THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 003 OF 2013

Coram: Egonda-Ntende, Musoke, Barishaki Cheborion, Kibeedi & Mulyagonja; JJCC

1. UNITED ORGANISATION FOR BATWA DEVELOPMENT IN UGANDA (UOBDU)
2. HABYARIMANA ELIAS
3. JOVANIS NYIRAGASIGWA
4. KAGUNDU CHRISTOPHER
5. ISABELA NIGHT
6. TUMUHEIRWA ERIC
7. KASUMBA ABEL
8. ABEL RUZUGA
9. KAKURU DAVID
10. MAHANO GEOFFREY
11. NYAMIHANDA ALICE
12. ALLEN MUSABYI

PETITIONERS

VERSUS

1. ATTORNEY GENERAL
2. UGANDA WILDLIFE AUTHORITY
3. NATIONAL FORESTRY AUTHORITY

RESPONDENTS

JUDGMENT OF IRENE MULYAGONJA, JCC

I have had the benefit of reading, in draft, the judgment of my sister, Lady Justice Elizabeth Musoke, JCC.

I agree that the petition should succeed and with the orders that she has proposed.

Irene Mulyagonja - 19/8/2021

Irene Mulyagonja
JUSTICE OF THE CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

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UNITED ORGANISATION FOR BATWA DEVELOPMENT IN UGANDA(UOBDU) & OTHERS:::::::::::::::::::::::::::::::::::: PETITIONERS

VERSUS

ATTORNEY GENERAL & OTHERS :::::::::::::::::::::::::: RESPONDENT

CORAM: HON.JUSTICE FREDERICK EGONDA-NTENDE, JCC
HON.LADY JUSTICE ELIZABETH MUSOKE, JCC
HON.MR.JUSTICE BARISHAKI CHEBORION, JCC
HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JCC
HON.LADY JUSTICE IRENE MULYAGONJA, JCC)

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA.

I have had the benefit of reading in draft the judgment of my learned sister Elizabeth Musoke, JCC and for the reasons she has ably given, I agree with her that this petition be allowed. I also concur in the declarations she has proposed.

Dated at Kampala, this..... 19th ..... day of ..... Aug 2021

.....

MUZAMIRU MUTANGULA KIBEEDI

JUSTICE OF THE CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

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CORAM: HON. MR. JUSTICE FREDRICK EGONDA-NTENDE, JCC
HON. LADY JUSTICE ELIZABETH MUSOKE, JCC
HON. MR. JUSTICE CHEBORION BARISHAKI, JCC
HON. MR. JUSTICE MUZAMIRU KIBEEDI, JCC
HON. LADY JUSTICE IRENE MULYAGONJA, JCC

JUDGMENT OF CHEBORION BARISHAKI, JCC

I have had the advantage of reading in draft, the judgment of my learned sister Musoke, JCC prepared in this matter. I agree with it. For the reasons she has given, I too, would allow the Petition on the terms she proposes, and make the declarations and orders she has set out.

Dated at Kampala this .....19th..... day of.....Aug.....2021.

.....

Cheborion Barishaki

Justice of the Constitutional Court

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HON. MR. JUSTICE MUZAMIRU KIBEEDI, JCC
HON. LADY JUSTICE IRENE MULYAGONJA, JCC

JUDGMENT OF ELIZABETH MUSOKE, JCC

The petitioners herein brought this Petition pursuant to **Article 137 (3) and (4) of the 1995 Constitution**; and **Rule 3** of the **Constitutional Court (Petitions and References) Rules, 2005**. The petitioners allege that the Petition sets out several questions for constitutional interpretation and that therefore this Court has jurisdiction to entertain it.

Background

This Petition concerns the Batwa, recognized under the 1995 Constitution, as one of the indigenous peoples who have lived in Uganda since at least 1st February, 1926. The 1st petitioner is stated to be a non-governmental organization engaged in advocacy of Batwa rights. The 2nd through to the 12th petitioners are all stated to be Ugandans of Batwa descent.

The 1st respondent is a cabinet minister responsible for representing Government in court proceedings and is sued in that capacity. The 2nd respondent is a statutory body established under the Uganda Wildlife Act, Cap. 200, and is sued for acts done while carrying out its statutory functions. The 3rd respondent is also a statutory body established under the National Forestry and Tree Planting Act, 2003 and is also sued for acts done while carrying out its statutory functions.

The factual background as set out in the Petition is briefly that the Batwa are a people with a population of approximately 6,000 individuals, the majority of whom live in the South Western Uganda districts of Kanungu, Kisoro and Kabale. The Petition alleges that the respective lands on which the present day Echuya Central Forest Reserve and Bwindi Impenetrable National Park and Mgahinga Gorilla National Park are situated was Batwa ancestral land, which was customarily owned by the Batwa for many years prior to the declaration of a British Protectorate over Uganda.

The Petition alleges that from about the 1930s to the present day, successive governments have done acts amounting to involuntarily displacement and/or exclusion and/or dispossession of the Batwa from their ancestral lands on which the relevant protected areas were established. These acts have included; the creation of Mgahinga Gorilla Sanctuary in 1930 and its continued recognition to date; the creation of two Crown Forest Reserves in the Bwindi Area in 1932, which was subsequently amalgamated and converted to a Game Reserve in 1961 and its continued recognition to date; and the creation of a forest reserve at Echuya in the late 1930s and its continued recognition as such to date. The Petition alleges that the Batwa were not consulted prior to the setting up of the stated protected areas on

land owned by them. Further, that no compensation was paid to the Batwa following the extinguishment of their interests in the land in issue. In view of the above facts, the Petition alleges the following constitutional violations as and against the respondents:

