THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA CIVIL SUIT NO. 027 OF 2015

GREENWATCH ::::::PLAINTIFF VERSUS

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

JUDGMENT

The plaintiff brought this public interest action against the defendant under Article 39, 41 and 50 of the Constitution seeking declaratory orders; a permanent injunction restraining the defendant, its agents, licensees and assignees from endangering a very rare species of wildlife in Uganda to wit Pangolins and cancellation of licences issued by the defendant to any person or body for dealing in, trading, exporting or otherwise in pangolin scales, skin or any such products or trophies.

It is the plaintiff's averment that on the 21st day of January 2015; the New Vision News paper carried a feature story that the defendant was issuing, had issued or was about to issue an export licence to a one Smith Ewa Maku and Smico Skin Craft Industries Limited to export seven tonnes of pangolin scale estimated at USD 4.2 million equivalent to UGX 11 billion. It is further averred that upon further investigations by the plaintiff; it was ascertained that a licence to purchase game trophy had been issued to Smith Ewa Maku.

Additionally, it is the plaintiff's contention that the defendant acted without authority when its Executive Director issued a licence to export pangolin scales and continues to act without authority and in contravention of Articles 39 and 237(b) of the Constitution. It is also contended that the administrative orders of the Minister in Charge of Wildlife are insufficient to remedy the damage as they are not only discretionary but can be withdrawn or revised. It is on that the plaintiff instituted this action.

The defendant denied any liability and contended that it is legally mandated to issue licences and the same were granted for the collection of pangolins that die from natural causes and not otherwise. In this vein, it is the defendant's averment that the plaint discloses no cause of action against it and that the same ought to be dismissed or struck out with costs accordingly

In their joint scheduling memorandum filed in court on 31/03/2015; the following were the agreed facts;

- a) The plaintiff brings this action in public interest
- b) The defendant issued and continues to issue licences for the purchase of game trophies of pangolin scales for export from Uganda
- c) Uganda is a signatory to the convention on International Trade in Endangered Species of Wild Flora and Fauna.

The agreed issues are;

1. Whether the issuance of a licence to export or otherwise deal in scales of dead pangolin contravenes Articles 39 and 237 (b) of the constitution of the Republic of Uganda; the Uganda Wildlife Act

and the Convention on International Trade in Endangered Species of Wild Flora and Fauna.

- Whether the defendant acted outside its mandate by issuing a licence to Smith Ewa Maku for the purchase and collection of 7310 kilo grams of game trophies of giant pangolin scales for export from Uganda.
- 3. Reliefs available to the parties.

Before the resolution of the issues as raised above, Smith Ewa Maku, the person to whom the licence, in issue was granted by the defendant herein, moved court vide MA No 67 of 2015; seeking to be added as a party to the main suit. It was his contention that the orders sought by the plaintiff would have far reaching effect on his economic rights in as far as the licence and its legality is concerned on the one hand and his right to a fair hearing on the other hand.

In my ruling dated 23/03/2015; I allowed the application in as far as the applicant therein would be part of the proceedings but only as an interested party who was not expected to file a written statement of defence. I also allowed him to file a statement which would act as his submission. Subsequently the rest of the parties were directed to file written submission accordingly.

In their submission, counsel for the plaintiff sought to resolve issues 1 and 2 jointly;

It is submitted that the issuance of an export licence to a one Smith Ewa Maku amounting to 7310kg of scales of pangolin is unreasonable and in contravention of Articles 2, 39 and 273 (b); paragraphs XIII of the National Objectives and Directive Principles of State Policy of the Constitution; sections 3 of the National Environment Act Cap 153; sections 2, 3 (1) of the Uganda Wildlife Act Cap 200; the 1st Schedule of the Game (Preservation and Control) Act Cap 198. It is the plaintiff's contention that to come up with 7310 kgs of Pangolin scales; an equivalent of 36,550 pangolins is required to be dead. In this regard it is the plaintiff's contention that the grant of an export licence for such large numbers of pangolins is detrimental to their survival and a contravention of Articles 39 and 237 (b) of the Constitution and other enabling laws such as the Uganda Wildlife Act and the CITES.

