

IN THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBALE
MISCELLANEOUS CAUSE NO.24 OF 2020



TSAMA WILLIAM & 47 ORS. APPLICANTS

VERSUS

1. ATTORNEY GENERAL RESPONDENTS
2. NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY
3. BUDUDA LOCAL GOVERNMENT COUNCIL

1ST AND 3RD RESPONDENTS' WRITTEN SUBMISSIONS

My Lord,

1st and 3rd respondents' facts.

The respondents oppose this application, the 2nd and 3rd respondents rely on the Affidavit of Natsambwa Samson in reply, some of the documents of the 2nd respondent and other authorities to confirm that the respondents have not infringed any rights of the applicants or their relatives and they have instituted an effective machinery for dealing with disaster and that the activities, actions and omissions of residents of landslide prone areas are the proximate cause of the consequences of the landslides to them.

Preliminary Objection

The 1st and 3rd Respondents Object to the Affidavit of Vincent Yiga on grounds that the matter before Court does not require expert opinion and the Affidavit not relevant evidence, he does not prove that he is specifically skilled on the matter before Court, he does not state the criteria of his art or science and gives a biased opinion, has not investigated the matter to ascertain the facts by himself, the facts have not been reported to the deponent, Affidavit's reliance materials are inadmissible secondary evidence, the Affidavit is full of falsehoods and contradictions,

Section 43 of the evidence Act provides-

When Court has to form an opinion upon **a point of foreign law or of science or art, or as to identity of hand writing or finger impressions**, the opinions upon that point of **persons specifically skilled** in that foreign law, science, or art, or in questions as to the identity of handwriting or finger impressions, are relevant facts. Such persons are called experts.

The matter before this court is human rights to; life, property and to a clean and healthy environment in relation to a land slide occurrence in Bududa District. That does not fall within the circumstances that require an expert as provided in **Section 43 of the evidence Act** above.

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In the case of **Thiongo Versus Republic Cr. Appeal 83 of 2015**, the High Court of Kenya while considering Section 48 of the Kenya Evidence Act which is in *Pari Materia* with Section 43 of the Evidence Act, Uganda considered the case of *Davy Versus Edinburgh* 1933 SC 34,40 on functions of an expert witness and held-

- “ An expert who hopes to carry weight in a Court of Law, must before giving his opinion;
- (i) Establish by evidence that he is specifically skilled in his science or art.
 - (ii) Instruct the Court in the criteria of his science or art, so that the Court may itself test the accuracy of his opinion by applying this criteria to the facts proved
 - (iii) Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness.”

Vincent Yiga does not prove the expertise claimed, apart from claiming that he swears the Affidavit as an expert in landslides in paragraph 1 of his Affidavit, he does not show how he became an expert in landslides, no evidence that he specialized, researched or handled any activity in relation to landslide management or human rights and does not show how his stated qualifications relate to landslide management.

Further, **he does not instruct Court on any scientific criteria** leading to his conclusions to enable court form it's opinion based on that criteria but just relies on documents which are inadmissible, some are not conclusive but requiring further investigations, some are politically motivated all the documents are not addressed to him.

Reliance Material inadmissible; save for his Curriculum Vitae, all the other reliance material annexed to the Affidavit of Vincent Yiga are purportedly copies of public documents, they are not certified, his Affidavit is purportedly premised on the same.

Whereas Secondary evidence is permitted for Public Documents under **Section 64 (1) (e) of the Evidence Act**, only a Certified Copy of the Document, but no other kind of secondary evidence is admissible of a Public Document as per **Section 64(4) of the Evidence Act**. All the annexures to the Affidavit of Vincent Yiga are not admissible in view of the foregoing provisions.

He has not ascertained the facts himself; he has not provided any evidence of his independent report arising from his own research on the matter.

Vincent Yiga's Opinion is biased,

In the case of **SHOSHO SIMON VERSUS NIMROD WANIALA Mbale High Court CA 224 of 2014** confirmed the notion as stated by Cross and Tapper on Evidence Butterworths 1995, 8th Edition Page 55-557 that “ an expert witness should provide independent assistance to the Court by way of **objective unbiased opinion** in relation to matters within his expertise.”