"1) **That the failure of the first respondent to recognize the Batwa as an "indigenous peoples" within the meaning of international law and as "minority" and "marginalized group" is inconsistent with or in contravention of the first respondent's obligations under Articles 2 (1), 20 (2), 36, 45 and 287 of the Constitution of the Republic of Uganda 1995 and Articles 19-24 of the African Charter on Human Peoples' Rights 1986; Article 1 and 27 of the International Covenant on Civil and Political Rights 1966; Article 1 of the International Covenant on Economic, Social and Cultural Rights 1966; Articles 1 and 5 of the International Convention on the Elimination of all Forms of Racial Discrimination 1965; Articles 8 and 30 of the United Nations Convention on the Rights of the Child 1989 and other regional and international law and jurisprudence; and with the legal principles of the above international laws being restated and reflected in Articles 2, 3, 9 and 33 of the United Nations Declaration on the Rights of Indigenous Peoples 2007.**

2. **That the actions of the first respondent in evicting, and the actions of the respondents in excluding and dispossessing the Batwa from the ancestral Batwa Forest lands have compromised and continue to compromise peoples' physical and cultural integrity and survival as an indigenous people and are inconsistent with or in contravention of the right to life, right to property, right to self-determination, and right to freely dispose (and not be deprived) of their wealth, natural resources and means of subsistence, their rights to economic, social and cultural development, the right to equality without discrimination and equal protection in respect of property rights derived from Batwa customary law, guaranteed under Articles 2 (1), 21, 22 (1), 25, 26, 32, 36, 37, 45, 237 (1), 287 and Objective XXVIII (b) of the National Objectives & Directive Principles of State Policy of the Constitution of the Republic of Uganda 1995 and Articles 2, 14, 19, 20 (1), 21, 22 and 24 of the African Charter on Human and People's Rights 1986; Articles 2 and**

5 of the Convention on the Elimination of All Forms of Racial Discrimination 1965; Articles 1, 26 and 27 of the International Covenant on Civil and Political rights, 1966; Articles 1, 2 and 15 of the International Covenant on Economic, Social and Cultural Rights, 1966; Article 8 (j) and 10 (c) of the Convention on Biological Diversity 1992; Articles 2, 8 and 30 of the Convention on the Rights of the Child 1989; Articles 3-5 of the African Charter on the Rights and Welfare of the Child 1990 and other international law and jurisprudence, and with the principles of the above international laws being restated and reflected in Articles 3, 4, 7, 8, 10, 19, 20, 26, 27, 28, 31 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples 2007.

3. That the actions of the Respondents in preventing and denying the Batwa from accessing the Ancestral Batwa Forest Lands are inconsistent with or in contravention of the cultural, linguistic and religious rights of the Batwa guaranteed under Articles 2 (1), 29 (1) (c), 37, 45, 287 and Objective XXVIII (b) of the National Objectives & Directive Principles of State Policy of the Constitution of the Republic of Uganda 1995 and Articles 8 and 17 of the African Charter on Human and People's Rights 1986; Articles 1, 18 and 27 of the International Covenant on Civil and Political rights, 1966; Article 15 of the International Covenant on Economic, Social and Cultural Rights, 1966; Article 8 (j) and 10 (c) of the Convention on Biological Diversity 1992; Articles 8 and 30 of the Convention on the Rights of the Child 1989; Articles 9 and 12 of the African Charter on the Rights and Welfare of the Child 1990 and other international law and jurisprudence, and with the legal principles of the above international laws being restated and reflected in Articles 9, 11, 12, 13 and 25 of the United Nations Declaration on the Rights of Indigenous Peoples 2007.

4. That the actions of the Respondents which have resulted in widespread displacement, exploitation, exclusion and marginalization of the Batwa in the communities they have resettled are inconsistent with or in contravention of the right to equality without discrimination and rights to equal and adequate access to, and the progressive realization of the rights to education, health, development, adequate standard of living, and participation in affairs of government ad civic activities

guaranteed under Objectives II, X, XIV, XVIII and XX of the National Objectives & Directive Principles of State Policy and Articles 2 (1), 8A, 21 (1), 30, 34, 38, 40 and 287 of the Constitution of the Republic of Uganda 1995 and Articles 2, 3, 11, 13-17 and 19-22 of the African Charter on Human and People's Rights 1986; Articles 2 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination 1965; Articles 6, 12, 12, 14 of the International Covenant on Civil and Political rights, 1966; Article 1, 2, 5-7 and 11-13 of the International Covenant on Economic, Social and Cultural Rights, 1966; Articles 2, 24 and 27-29 of the Convention on the Rights of the Child 1989; Articles 3-5, 11 and 14 of the African Charter on the Rights and Welfare of the Child 1990 and other international law and jurisprudence."

The petitioners prayed this Court to make certain declarations and grant several orders set forth in the Petition. These will be considered later in the judgment. The evidence in support of the Petition is contained in the respective petitioners' affidavits; and several other affidavits attached to the Petition. The petitioners also filed a rejoinder to the respondents' respective Answers.

The respondents opposed the Petition. The 1st and 2nd Respondents filed a joint Answer to the Petition. The evidence in support of that Answer is contained in an affidavit sworn by Mr. Elisha Bafirawala, stated to be a State Attorney in the 1st respondent's Chambers; and in an additional affidavit sworn by Mr. Charles Tumwesigye, Deputy Director Field Operations with the 2nd Respondent. The 3rd Respondent filed a separate Answer to the Petition supported by evidence contained in the affidavit of Mr. Maniraguha Stuart, its Director Plantations Development; and a supplementary affidavit deponed by the same person.

Representation.

At the hearing, Mr. Onyango Owor, learned counsel appeared for the petitioners. Mr. Richard Adrole, learned State Attorney from the 1st respondent's chambers appeared for the 1st and 2nd respondents. Mr. Kwesiga Joseph assisted by Ms. Namuddu Jackeline, both learned counsel

appeared for the 3rd respondent. Mr. Ali Luzinda, a representative of the 3rd respondent was present.

Counsel for the respective parties argued their cases by way of written submissions after leave was granted for that purpose. The Court put some oral questions to the respective counsel.