In its reply, defendant counsel sought to associate himself with the plaintiff's submission in as far as the citizen's right to a clean and healthy environment is concerned. Counsel however contended that the submission is redundant in as far as the matter before court is not concerned with the same but the mandate to issue export licence for pangolin scales. It is therefore contended that the matter before court is distinguishable from the authority of *Sanas Chand Vs State of Rajasthan Criminal Appeal No. 2024 of 2010* in as far latter related to activities of avaricious and rapacious persons organised to perpetuate crimes by killing wildlife in India unlike the instant case which is about purchase and collection of game trophies of pangolin scales gathered from pangolins that die from natural causes; there is no authorisation to kill or hunt pangolins.

It is submitted for the defendant that whereas Article 237 of the Constitution envisages the principle of sustainable utilisation of wildlife to the benefit of the people; the same should be read together with other provisions of the Constitution in regard to the duty of the state and its organs and the public trust doctrine. Counsel referred to the

authority of *National Forestry Authority Vs Sam Kiwanuka SCCA No.17 of 2010* for the proposition that the state must take into account issues such as sustainable development and the balance between development and the environmental needs so as to promote a wholesome public interest both for the present and for the future generations.

It is further submitted for the defendant that a coordinated survey by the defendant officials indicated a prevalence of specimen in communities and public places; and in a proposal for disposal of wildlife specimens held by the communities dated 4th March 2013; the justifications for the issuance of the licence to collect game trophies were given therein.

It is the defendant's contention that the issuance of the licence is well within its mandate under sections 29, 30 of the Wildlife Act and Article 245 of the Constitution. It is averred that the rationale for issuance of the licence is to ensure that wildlife resources are utilised sustainably under the supervision of the defendant in fulfilment of the principle of sustainable development. It is also contended that whereas the plaintiff seeks to rely on the provisions of the Game (Preservation and Control) Act Cap 198 whose schedule was saved by the Uganda Wildlife Act; it should however be noted that this law came into force before the promulgation of the 1995 Constitution with emphasis on Article 274 thereof. It is therefore submitted for the defendant that the schedules of the Game (Preservation and Control) Act should be read together with the Wildlife Act so as to achieve the desired intention of the law; it is also noted that the special permit under the 1st schedule to the Game Preservation and Control Act is required for animals not to be hunted or captured without a special permit.

In the instant case the matter does not relate to hunting nor capturing live animals but the purchase of game trophies. It is therefore contended that the defendant never issued any licence to hunt or capture live pangolins but the licence issued was for the collection of scales of dead pangolins which is not in contravention of the law.

Without prejudice to the above submission, it is submitted for the defendant that the Executive Director is mandated under section 65 of the Uganda Wildlife Act to issue to any person a permit in a prescribed form to import, export or re export any specimen. It is further submitted that the defendant's mandate in the instant case is limited to the issuance of a licence for the purchase and collection of the pangolin scales and the mandate to issue an export licence is a preserve of the CITES Management under the Ministry of Tourism, Wildlife and Antiquities as provided under Article iv of the CITES.

It is contended that the collection of the pangolins was done under the supervision of the defendant which ensured that no collection was near the protected areas and that the trophies were collected from animals that died of natural causes. In this regard, it is submitted that the defendant exercised its mandate diligently in accordance with the law and the principle of sustainable utilisation of wildlife resources.

In rejoinder the plaintiff reiterated its earlier submissions and contended further that the fact that pangolins are listed as rare species under the 1st schedule to the Game (Preservation and Control) Act, it is unreasonable for the defendant to issue an export licence worth 7310kg of pangolin scales without carrying out a population count of the pangolins in existence and to take necessary steps to ensure that their

abundance is maintained at optimum levels. It is also contended that the issuance of such licences for the exportation of the trophies of such animals encourages poaching so as to feed the high value market.