Vincent Yiga he only focuses on what he assumes Government has not done without referring to any law which requires Government to do that specific thing; he does not consider adaptation measures, roles and duties of the residents and the impact of the acts and omissions of residents; he disregards what government has done and is in the process of doing; he ignores other disasters that compete for the resources and

other challenges faced by Government, only to draw a false conclusion in Paragraph 12 and 13 of his Affidavit. He does not even state how he knows the applicants but confirms that Government has not put measures to safeguard the "applicants".

The Affidavit of Vincent Yiga is full of falsehoods and contradictions.

In Paragraphs 12 to 17 of the Affidavit of Vincent Yiga, he gives false statements which substantially contradict some of the reports he purports to rely on. His annexures confirm the fact that Government has put in place effective measures in dealing with disaster including checks to ensure accountability, they rebut all his claims in paragraphs 12 to 17 and instead agree with Affidavit of Natsambwa Samson who is a competent witness as the Acting Deputy Chief Administrative Officer in Bududa District, a Disaster focal person in charge of coordinating all disaster preparedness and management activities in Bududa District where it is stated in paragraph 7-

" The Government's role in dealing with disaster is disaster preparedness before the incident, and management after the incident which has been duly executed by setting up a department in the office of the Prime Minister to handle matters of disaster to which available resources are allocated, coordination with District and parish chiefs, providing tools such as mega phones to chiefs, conducting early warning for persons to vacate disaster prone areas, sensitizing persons on signs of likely incident and offering assistance to victims."

Annexure 6 of the Affidavit of Vincent Yiga at Page 10 paragraph 16, 17 & 18 states that the department of relief, Disaster Preparedness and management established early warning systems including mega phones, smart phones, motor cycles, FM stations, bicycles and is actually the best performing in 200 countries assessed in Africa, the system is effective, out of the 67 landslides 66 did not register any fatalities of the landslides in Elgon region.

Annexure 2 of the Affidavit of Vincent Yiga at Page 4 to 7 paragraphs 1.25 to 1.44 indicates mitigation measures which include sensitization meetings with high risk persons, identifying safe homes to host persons at risk providing necessities to hosting families, early warning messages, activating national Emergency Coordination Center and resettlement, a ten year plan delayed by factors beyond Government but resumed in 2018 and it's handled in phases.

One wonders why the same person who annexed such a document could go ahead and state in paragraph 13 of his Affidavit that things like early warning, coordination, resettlement, mapping out are not in place yet his own document shows the same, he even annexed a map showing landslide prone areas. He either did not read or was part of a scheme to mislead court, a clear abuse of Court process.

Vincent Yiga's allegations in paragraphs 12 and 13 of his Affidavit are false and his purported proposals in paragraph 17 are things which government has already done as indicated in the Affidavit of Natsambwa Samson.

It is trite that inconsistencies in affidavits cannot be taken lightly, an Affidavit containing falsehoods is suspect and ought to fail; hence such an Affidavit of Vincent Yiga ought to be rejected.

In view of the foregoing submissions, the evidence of Vincent Yiga has not proved that he is specifically skilled, his Affidavit is not relevant, it's not admissible, is comprised of falsehoods and contradictions. We pray that his Affidavit be struck out with costs.

Burden of Proof

It is important to note that the burden of proof is on the Applicants in accordance with Section 101(1) and Section 102 of the Evidence Act, cap 6-

"Whoever desires any Court to give judgement as to any legal right or liability dependant on the existence of facts, which he or she asserts must prove that those facts exist."

S.102 of the Evidence Act, the burden of proof in a suit rests on a person who would fail if no evidence at all were given on either side.