The parties agreed on the following issues as proposed in the written submissions for the petitioners:

"1. **Whether the Petition raises any questions of constitutional interpretation.**

2. **Whether the respondent's actions of compulsorily depriving the Batwa of their interest in or right over the relevant lands is inconsistent with or in contravention of Article 26 of the Constitution of the Republic of Uganda 1995.**

3. **Whether the actions of the Respondents in denying Batwa access to their ancestral lands is in consistent with or in contravention of Articles 29 (1) (c), 37 and 45 of the Constitution of the republic of Uganda 1995.**

4. **Whether the failure of the 1st respondent to recognize the Batwa as an indigenous people and ethnic minority is inconsistent with or in contravention of Articles 20 (2), 36, 45 and 287 of the Constitution of the Republic of Uganda 1995.**

5. **Whether the petitioners are entitled to the declarations and other reliefs prayed for."**

Preliminary objection to the Petition

The 1st and 2nd respondents in their joint Answer to the Petition, and the 3rd respondent in its separate Answer contended that this Petition does not raise any question for constitutional interpretation and that this Court has no jurisdiction to hear it. Counsel for the 1st and 2nd respondents submitted that the jurisdiction of this Court is derived from **Article 137 (1)** and **(3)** of the **1995 Constitution** and is only exercisable where the Petition filed with the Court sets out questions as to the interpretation of the Constitution. He relied on the authority of **Attorney General vs. Major General David**

Tinyefuza, Constitutional Appeal No. 1 of 1997 (per Kanyeihamba, JSC) for the proposition to the effect that there is a distinction between applying and enforcing the provisions of the Constitution on the one hand, and constitutional interpretation on the other hand. Actions for the former can be brought before any competent Court while actions for the latter may be considered by the Constitutional Court.

Counsel submitted that the present Petition concerns allegations of violations of the petitioners' right to property enshrined in Article 26 of the 1995 Constitution; and violation of the equality provision in Article 21. In counsel's view, these are matters of human rights enforcement which ought to have been instituted in the High Court under Article 50 of the 1995 Constitution. Further, the allegations advanced by the petitioners require the adducing of evidence in their support, something which cannot be done in an action of this nature which has proceeded by way of affidavit evidence. Counsel prayed this Court to find that the Petition raises no questions for constitutional interpretation.

Counsel for the 3rd respondent's submissions were similar to those for the 1st and 2nd respondents. They cited the decision of this Court in **Charles Kabagambe vs. Uganda Electricity Board, Constitutional Petition No. 2 of 1999** for the proposition that this Court's jurisdiction shall not be invoked where a Petition does not require interpretation of a constitutional provision. Counsel submitted that underlying the Petition are allegations of violations of the rights of the Batwa people by the respondents. Those rights are enforceable by the High Court under Article 50 of the 1995 Constitution. If a question of constitutional interpretation arises in the High Court proceedings, a reference may then be made to this Court. Counsel were of the view that this Petition is solely for enforcement of the rights of the Batwa people and as such this Court has no jurisdiction to entertain it. Counsel prayed this Court to dismiss the Petition with costs to the respondents.

In reply, counsel for the petitioners contended that this Petition raises questions for constitutional interpretation, and this Court has jurisdiction to entertain it. He cited the decision of the Supreme Court in **Raphael Baku**

and Another vs. Attorney General, Constitutional Appeal No. 1 of 2003 where it was held to the effect that a Petition is deemed to raise questions for constitutional interpretation where it shows: i) the acts complained of; ii) the provisions of the Constitution which the acts are alleged to be inconsistent (or in contravention of); and iii) contains prayers for a declaration to that effect.

Counsel submitted that this Petition sets out the particular acts done by the respondents which violated the provisions of the 1995 Constitution referred to therein. Those acts include the continued exclusion of the Batwa from the relevant lands to their detriment. He pointed out that this Petition contains prayers for declarations to the effect that the said acts were unconstitutional. Further, that in determining whether the impugned acts of the respondents violated the 1995 Constitution, this Court will be required to examine the meaning and the scope of the rights and freedoms as enshrined in the 1995 Constitution. In doing so, this Court shall on the basis of the decision of this Court in **Alenyo vs. Attorney General and Others, Constitutional Petition No. 5 of 2000**, be conducting a constitutional interpretation exercise.

Counsel further submitted, that moreover, this Court has the jurisdiction to entertain matters that would otherwise fall under Article 50 of the Constitution if in doing so, the Court would also engage in the process of constitutional interpretation. He relied on the authority of **Joyce Nakacwa vs. Attorney General and Others, Constitutional Petition No. 2 of 2001** in support of his submissions.

Counsel highlighted several questions which, in his view, this Petition presents to this Court for constitutional interpretation, to wit: First, do the words "any interest in or right over property" used in Article 26 (2) include an interest or right solely derived from a community's possession, occupation use and/or customary ownership of its traditional lands over an extended period? Second, does an indigenous people's possession, occupation, use and/or customary ownership of its traditional land over an extended period confer upon it a right to sustainably enter, use and occupy protected areas

established on those land without their free, prior and informed consent, a right which is included in Chapter IV although not specifically mentioned therein? Third, do Articles 29 (1) (c) and/or 37 prohibit the exclusion of a community from land to which it has a strong spiritual and cultural attachment. Fourth, whether an obligation on the 1st respondent to recognize the Batwa as an "indigenous people" within the meaning of international law can be read into Articles 20 (2), 36, and/or 45 of the 1995 Constitution. Counsel prayed this Court to find that the above questions requiring constitutional interpretation are contained in the present Petition.

I have carefully considered the submissions on whether this Petition raises any question(s) for constitutional interpretation. **Article 137** of the **1995 Constitution** as far as is relevant, provides as follows:

> **"The constitutional court.**
>
> **137. Questions as to the interpretation of the Constitution.**
>
> **(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.**
>
> **(2) ...**
>
> **(3) A person who alleges that—**
>
> **(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or**
>
> **(b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.**
>
> **(4) Where upon determination of the petition under clause (3) of this article the constitutional court considers that there is need for redress in addition to the declaration sought, the constitutional court may—**
>
> **(a) grant an order of redress; or**
>
> **(b) refer the matter to the High Court to investigate and determine the appropriate redress.**
>
> **(5) ...**
>
> **(6) ...**

(7) ..."