I have critically perused the record. The gist of the matter before court hinges on the legality of the licence issued by the defendant to a one Smith Ewa Maku, the interested party herein; whether it was in contravention of the law specifically Articles 2, 39, 273 (b) and paragraph xiii of the National Objectives under the Constitution of the Republic of Uganda; sections 153 of the National Environment Act; sections 2, 3 (1) of the Uganda wildlife Act and the 1st Schedule to the Game (Preservation and Control) Act. For ease of reference the respective statutory provisions are set out below.

Article 2 provides;

"This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda. (2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void."

Article 39;

"Every Ugandan has a right to a clean and healthy environment."

This provision is similar to section 3 (1) of the National Environment Act Cap 153. On the other hand Article 273 (2) (b) provides;

"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 touristic purposes for the common good of all citizens;"

The National Objective and Directive principle of state policy provide;

"(*i*) The State shall promote sustainable development and public awareness of the need to manage land, air and water resources in a balanced and sustainable manner for the present and future generations.

(ii) The utilisation of the natural resources of Uganda shall be managed in such a way as to meet the development and environmental needs of present and future generations of Ugandans; and, in particular, the State shall take all possible measures to prevent or minimise damage and destruction to land, air and water resources resulting from pollution or other causes.

Article 245 provides;

"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; andc) to promote environmental awareness"

Section 29 of the Uganda Wildlife Act provides for the different types of wildlife use rights, that is to say;

(1) The following wildlife use rights are established under this Act-

Section 30 of the Uganda Wildlife Act provides;

"No person may engage in any of the activities under section 29 or any other activities of a like nature which involve the utilisation of wildlife and wildlife products without first obtaining a grant of a wildlife use right."

Article (iv) of the **CITES** provides;

- "(1) All specimens of the species in Appendix II shall be in accordance with the provisions of this Article
- (2) The export of any specimen of a species included in appendix II shall require the prior grant and presentation of an export permit. An export permit shall only be granted where the following conditions have been met;
- a) A scientific authority of the State of Export has advised that such export will not be detrimental to the survival of that species;
- *b)* A Management Authority of the state of export is satisfied that the specimen was not obtained in contravention of the laws of that state for the protection of fauna and flora; and
- c) A Management Authority of the state of export is satisfied that any living specimen will be so prepared or shipped as to

minimise the risk of injury, damage to health or cruel treatment."

The defendant stated in its submission that the issuance of the licence was justified as per the proposal dated 4/03/2013. It is stated therein that;

"UWA has so far received numerous requests from Wildlife User rights Licencees to purchase trophies from Jocal communities. Whereas UWA remains sceptical to allow the utilisation pf old trophies held by the communities, the fact is, they continue to flood the markets and public places illegally yet UWA has no capacity to monitor this illegal movement of the trophies in the porous community areas.

It is therefore recommended to allow the licenced companies to collect trophies from communities and the public to reduce illegal trade life in uganda and generate resources to protect those that are still existing in the protected areas' wilderness."

The said proposal further illustrates that UWA tested the existence of some wildlife trophies in communities in 2007 and it was evident that these trophies indeed existed in large numbers in the public. It is also stated in the proposal that trophy collection would not be allowed in areas next to the protected areas as that might trigger illegal harvest by the neighbouring communities.

I note through perusal of the Memorandum dated 19/01/2015 by the defendant clearly states in the conclusive remarks that the licence was issued for collection of old trophies and not hunting of the live specimens. It is also stated therein that that the estimated population of the giant pangolins is good enough to sustain the survival of the species

in Uganda; and that the protected areas are a good habitat for the pangolin where strict protection of the specie is done, a factor that affirms their survival in the wild despite the growing threat on its habitat. I, however, note also that admittedly there is no credible census of these mammals to talk of.

It is also noted that the licensee herein purchased some of the trophies from UWA stores and was also granted a collection permit of old trophies held by communities across the country save for communities/ districts neighbouring the protected areas. See the letter dated 12/05/2015 from UWA addressed to Smith Ewa Maku and the letter dated 4/07/2014 from UWA addressed to the Permanent Secretary Ministry of Tourism, Wildlife and Antiquities. There is however no report on the source of the persons the trophies were purchased from.