Issues and Resolution

It is our considered view that the case is misconstrued by the applicants, a matter that would have been considered by way of Judicial Review if Government had not executed it's legal mandate as they allege, the applicants instead filed it as a human rights matter and we find the appropriate issues as follows-

- (1) Whether the respondents infringed the applicants' rights to life, property and to a clean and healthy environment and the rights to life of their relatives when landslides occurred in Bushika Sub-county, Bududa District.
- (2) What remedies are available to the parties?

The 1st and 3rd respondent's resolution of the above issues is as follows-

- (1) ISSUE 1 - Whether the respondents infringed the applicants' rights to life, property and to a clean and healthy environment and the rights to life of their relatives when landslides occurred in Bushika Sub-county, Bududa District on 3rd December, 2019?

My Lord,

In addressing this issue, it is important to ascertain whether the applicants and their alleged relatives are residents of Bushika sub-county, Bududa District and are victims of the landslide, since the case is based on a landslide occurrence there and then ascertain whether the respondents infringed their rights?

We note that the burden of proving the same is on the applicants and it's our humble submission that they have not discharged the same as per the evidence on record.

- (a) whether the applicants and their alleged relatives are residents of Bushika sub-county, Bududa and are victims of the landslide?

Whereas the 1st, 2nd, 3rd, 4th and 5th Applicants allege that they lost relatives, this is a mere allegation that can be made by anyone and Court is not inclined to believe it to be true unless there is substantial evidence to prove that those persons actually existed, are not fictitious, they are relatives of the applicants, they were residents in Bushika Sub-county, Bududa District and actually died as a result of the landslide.

There is no such evidence provided, no death certificates or postmortem report on record which would have proved the name, address, date of death and cause of death.

The 7th, 11th, 14th, 15th, 18th, 19th, 21st, 25th, 27th, 28th and 37th Applicants did not provide any evidence of their residence in Bushika sub-county Bududa District and the fact that they are actual persons by those names. There is no explanation for not providing Identity cards or letters from LCs as the other applicants did.

The commissioning of Affidavits cannot confirm that they exist considering that the same commissioner commissioned Affidavits of the 6th and 30th Applicants whose National I.Ds were stating that they are residents of Malukhu Mbale and Kiryandongo District respectively yet the Affidavits were indicating that they are residents of Bushika Sub-county, Bududa District which means the commissioner did not verify the identity of those persons.

In view of the above the 1st to 5th Applicants have not proved that their alleged relatives existed, were residents of Bushika Sub-county, Bududa District and died as a consequence of the land slide; the 6th, 7th, 11th, 14th, 15th, 18th, 19th, 21st, 25th, 27th, 28th, 30th and 37th Applicants have not provided any proof of residence at Bushika Sub-county, Bududa District and hence there is no evidence that they are victims of the landslides and we pray that all their claims based on residence at Bushika Sub-county, Bududa District are disregarded and their case be dismissed.

- (b) Whether the respondents infringed on the applicant's rights when landslides occurred in Bushika Sub-county, Bududa District?

- (i) The right to life and to own property

Article 22 of the constitution provides-

- (1) No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a Court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate Court.

Article 26 of the constitution provides-

- (2) No person shall be compulsorily deprived of property or any interest therein or right over property of any description except where the following conditions are satisfied-

My Lord,

The above provisions are clear on what constitutes infringement of the rights to life and property that is intentionally or compulsorily depriving respectively. Apart from the applicants failing to provide proof of death of their alleged relatives so as to confirm that the same were deprived of life, the applicants have not provided any evidence that the respondents deprived such persons of life and they did so intentionally nor have they provided any proof of existence of the alleged property and how the respondents compulsorily deprived the same.

In the un rebutted evidence of Natsambwa Samson in the Affidavit in reply for the 1st and 3rd defendant in paragraph 3 he denies infringement of rights by the respondents and clearly states in paragraph 5 of his Affidavit that Government has not intentionally or compulsorily deprived a person of life or property in Bushika sub-county, Bududa District.