While considering the nature of the jurisdiction of the Constitutional Court, in **Attorney General vs. Tinyefuza, Constitutional Appeal No. 1 of 1997, Wambuzi, C.J** citing with approval a passage in the legal text "Mulla on the Code of Civil Procedure", observed that:

> **"...jurisdiction is defined in Mulla on the Code of Civil Procedure at Page 225 as:-**
>
> **"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.**
>
> **The limits of this authority are imposed by the statute, charter or commission under which the Court is Constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is unlimited"."**

Wambuzi, C.J then considered that the jurisdiction of the Constitutional Court was limited by the provisions of Article 137 of the 1995 Constitution. His Lordship held that:

> **"In my view, jurisdiction of the Constitutional Court is limited in article 137(1) of the Constitution to interpretation of the Constitution. Put in a different way no other jurisdiction apart from interpretation of the Constitution is given. In these circumstances I would hold that unless the question before the Constitutional Court depends for its determination on the interpretation or construction of a provision of the Constitution, the Constitutional Court has no jurisdiction."**

Kanyeihamba, JSC in **Attorney General vs. Tinyefuza (supra)** observed as follows:

> **The marginal note to Article 137 states that it is an article which deals with questions relating to the interpretation of the constitution. In my opinion, there is a big difference between applying and enforcing the provisions of the constitution and interpreting it. Whereas any court of law and tribunals with competent jurisdictions may be moved by litigants in ordinary suits, applications or motions to hear laws, under Article 137 only the Court of Appeal sitting as the Constitutional court**

may be petitioned to interpret the constitution with a right of appeal to this court as the appellate court of last resort.

Under the Uganda constitution, courts and tribunals have jurisdictions to hear and determine disputes arising from the application of such articles as 20,23,26,28,31,32,35,42,44,45,50,52,53,67,84,107,118 and generally under chapter 8 of the Constitution. In my opinion, Article 137(1) and 137(3) are not mutually exclusive. I do believe that the jurisdiction of the Constitutional Court as derived from Article 137(3) is concurrent with the jurisdiction of those other courts which may apply and enforce the articles enumerated above, but there is an important distinction I see, and that is that for the Constitutional Court to claim and exercise the concurrent jurisdiction, the validity of that claim and the exercise of the jurisdiction must be derived from either a petition or reference to have the constitution or one of its provisions' interpretation or construction as the primary objective or objectives of the petition. To hold otherwise might lead to injustice and, in some situations, manifest absurdity."

Mulenga, JSC. expressed a dissenting view on the nature of the jurisdiction of the Constitutional Court. While Mulenga, JSC. agreed with the majority that the jurisdiction of the Constitutional Court is circumscribed by Article 137, disagreed with Kanyeihamba, JSC's assessment that provisions in Clauses (1) and (3) of Article 137 were not mutually exclusive. He stated that:

"There is nothing in Article 137 or in any other provision in the Constitution which suggests that provisions of Clause (1) control or restrict those of Clause (3). Thus none is made subject to the other. The two have to be read together as complementary to each other."

Commenting further on the import of the provisions in Clause 3 and 4 of Article 137 of the 1995 Constitution, **Mulenga, JSC**. stated that:

"The two clauses (3 and 4 of Article 137) are innovations introduced by the 1995 Constitution. They must have been introduced for a purpose. The purpose for the innovations may first be discerned from the provisions of the clauses themselves, which in my view are unambiguous. By giving the ordinary and natural meaning to the wording in the two clauses it is evident that under Clause (3) the

Constitutional Court is empowered to do more that "interpret" in the sense of "giving meaning to words" of provisions of the Constitution. Under paragraph (a) of clause (3) the Constitutional Court is empowered to, and may "interpret" provisions of an Act of Parliament or any other law in order to determine whether such Act or other law is inconsistent with some provision of the Constitution even if the latter is so clear that there is "no question as to its interpretation". Similarly, under paragraph (b) the Court is empowered and may assess, analyse or evaluate the import of an act or omission by any person in order to determine whether such act or omission is in contravention of a provision of the Constitution, without having to interpret or give meaning to that provision. In my considered opinion therefore, the jurisdiction of the constitutional Court to be exercised over causes of action under Clause (3) is broader than interpretation of provisions of the Constitution in the narrow sense of "giving meaning to words and expressions" in the Constitution. Secondly, the purpose can be deduced from the contrast illustrated above. Under the new provision, a person with relevant complaint may go direct to the Constitutional Court for declaration and redress, unlike the previous position where he could access the Constitutional Court only through proceedings in another Court, and even then, for only an interpretation of some Constitutional provision. It is my considered opinion that the new Constitution, in Clause (3) of Article 137 gives to the Constitutional Court, over and above the jurisdiction to interpret the provisions of the constitution in the sense of giving meaning to words and expressions therein, original jurisdiction (a) to review Acts of Parliament, and other laws and (b) to determine any question on the inconsistence of anything with a provision of the Constitution, and/or on the contravention of a provision of the Constitution by anything."

Mulenga, JSC. concluded by holding that:

"Taking the jurisdiction of the Court under Article 137 as a whole, I would state it thus: It embraces references and petitions whose resolution depend either on the interpretation of a provision of the Constitution or on determination of a question on inconsistence with, or contravention of, a provision of the constitution."