On the facts given by the plaintiff, in law a fact is said to be proved when court is satisfied as to its truth. The evidence by which that result is produced is called the proof. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof: that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut that presumption.

In the instant case, it is true the plaintiff has not adduced any evidence to substantiate its allegation that the licence issued involved the export of live/hunted pangolins or that pangolins are killed for that purpose; nor has sufficient evidence been adduced to show that the defendant's actions were in contravention of the law. I must say most of the plaintiff's allegations are merely speculative and not backed up with evidence.

Having said the above, there is no dispute that pangolin is a rare specie that is indeed protected under the CITES. It is true that the particular permit issued by UWA to the interested party was to collect the trophies from the community who had had them for some time, hence that would envisage no killing of pangolin for this purpose. In his letter to the interested party, dated 12/5/2014, the Executive Director of the defendant wrote:

"On the matter of collection as raised in the same letter, we have taken note of your concerns and now permit you to carry out a one off collection of old trophies to boost the quantities obtained from our stores. These trophies should be collected and or bought from public markets and other public places. You have been given two weeks to carry out this exercise. During the collection exercise you shall be accompanied by a staff member of UWA to ensure compliance to the conditions set for your trophy collection exercise. You shall not collect trophies in communities and Districts neighbouring the protected areas. You are advised not to collect any trophies of species which are prohibited to be traded in by CITES." (See Document "J" of defendant's documents).

It is clear that the license to the Interested Party was for a one off collection of trophy for a period of two weeks. Apparently he managed to gather 7310 Kilograms of pangolin scales. And although in his request letter dated 19/3/2014 (Document "G" of Defendant's

documents), the Interested Party had undertaken to declare all trophies indicating the location source and the person who sold such to him, the source location and the persons he purchased from were never declared. Neither have details of the public markets and other public places from where the trophies were purchased declared. He only mentions the districts where he collected from. There is no evidence that UWA insisted on a full declaration as per the conditions set by both parties in their correspondences. (See Document 'M' of the defendant's documents). He actually asks for more time to collect more as the collection in issue was only from Buganda Central Region.

"As indicated above, 7300kg of giant pangolin scales and 10kg are of lesser pangolin.

As in the above, also collection has only been done in mostly Central Buganda Kingdom. I continue to liase with my other contacts in Eastern and Northern Uganda where long tailed pangolins are most common and will be reporting accordingly.

I therefore request to export what I collected and be granted more time to conclude my collection."

It is therefore clear that more scales are intended to be collected countrywide from "other contacts." This would mean that the 2 weeks maximum given to him in the Executive Director's letter was of his consequences. And he says, he has his "contacts" who most probably kill these mammals to feed him with his requirements.

It is quite apparent that there are no measures, other than adhoc ones, put in place to ensure that the licenses such as the one issued by UWA to the Interested Party comply with whatever is in the license. There ought to be put in place adequate and stringent measures to ensure that a balanced sustainability of the environment, and not only the economic side of it, is ensured. As it is, the defendant seems to put more emphasis on the sustainable development thereby not promoting a whole some public interest. There is no indication on record, apart from being defensive, that UWA has any interest in preserving these likely to be extinct mammals. They don't mention that the mammals are on very high demand and could be extinct if the issue of licences is not checked.

I agree that the plaintiff has not adduced any scientific evidence to prove the assertions, for example that to produce 1kg of pangolin scales, one needs about five pangolins; or that to get 7310kg you would need to have 35,550 pangolins dead.

I however agree that issuance of licences on adhoc basis to collect/purchase large amounts of trophies from rare species is sure to encourage the vice of poaching and illicit killing of the mammals since the rewards are likely to be quite lucrative considering the high demand for the scales. Uganda Wildlife Authority has not demonstrated that they are concerned that the issuance of the license like the one to the Interested Party, though clothed in legal terms, was likely to trigger the killing of these animals and eventually probably lead to their extinction. UWA's only interest is that they are legally covered in the wording of the Licence.