In the of **Massa Vs Achen [1978] HCB 297**, it was held that:-

“Where the facts are sworn in an Affidavit and these are not denied or rebutted by the opposite party, the assumption is that facts are accepted”

In view of that position, the applicants did not rebut or deny the facts in the Affidavit of Natsambwa Samson that Government did not intentionally or compulsorily deprive any person of life or property and the same is deemed accepted.

The applicants allege that such people died due to a landslide which is by its nature a disaster that causes loss of life and destruction of property. The landslide was not occasioned by the respondents hence it can't be said to be intentional and compulsory deprivation of property by the respondents.

The applicants allege in their Affidavits that they reside in places dangerous for human habitation, they do not show that Government or any other person forced them to settle there. In paragraph 4 of the un rebutted Affidavit of Natsambwa Samson he clearly states that Government has never settled a person in landslide prone areas and advised the persons to vacate those areas. If they are indeed resident there, they chose to endanger their lives when they decided to settle in places well knowing that such places are dangerous for human habitation and ignored warnings to vacate those areas. If the allegations of the applicants in their affidavits that Government promised to safe guard their lives by resettling and relocating the affected people to safer places, gave condolence money, assisted in excavating, gave relief items are true, it clearly shows that government's intention is to save lives despite people choosing to endanger their own lives by settling in places which they claim to be dangerous for human habitation and this claim for infringing rights is absurd.

It is clear from the applicants' Affidavits that their claim for resettlement is mere promise not a right provided for by law nor is there a stated time frame within which it is to be done. Natsambwa Samson in Paragraph 8 of his Affidavit stated that resettlement can be done only when resources are available, though the applicant's

in their submissions allege that funds were diverted to save hunger victims in Karamoja and war victims in Sudan, that was still part of response to disaster and if in the wisdom of the responsible department it was more urgent to save war victims or hunger victims, it was within their discretion.

Some of the Applicants confirm that resettlement already started for instance in paragraph 5 of the Affidavit of Wephukhulu Damasco who confirms that resettlement cards were given to those Government was ready to resettle and there was a vehicle evacuating people for resettlement. However his claims of entitlement are not sustainable considering that he has no proof of residence nor did he provide a copy of a resettlement card given to him. This would apply to other applicants considering that not all residents of Bushika Sub-county Bududa District were affected, if resettlement cards were given to the persons promised resettlement, the applicants should have provided the same to confirm that they were also affected.

Having discussed the Affidavit of Vincent Yiga in the objection above, the purported positive obligations and claims failure to execute positive obligations contained in the Affidavit of Vincent Yiga and the submissions of the Applicants are misconstrued and I reiterate my submissions on the objection to the Affidavit of Vincent Yiga above and further submit that such claims are rebutted by the Affidavit of Natsambwa Samson especially paragraph 7 which states the positive obligations of Government and confirms the role of Government in dealing with disaster which has been duly executed. Some of the powers claimed not to have been exercised are discretionary and the responsible organs did not find it necessary for instance declaration of a state of emergency, the constitution uses the word "may" and for issues of disaster the discretion on how to deal with the same is left to Government. Considering that despite the various disasters in the country Government responds to all as confirmed in the submissions of the Applicants and their Affidavits that Government responded to Karamoja hunger, Sudan war victims, excavated bodies, offered relief items, money, embarked on resettlement of some of the victims from Bududa and the coordination, warning and sensitization system in place as per the Affidavit of Natsambwa Samson, that is evidence of an effective machinery in dealing with disaster.

The claims of the Applicants in their affidavits that there was no warning system in place and they did not receive any warning from Government about the risk landslides is not sustainable, the applicants state in their Affidavits that where they reside is not safe for human habitation which shows that they are already aware with or without a warning system but chose to stay there. Further such claims are rebutted in paragraph 4 of the Affidavit of Natsambwa Samson that hotspots for landslides have always been mapped out and people were warned to vacate, he details the coordination mechanisms and confirms that there is early warning and sensitization of people on signs of likely incident in paragraph 7. It is obvious from the above that it is the residents to observe the signs of a likely occurrence and move considering that Government already earmarked landslide hot spots and advised people to vacate but some continue staying there.

