics important for environmental adjudication, court practices, and environmental rule of law. *See Judges Establish the Global Judicial Institute for the Environment*, Int'l Union for Conservation Nature (July 8, 2016), https://www.iucn.org/news/world-commission-environmental-law/201607/judges-establish-global-judicial-institute-environment.