I must observe that the **Attorney General vs. Tinyefuza case (supra)** was the first occasion the Supreme Court had to express itself on the extent

of the jurisdiction of the Constitutional Court. Indeed, the Supreme Court did so. However, its decision was not unanimous. Since then, the majority decision as well as the minority opinion expressed by Mulenga, JSC have been applied in several decisions of the Supreme Court and this Court. For example, in **Ismail Serugo vs. Kampala City Council and Another, Constitutional Appeal No. 2 of 1998**, Wambuzi, C.J reiterated his position holding that:

> **"In my view for the constitutional court to have jurisdiction the petition must show, on the face of it, that interpretation of a provision of the Constitution is required. It is not enough to allege merely that a Constitutional provision has been violated. If therefore any rights have been violated as claimed, these are enforceable under Article 50 of the Constitution by another competent Court."**

In the same Ismail Serugo case (supra) **Kanyeihamba, JSC** citing the decision in **Attorney General vs. Tinyefuza (supra)** held that:

> **"Nevertheless, when it comes to that Court's view of the jurisdiction of the Court of Appeal as a Constitutional Court, its decision in that case [Attorney General vs. Tinyefuza] is that the Constitutional Court has no original jurisdiction merely to enforce rights and freedoms enshrined in the Constitution in isolation to interpreting the Constitution and resolving any dispute as to the meaning of its provisions. The judgment of the majority in that case, [Wambuzi, C.J., Tsekooko J.S.C., Karokora J.S.C., and Kanyeihamba J.S.C], is that to be clothed with jurisdiction at all, the Constitutional Court must be petitioned to determine the meaning of any part of the Constitution in addition to whatever remedies are sought from it in the same petition."**

Kanyeihamba, JSC. further observed that:

> **"In my opinion, the question of cause of action must be distinguished from the matter of jurisdiction. A court may have jurisdiction while the plaint lacks a cause or a reasonable cause of action and vice –versa. In other words, a Plaintiff may have a perfectly legitimate and reasonable cause but the court before which the plaint is filed lack jurisdiction, just as the court may have jurisdiction but the litigant before it lacks a cause of action."**

In the same case, **Mulenga, JSC** on his part found that where a Petition discloses a cause of action for constitutional interpretation, the Constitutional Court is deemed to have jurisdiction to entertain it. He stated as follows:

> **"I would hold that the Constitutional Court had jurisdiction over the instant case because it involves interpretation of the Constitution, a fact which is also the basis for the earlier holding that the petition discloses reasonable causes of action under Article 137."**

On whether a Petition discloses a cause of action, Mulenga, JSC. held:

> **"A petition brought under this provision, in my opinion, sufficiently discloses a cause of action, if it describes the act or omission complained of, and shows the provision of the Constitution with which the act or omission is alleged to be inconsistent or which is alleged to have been contravened by the act or omission, and prays for a declaration to that effect."**

The majority view of the Court in the Ismail Serugo case (supra) with regards to jurisdiction of the Constitutional Court was on the lines expressed in the Judgments of Wambuzi, C.J and Kanyeihamba, JSC. The view of the majority in the **Tinyefuza (supra)** and **Serugo (supra)** cases have been followed in most cases where this Court has had to consider the nature of its jurisdiction. In **Charles Kabagambe vs. Uganda Electricity Board, Constitutional Petition No. 2 of 1999**, this Court cited the decisions in the aforementioned cases and held that:

> **"It is therefore now settled once and for all that if the matter does not require an interpretation of a provision of the Constitution, then there is no juristic scope for the invocation of the jurisdiction of this Court."**

After considering the above authorities, I hold the view that the import of the relevant provisions of Article 137 as articulated in the decisions referred to above is that the Constitutional Court may only entertain a Petition if it alleges that either an Act of Parliament or any other law, or acts or omissions attributed to any person or authority are inconsistent with or in contravention of a provision of the 1995 Constitution; and in addition, the determination of the allegations in the Petition must require interpretation of the Constitution for their resolution.

The next step is to ascertain the meaning of "interpretation of the Constitution" for purposes of Article 137. According to the **Merriam-Webster Dictionary (2021)**, "interpretation" means the act or result of interpreting. "Interpret" means to explain or tell the meaning of. The authorities, however, indicate that constitutional interpretation is to be understood as distinct from enforcement of the Constitution, and Petitions which set out matters for enforcement are to be taken as incompetent to be entertained by this Court.

In **Kabagambe vs UEB (supra)**, this Court held to the effect that the Constitutional Court has no original jurisdiction to entertain matters involving allegations of rights violations and those dealt with by specific laws. The Court held that such matters are better enforced by a competent court and if a question of interpretation of the constitutional interpretation arises in that Court, a reference to the Constitutional Court may be made.

In the present Petition, the respondents allege that the Petition concerns matters of enforcement of rights such as the right to property and the right not to be subjected to unequal treatment. It is true that the Petition largely sets out allegations of rights violations. The petitioners are aggrieved with the manner in which their alleged right to ownership and occupation of the relevant lands has been violated by the respondents. Paragraph 19 (2) of the Amended Petition alleges violation of the certain rights of the Batwa, namely: the right to life, the right to property, right to self-determination, and right to freely dispose of wealth, natural resources and means of subsistence, right to economic, social and cultural development, right to equality without discrimination and equal protection in respect of property rights derived from Batwa customary rights. These violations are alleged to have arisen following the respondent's acts of evicting, excluding and dispossessing the Batwa from their ancestral land with negative impact on them. Paragraph 19 (3) alleges further violations of cultural, linguistic and religious rights of the Batwa arising out of the respondents' acts of preventing and denying the Batwa from accessing their ancestral forest lands. Paragraph 19 (4) alleges violations of the Batwa's rights to equality

without discrimination; equal and adequate access to and the progressive realization of the rights to education; health; development; adequate standard of living; and participation in affairs of Government and civic activities. In my view, as the paragraphs referred to above clearly allege human rights violations, it can be concluded that the allegations therein are for human rights enforcement rather than interpretation of the Constitution. Therefore, this Court has no jurisdiction to entertain the same.