On a positive note, however, I note that the CITES Management Authority (Commissioner Wildlife Conservation) authorized the export of only 1000kg in January 2015 out of a total of 7510 kilogrammes collected. True, more export licenses will be granted to Mr. Maku to export his trophies, but if the release continues to be likewise controlled by the CITES Management Authority, this is one measure which will go a long way to control the export of the pangolin scales, thereby showing down the pressure on the rapid acquisition of these scales, hence also scaling down likely illicit killing of these mammals for their treasured trophies. It is worth noting that it did not bother the defendant that the export of so much at once could result into undesired effects, since they are hiding under the cover of the legal license they issued to gather scales from "Pangolins that die from natural causes". There was no recommendation in UWA's letter to CITES Management Authority to phase the export of the consignment. The letter from UWA dated 4th July 2014 to the Permanent Secretary, Ministry of Tourism, Wildlife and Antiquities is as follows:

"4th July 2014

The Permanent Secretary Ministry of Tourism, Wildlife and Antiquities PO Box 7103 Kampala

Attn. Commissioner Wildlife Conservation/CITES Management Authority MTWA

PERMISSION TO EXPORT WILDLIFE TROPHIES (PANGOLIN SCALES) BY SMICO SKIN CRAFT INDUSTRIES LTD

Mr. Smith Ewa Maku of Smico Skin Crafts Industries Ltd (SMICO) was granted Class D. Wildlife Use Right (trade in wildlife and wildlife products) in accordance with section 29 of the Uganda Wildlife Act Cap 200 of 2000 to export among others, wildlife trophies.

Mr. Maku purchased some trophies from UWA stores, and was also granted a collection permit of old trophies held by communities across the country. He has now applied for a permit to export some of the trophies (particularly 7310Kg of Giant Pangolin scales Manis gigantae) collected during this exercise. Please find attached Export Licence Serial No. 29353 allowing Mr. Maku to export 7310Kg Giant pangolin scales.

The purpose of this letter is to request you to issue a CITES Export Permit for the said pangolin scales.

By copy of this letter, Mr. Maku is advised to apply for CITES Export Permit from the CITES Management Authority, and to obtain a Veterinary Certificate from Ministry of Agriculture, Animal Industry and Fisheries (MAAIS) for the trophies before export. Mr. Maku is also advised to ensure that the trophies are inspected by UWA before shipment and to ensure that all export returns are submitted both to UWA and CITES Management Authority within fourteen days from the date of export.

Conserving for Generations Yours sincerely,

.....sign..... DR. ANDREW G. SEGUYA EXECUTIVE DIRECTOR

- c.c. Commissioner Livestock, Health and Entomology, MAAIF
- c.c. Mr. Smith Ewa Maku, SMICO Skin Crafts Industries Ltd

c.c. Community Conservation Coordinator, Coordinator Law Enforcement UWA."

To make matters worse, apparently by 19th December 2014, the Interested Party had not yet fulfilled the payment obligations to pay trophy fees worth USD51,278 in relation to Export Licence No. 29353 (for the export of the 7310 kilogrammes of pangolin scales). One wonders why the defendant had to recommend the Interested Party to CITES Management Authority for issue of an Export permit before the payment issues were resolved. My view is that in matters where the extinction of species is likely to occur, the court should not only limit itself to the letter of the license granted by Uganda Wildlife Authority without giving due consideration to the likely adverse effects of such an otherwise "legal" license. I believe that UWA ought to do more that feed commercial interests of particular individuals without weighing the likely implications on the defenceless rare species which are on such high demand in other countries.

From the above, it is my finding that although the grant of the licence by the UWA to a one Smith Ewa Maku to collect scales from pangolins that have died from natural causes appears to fall within the ambit of the law, there are grave implications to the issuance of licences for collection of such large amounts without adequate measures in place to balance sustainable development and the preservation of the fauna.