The claims of infringement of right to life and property as presupposed by the Applicants arising from land slide are not envisaged in the constitution and are misconstrued.

(ii) The Right to a clean and Healthy environment

My Lord,

I have had the chance to peruse the submissions of the 2nd respondent on this matter and I associate with the same and add-

The 1st and 3rd respondents deny infringing the right of the applicants to clean and healthy environment as indicated in Paragraph 3 of the Affidavit of Natsambwa Samson.

Government through the responsible organs has enacted laws and guidelines for ensuring a clean and healthy environment which are confirmed by the applicants to be existing and has endeavoured to enforce the same through sensitization, encouraging good practices such as agro-forestry as seen in paragraph 6 of the Affidavit of Natsambwa Samson.

It is clear that the activities that affect a clean and healthy environment are by the residents of the area and some of which are responsible for increased occurrence of landslides. It is the duty of every citizen to contribute to the wellbeing of the community where that citizen lives and to be patriotic as per **Article XIX of the constitution**. The residents of affected communities have instead destroyed the environment and ignored to follow the law and guidelines despite sensitization. It is unfortunate they want government to take responsibility for their actions

Apart from claiming that they live in a dangerous place, the applicants have not provided any evidence of what Government has done to endanger their environment, they concur that Government has enacted laws to ensure a clean and healthy environment hence there is no proof of violation of that right by the respondents. If their environment is not clean and safe, it is because of the activities of the residents as indicated in paragraph 6 of the Affidavit of Natsambwa Samson and their failure to execute their constitutional mandate to contribute to the well being of the community by following the laws in place and heeding to advise received during sensitization.

It is the 1st and 3rd respondents' humble submission that the applicants have not proved their case that their rights and those of their relatives were violated by the 1st and 3rd respondents, their misconstrued claim that government has not executed its positive obligations is rebutted. The purported claims of entitlement are not supported by any law or evidence but mere assumptions. Respecting, upholding and protection of rights is the duty of all persons as per **Article 20 (2)** of the constitution including the applicants, there is no evidence in their Affidavits to show what they have done to protect themselves, their property and environment. It is clear that the residents of Bushika subcounty, Bududa District whom the applicants claim to be part of are responsible for the misfortunes arising from landslides when they ignore warning from government and choose to settle in hot spots for landslides well knowing that where they reside is dangerous for human habitation as claimed in the applicants Affidavits, ignore to monitor the signs or likely occurrence or timely vacate upon signs occurring, fail to execute their constitutional mandate to be patriotic and contribute to the

wellbeing of the society but instead destroy the environment in total disregard to the laws and advise of government on best practices.

I have perused the authorities relied on by the applicants some are not precedent in this country, are distinguishable and others out of context-

Cases from Russia are not precedent and are not even persuasive, Russia and other European Countries considered are first world if they did not do what they were expected to yet they had the financial capacity, their scenario is different from Uganda a third world country where Government has set up an effective mechanism to handle disaster but the resources are minimal, the processes cannot be effected at once, the affected communities are not executing their duties and continuously escalate the problem. More so the legal frame work is different.

Some cases are not disaster related for example the case of Centre for Health, Human Rights and Development & Others Versus Attorney General Constitutional Petition 16 of 2011 which related to a health sector which is not related to disaster, the victim had no role to play in causing lack of a necessary equipment which was expected in the kind of health facility, if Government had not opened up such a health facility the victim would not have gone there and would not have died considering that the lack of the equipment caused her unfortunate death. In this case people chose to settle in risky areas, disregard laws on environment, degrade the environment, ignore their constitutional duties. Government has nothing to do with occasioning their misfortune though it has put up a mechanism within the available resources attached amidst competing disasters some of which are not anticipated and dealt with disaster. More so equipping a health facility is something that can be budgeted and done once in a while yet disaster though may be anticipated cannot be dealt with once.