The petition further calls upon this Court to pronounce itself on aspects of international law concerning the concept of indigenous peoples. It is alleged in the petition that the failure of the 1st respondent to recognize the Batwa as an "indigenous peoples" within the meaning of international law is inconsistent with the 1995 Constitution. Counsel for the petitioners in his submissions appeared to concede that the 1995 Constitution does not explicitly make provision for a concept of indigenous peoples as understood in international law. However, counsel submitted that the concept can be read into Articles 20 (2), 36 and/or 45 of the Constitution. Reading words into a constitutional provision, is a legitimate method of interpretation, and this was recognized in the UK House of Lords decision in **Inco Europe Ltd vs. First Choice Distribution [2000] 1 WLR 586** where it was held that:

> **"In suitable cases, in dischargingе its interpretative function the Court will add words, omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross' admirable opuscule, Statutory Interpretation, 3rd ed (1995) pp 93-105. He comments at p 103 that "in omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the statutory provision read in its appropriate context and within the limits of the judicial role."**

In my view, counsel for the petitioners' submissions on this point must be rejected. To "interpret" is to explain the meaning of [something]: present in understandable terms; **Merriam-Webster Dictionary (2021).** In carrying out a constitutional interpretation exercise, therefore, this Court will be seeking to explain the meaning of a Constitutional provision. It is now trite

that in explaining a constitutional provision, the court will have regard to the plain and ordinary meaning of the words used in the relevant provision. Once the meaning of the words as employed has been established, this court's interpretative role is completed. It is not for this Court to read words into an explicit constitutional provision. To do so may amount to a legislative exercise and to this Court usurping the powers and role of Parliament. I would hold that this Court has no jurisdiction merely to interpret provisions of international treaties or declarations. I observe that this Court may make reference to an international treaty or declaration necessary in the process of explicating the import of a constitutional provision, but it may not rely on international law to "read words" into a constitutional provision. I therefore find that no question for constitutional interpretation arises from the petitioners' allegations that the 1st respondent has failed, in accordance with the concept of indigenous peoples as understood in international law, to recognize the Batwa as indigenous peoples.

Affirmative Action and this Petition

However, in my view, implicit in the Petition are questions concerning affirmative action as stipulated in **Article 32 (1)** of the **1995 Constitution.** These are rightly before this Court and ought to be determined. The questions may be framed as follows: 1) What is the meaning of the concept of affirmative action as articulated in the 1995 Constitution? 2) Does the concept of affirmative action have any application to the circumstances of the present Petition? 3) If it does, what affirmative action measures may be taken with respect to the petitioners?

As to the meaning of the concept of affirmative action, I note that **Article 32 (1)** of the **1995 Constitution** requires the taking of affirmative action in favour of marginalized groups. The provision states as follows:

> **"32. Affirmative action in favour of marginalised groups.**
>
> **(1) Notwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition**

or custom, for the purpose of redressing imbalances which exist against them."

Article 32 (1), however, does not set out a definition of the concept of affirmative action. According to the **Merriam-Webster Dictionary (2021)**, affirmative action may be defined as follows:

> **"An active effort to improve the employment or educational opportunities of members of minority groups and women**
>
> **also: a similar effort to promote the rights or progress of other disadvantaged persons."**

In the **Black's Law Dictionary, 8th Edition**, the following is said of affirmative action:

> **"AFFIRMATIVE ACTION**
>
> **affirmative action. A set of actions designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination."**

Affirmative action may, therefore, generally be understood as remedial action which, in any given circumstances, is required to be done in order to rectify effects of past discrimination or historic injustice. The appropriate affirmative action which may be taken depends on the facts of each case. I will now consider whether the concept of affirmative action has any application to the circumstances of the present case. Central to the Petition are allegations of the illegal eviction of the Batwa people from their land, on which the present day Echuya Central Forest Reserve (ECF), Bwindi Impenetrable National Park (BINP) and Mgahinga Gorilla National Parks (MGNP) are situated. At paragraph 18 (d) and (e) of the Amended Petition, it is alleged as follows:

> **"(d) Beginning in 1930 and continuing to the present day the Batwa have been and continue to be involuntarily displaced, excluded, evicted and/or dispossessed by the respondents and/or their agents from the ancestral Batwa forest lands, as a result of acts including but not limited to the following-**

(i) **The creation of the Mgahinga Gorilla Sanctuary in 1930s;**

(ii) **The creation of two Crown Forest Reserves in the Bwindi area in 1932, subsequently amalgamated in 1942 and converted to a Game reserve in 1961;**

(iii) **The creation of a forest at Echuya in the late 1930s;**

(iv) **The establishment and continuation to date of the Bwindi and Mgahinga National Parks in 1991, and the continuation to date of the Echuya Forest Reserve.**

(e) **The respondents have never adequately consulted the Batwa, nor have they sought and received the free, prior and informed consent of the Batwa nor provided to the Batwa adequate compensation of any equitable benefits, in respect of the exclusion and/or dispossession of the Batwa from the ancestral Batwa forest lands outlined in paragraph 18 (d) above."**

On the alleged illegal eviction of the Batwa from the relevant lands, counsel for the petitioners contended that the Batwa have been the indigenous people in occupation of the relevant land since time immemorial. This, in counsel's view, conferred on the Batwa an interest in the land protected under Article 26 of the 1995 Constitution. He submitted that the fact of the Batwa's long occupation of the relevant land was an agreed fact among the parties to the Petition. Further, that there is unchallenged expert evidence which establishes that the Batwa occupied the relevant land. In this regard, counsel made reference to the affidavits of Dr. Liz Alden Wily, Dr. Jerome Lewis and Dr. Chris Kidd which were deponed in support of the Petition. Counsel further pointed out that the evidence of the petitioners, 2nd through to the 12th petitioners, themselves Batwa also substantiated on the fact that they occupied the relevant land.

Further, while citing the decision in **CEMRIDE and MRG (on Behalf of the Endorois Welfare Council) vs. Kenya, Communication 276/2003**, counsel submitted that the jurisprudence of the treaty bodies established under the African Charter on Human and People's Rights has held that possession of land by indigenous peoples, within the meaning of international law gives rise to property rights in their favour.