Because there was a Licence issued by UWA and the trophies are already collected, and indeed an export permit granted by the CITES Management (who are not party to the suit), and the plaintiff has not provided any evidence that these were not old trophies collected from communities and UWA or that they were procured through illicit activities, I am of the view that it is now too late to interfere with the process of the export of the 1000 kg. The exportation, with valid licence and permits from the relevant authority, is not unconstitutional. There is no ban on the export of pangolin scales. What needs to be ensured is that stringent measures are put in place to ensure that the Licences issued by UWA for collection of scales from Pangolins that have died of natural causes, are not abused to the detriment of this highly endangered species. Better still there could be a lobby by public interest groups like the plaintiffs for classifying the pangolin scales as a no export item, due to the dangers of extinction.

Be the above as it may, it is court's view that the letters from the defendant and the interested party already referred to above which contained conditions for the collection of the trophies are to be read together with the Licence given to the interested party. And since as I indicated, the conditions were not fully complied with, UWA ought not to have recommended the same for export permits. Indeed, another reason why such recommendation was premature is the fact that the payment for UWA fees was still outstanding.

It is court's view that, apart from the 1000 kg for which an export permit was given, no permit should be issued for further exports until all the conditions are complied with; and the monies owing, are paid to UWA by the Interested Party. The letter from UWA to the CITES Management dated 4th July 2014 (supra) is nullified to that extent. UWA recommendation should only come after the conditions attached to the licence are complied with.

Failure by the Interested Party to declare the names of persons from whom, and markets/public places from where the trophies were procured, was contrary to the licence. This should be rectified before the next batch is given an export permit. It was part of the control measures to ensure that the collection is not extended to illicit killing of mammals for their scales.

It is quite clear that the defendant realised there was a loop hole in the licence granted to collect pangolin scales that is why it was found necessary to put further conditions in the correspondences, which as I stated, are deemed to form part of the licence. There is therefore need for the responsible authority, in this case the board of the defendant, to look into the issue of the threat to the pangolin afresh with a view to coming up with streamlined clear and stringent conditions to attach to all licences for the collection of these scales. Although it has always been ivory in high demand on the international market, it is clear that the pressure is now on the pangolin. It is the statutory duty of UWA to promote conservation and development of wildlife (more so the endangered ones) and to specify plans and measures with a view to ensuring ecological and environmental security in the country. The board of UWA is empowered under section 91 of the Uganda Wildlife Act Cap 2000 to make regulations for carrying into effect the provisions of the Act.

Turning to the issue 3; the plaintiff counsel reiterated the prayers as laid out in the plaint and invited court to accordingly grant the same. In reply, learned counsel for the defendant contended that no remedies accrue to the plaintiff since the actions to which the plaintiff seeks relief fall well within the defendant's mandate under the law. Counsel therefore invited court to dismiss the suit with costs accordingly.

It is noted that the interested party to this suit substantially associated himself with the submissions of the defendant. For this reason I will not produce the same here. In light of my findings under Issues 1 and 2, I will make the following orders:

- The licence granted to the Interested Party is valid, but has to be read together with the conditions in the letters exchanged by UWA and the Interested Party.
- 2) The interested party is free to export the pangolin scales for which an export permit have been issued, if he has fully discharged his financial obligations to the defendant, of USD 51,278.
- 3) The recommendation for export permits for the rest of the 7310 kilograms of the pangolin scales, contained in the letter dated 4th July 2014, is hereby injuncted as far as the scales that are not yet granted export permits are concerned, until such a time as the conditions set as part of the licence from UWA are fully satisfied.
- 4) The interim order issued by the Deputy Registrar, Civil on 2nd March 2015 is hereby vacated accordingly.
- 5) Any further issue by the defendant of licenses to any person to collect scales of pangolin is hereby injuncted until such a time that the defendant puts in place stringent and effective measures to ensure the protection of pangolins from illicit killing by avaricious and rapacious individuals.

Such measures could include;

• A census of this highly endangered species, in both protected and unprotected areas.

- Ploughing back of monies received from the licences into the preservation of the pangolin.
- Requirement for credible and effective supervised collection.
- Clear sources of collected scales to be declared.
- Provision of annual quotas for such licences.

This is a public interest litigation which has not been unmeritorious. Each party shall therefore bear its own costs.

Orders accordingly.

Elizabeth Musoke

JUDGE

5/06/2015