Further, the applicants have not disclosed which positive obligations the 3rd respondent has under the law and how it has not complied but made vein assumptions. International laws have no effect until domesticated.

In view of the foregoing submissions and considering that the choice to settle in a place the deem dangerous, refusing to leave despite warning and destroying environment is the cause of the misfortunes of landslides, the actions being by residents not government Court ought reject the applicant's claims in consideration of the the *maxim exturpi causa non oritur* action considered in **Candiru Asina Binnia Versus Centenary Rural Dev't Bank Ltd HCCS 22 of 2016** that-

" All the rule means is that the courts will not enforce a right which would otherwise be enforceable if the right arises out of an act committed by the person asserting the right (or by someone who is regarded in law as his successor) which is regarded by the court as sufficiently anti-social to justify the court's refusing to enforce that right."

2) What remedies are available to the parties?

My Lord,

The applicants have prayed for declarations that their rights to life, property, clean and healthy environment have been violated and other orders for Government to

implement. It's the respondents case that the applicants have not provided proof of violation of such rights by the respondents and that whatsoever misfortunes arising from the landslides in Bududa District to the residents were occasioned by the omission of the residents to execute their constitutional duty and took the risk. For the other proposed orders, they are not backed by any Law.

It's the respondents' pray that Court declines to grant such a remedies which are not proved.

The applicants also prayed for damages, it's the 1st and 2nd respondents' submission that the applicants are not entitled to any damages. It is trite that the award of damages is at the Discretion of Court. In the matter of **Lt.(RTD) George Kiggundu Versus Attorney General High Court Civil Suit 386 of 2014**, Court in exercising it's discretion in determining whether to award damages and what quantum emphasized that it is the duty of claimant to plead and prove that there were damages losses or injuries suffered as a result of the respondents actions. Court further emphasized the decision in **Benedicto Musisi Vs Attorney General HCCS 622 of 1989 [1996] 1 KALR 164**

"Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and so to speak, throw them at the head of the court, saying, "This is what I have lost, I ask you to give these damages" They have to prove it."

It's the respondent's submission that the applicants have not provided any proof any claimed losses, no proof death, some have no proof of residence at Bushika Sub-county, Bududa District no proof of damage or ownership of the applicant's property not even photos certified by local authorities. They have not proved any action of the respondents that occasioned them the purported losses. The applicants confirm that Government offered assistance to victims of the landslides. To award damages to the applicants without any proof that they are the rightful victims of landslides and are entitled to the same might deny the rightful victims of disaster verified by Government of necessary assistance because it will occasion diversion of resources.

The repondents have on the other hand proved that the actions of the residents of the Bushika Sub-county, Bududa District are responsible for the misfortunes arising from the landslides to the affected persons. To award applicants damages for misfortunes arising from failure of residents to make proper decisions and to execute their constitutional duty would amount to rewarding them for their wrong and might cause a scenario of people chosing to settle in disaster prone areas to be compensated and even those who have alternative places to settle refusing to explore options. It is the duty of the citizen to find a safe place to stay and not Government's.

Further, the applicants have not proved that they are entitled to resettlement, it is not provided for by any law, one of them indicated that persons appointed for resettlement were given resettlement cards and some actually evacuated. There is no averment that the whole of Bushika Sub-county Bududa District is a hotspot for landslides. There are other adoptive measures for ensuring safety while staying in Bududa; vacating hotspots, monitoring signs of likely incident and ensuring good agricultural practices.

Resettlement is a long term measure with Government having the discretion to assess who should be given priority since it is government's initiative and not a legal mandate. The applicants have not proved that the persons Government started with are not entitled. Therefore awarding damages for resettlement, Court would be usurping powers to determine who should be given priority in the disaster budget considering that the people of Bushika are not the only victims of Disaster in Uganda.

It is trite that costs follow the event, it is the 1st and 3rd respondents' prayer that this application is dismissed and costs are awarded to the respondents.

We so pray.

Dated at Mbale this 3rd day of August 2021

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COUNSEL FOR THE 1st and 3rd RESPONDENTS

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