It was further the submission of counsel for the petitioners that the Batwa had an interest in the suit land by virtue of the common law doctrine of pre-existing rights also known as the doctrine of native or aboriginal title. He contended that this arose because the Batwa occupied and used the relevant lands under their customary law, long before the Uganda Protectorate was established. The said pre-existing rights remained in place after the Uganda Protectorate was established and were never extinguished under colonial rule, or in the post-independence period. Counsel further contended that in the post-independence period, the Batwa rights were protected by the 1962 and 1967 Constitutions and at present by the 1995 Constitution.

Counsel submitted that the doctrine of pre-existing land rights has been formulated in a series of land mark decisions of certain courts in Canada, New Zealand, South Africa and Tanzania. He pointed out that the key decisions of those Courts have been collated in an article attached to the affidavit of Dr. Gilbert sworn in support of the present Petition. Counsel referred to a statement from an article published by Kent McNeil in a text titled **"Common Law Aboriginal Title (Oxford 1989)"** at page 165 that the failure to recognize pre-existing rights would have the curious result that indigenous peoples would automatically have become trespassers in their homes.

Counsel cited the decision of the Australia High Court, the most superior appellate Court in that country, in **Mabo vs. Queensland (No 2) [1992] HCA 23** wherein several applicable principles on pre-existing title were articulated. Counsel also cited the decision of the Botswana High Court in **Sesana vs. Attorney General [2006] BLR 1** and that of the South Africa Supreme Court of Appeal in **Richtersveld Community et al vs. Alexkor Ltd and Another [2003] BCLR 583** where the principles articulated in the Mabo case (supra) were applied. Counsel urged this Court to apply the principles articulated in the above cases and find that the Batwa were not trespassers on the relevant lands, which they occupied prior to the establishment of the Uganda Protectorate.

Counsel further contended that the Batwa property rights in the relevant land have never been extinguished and remain in force to this day. Counsel cited the Canada Supreme Court decision in **R vs. Van der Peet [1996] 2 SCR 507** where it was held that aboriginal rights could only be extinguished by legislation or regulations indicating a clear and plain intention to do so. Counsel submitted that in the present case, no such legislation has ever been passed. On the contrary, there is evidence contained in Dr. Kidd's second affidavit showing that the colonial government was interested in protecting the rights of the Batwa in the relevant land. Counsel further submitted that none of the legislation relied on by the respondents as having extinguished Batwa interests in the relevant land, namely; the Public Land Ordinance, Forest Ordinance, National Park Act or the Game Ordinance can be said to have so extinguished the said rights as they showed no clear and plain intention to do so.

Counsel submitted that the respondents have taken over the relevant lands in a manner inconsistent with Article 26 of the 1995 Constitution. The 2nd and 3rd respondents now control access to the relevant lands and have put armed officials thereon. Further that while conservation of forests is necessary in the public interest of safeguarding bio-diversity, in the present case, the petitioners contend that it was unnecessary to evict the petitioners in order to safe guard that public interest; and the onus was on the respondents to prove otherwise. Moreover, the evidence adduced in support of the Petition indicates that non-Batwa as opposed to the Batwa were the ones who have conducted themselves in a manner that threatens the existence of the forests on the relevant lands.

Counsel further submitted that evicting the Batwa from the relevant lands was neither necessary nor proportional. He relied on the decision of this Court in **Human Rights Network of Uganda and Others vs. Attorney General, Constitutional Petition No. 56 of 2013 (per Kakuru, JCC)** and the Tanzania decision of **Director of Public Prosecutions vs. Daudi Pete, Criminal Appeal No. 28 of 1990** in support of his submissions, and contended that the respondents could have adopted less-restrictive

measures aimed at conservation of the forests on the relevant lands while also ensuring the continued occupation of the relevant lands by the Batwa. Counsel pointed out that such an approach is encouraged under the International Convention on Biological Diversity, to which Uganda is a party. Further, he invited this Court to apply the reasoning in the African Court on Human and Peoples' Rights decision in the **Ogiek Case, Application No. 006 of 2012** where the Court rejected the approach of completely denying an indigenous community access to a forest on which they had an interest.

Counsel further submitted that the Batwa have never been compensated for the loss of the relevant lands in accordance with Article 26 of the 1995 Constitution, following the establishment of the protected areas on the relevant lands. Counsel submitted that while the 1st and 2nd respondents allege in their joint Answer that the Batwa were compensated, the affidavit in support of the Answer contains unverifiable information on the quantum of compensation and to what individuals it was paid. Counsel pointed out that the petitioners' evidence was clear that the Batwa had never received any compensation.

Counsel further noted the averments in the 3rd respondent's Answer to the Petition that the Batwa were merely migrants from Ituri forest in the Democratic Republic of Congo searching for forest produce in EFR and not settlement, but submitted that the respondents never disputed the fact that the Batwa are indigenous to the relevant forests and are usually referred to as forest people. Further, that the respondents did not dispute the fact that the Batwa have deep cultural attachment to the forests on the relevant lands and have their burial grounds, worship and religious sites within forests. Therefore, it logically followed that the Batwa had lived on the said land prior to their eviction. Counsel also pointed out that the evidence for the petitioners contained in the supporting affidavits of Dr. Kidd and Tamusore Pafure, both dated 21st October, 2020 were to the effect that the Batwa used to live on land where Echuya Forest Reserve is situated. The evidence proves the fact of the Batwa's occupation of the land in question.

Counsel urged this Court to reject the submissions for the respondents that the Batwa were paid compensation in form of land, arguing that the size of the alleged land was not adequate when viewed as compensation. Counsel further referred this Court to the evidence for the petitioners contained in the affidavit of Zaninka Penninah to the effect that the 6,200 Batwa individuals were not given adequate compensation.

In reply, the 1st and 2nd respondents, in their joint submissions disagreed with their learned friend for the petitioners. Counsel for the 1st and 2nd respondents submitted that the case for the 1st and 2nd respondents is that MGNP and BINP were gazetted by Government as forest reserves in the 1920s and subsequently as National Parks in the 1990s. After the said parks were gazetted, some Batwa, who lived just outside the same, began to encroach on the MGNP forest. Subsequently, the Government decided to compensate the encroachers for their developments on the land, so as to have them resettle elsewhere. The Government has always considered the relevant land to be public land held by it.

Counsel submitted that the case for the 1st and 2nd respondent is further that the Batwa have never owned land or houses on the land on which the relevant parks are situated and have only been deriving a livelihood therefrom. The petitioners have failed to adduce evidence to prove ownership of the relevant lands.

While its correct to say that Article 26 of the 1995 Constitution contains guarantees on the citizen's right to property; and that the principles on the said provision were articulated by this Court in the case of **Advocates for Natural Resources Governance and Development and 2 Others vs. Attorney General and Another, Constitutional Petition No. 40 of 2013**, counsel submitted that the 1995 Constitution could not apply retrospectively so as to apply to violations of the petitioners' rights which allegedly took place in the 1920s. As the relevant land on which MGNP and BINP are situated were gazette in the 1920s, counsel prayed that this Court finds that no discussion on violation of Article 26 can be undertaken in this case.

It was further argued that the present Petition was brought to illegally defeat the law on limitation, which, as stipulated by **Section 5 of the Limitation Act, Cap. 80**, prohibits the institution of suits for recovery of land after the expiry of 12 years from the date of which the cause of action accrued. In the present case, counsel prayed that this Court finds that the Petition was time barred.

Counsel for the 3rd respondent submitted that the Batwa have never received compensation in respect to the land on which EFR is situated because they have never owned the same nor had any interest thereon. As the evidence adduced for the 3rd respondent indicated, the Batwa people have previously lived and continue to live a nomadic way of life as hunter-gatherers and have no specific ownership rights on any identifiable portions of land.

I have considered the submissions on whether the Batwa had an interest in the land on which the present day EFR, BINP and MGNP are established (the relevant lands); and whether their interests in the land were unlawfully extinguished by the respondents. I observe that it is necessary to answer this point in order to determine whether the concept of affirmative action as enshrined in the 1995 Constitution applies to the circumstances of the Batwa.

It was stated by counsel for the petitioners that the Batwa people traditionally inhabited, used and possessed the relevant lands. However, that the Batwa people no longer possess the relevant lands because they were evicted therefrom by the respondents. Counsel submitted, that the eviction took place between the 1930s and 1991, during which time the relevant lands were turned into environmentally protected areas by respective governments. The management of the protected areas necessitated the eviction of the Batwa from the relevant lands.

The petitioners deponed affidavits in support of the claim that the Batwa people owned the relevant lands prior to their eviction. The 2nd petitioner Habyarimana Elias stated in his affidavit that he is a Mutwa (singular for Batwa) born on 25th December, 1969 and therefore aged about 42 years old in 2011 when he deponed the affidavit. He stated that he was informed by his father that his ancestors lived in the area on which EFR is now

established. The Batwa groups who lived in the EFR area derived their sustenance from the forest and lived as hunter-gatherers collecting honey from the forest. The Batwa's religious sites were also situated in the EFR area and they went there to conduct religious activities. The 2nd petitioner deponed that that his ancestors were forcefully evicted from the EFR area following the gazetting of the land as a forest reserve. The Batwa never gave any free, prior or informed consent to their eviction from the EFR area. The Batwa were also never compensated for their interest in the relevant land; and neither were they given any alternative land to settle on. As a result, the Batwa have been forced to live as squatters on land adjoining the EFR area, which land is owned by individuals from the Bakiga and Bafumbira ethnic groups. Some of the Batwa migrated to other areas in search of land and are now scattered in the nearby districts of Kabale, Kisoro, Kanungu and Bundibugyo.

The 2nd petitioner further stated that the Batwa live at the mercy of Non-Governmental Organisations like CARE and African International Christian Ministry (AICM) who have provided some Batwa with land for settlement. However, the solution provided by the NGOs is precarious in that the Batwa have no security of tenure on the said land and have not been given title to the land. The Batwa live under constant fear of eviction.

Further that the Batwa, in the immediate aftermath of their eviction, used to access the EFR area at the pleasure of the 3rd respondent. This helped the Batwa to observe worship rites at their places of worship situated in the EFR. The occasional access, however ended in 1991 upon gazetting EFR as a forest reserve.

In her affidavit, the 3rd respondent Jovanis Nyiragasigwa gave evidence about the traditional land rights of the Batwa in the area where the present day BINP was established. She was born around 1945 at Nshongye, an area within the present day Bwindi Impenetrable National Park. Her parents derived sustenance from Bwindi forest as hunter-gatherers; hunting, harvesting wild honey, and fishing from the rivers and swamps in the area. The 3rd respondent claims the existence of Batwa areas of worship at

Murugyezi in the middle of Bwindi Forest, where they used to carry out religious activities.

Further, that her family was evicted from Bwindi approximately in about 1952. During the eviction, the Government soldiers used excessive force leading to the death of many of her relatives. The Batwa lost their livelihoods following eviction from the relevant land, and were forced to settle in areas adjoining the BINP occupied mainly by Bakiga and Bafumbira communities. The 3rd petitioner claims that several Batwa have been exposed to sexual violence due to their eviction from the relevant lands. Further that "fewer and fewer Batwa speak Batwa languages or practice traditional customs and there is a danger that their languages and customs will die out". The 3rd petitioner further stated that the Government had neglected to support the livelihoods of the Batwa. Neither did the Government offer the Batwa people any compensation following their eviction from the BINP area.

The 11th petitioner Nyamihanda Alice gave evidence concerning MGNP. She was 23 years old at the time of deponing her affidavit in 2011. She testified that her father informed her that the Batwa were originally a forest dwelling people. Her ancestors including her grandfather were evicted from Mgahinga Forest and rendered landless in the process. They were forced to settle on land adjoining Mgahinga Forest as squatters. They settled on the land of the Bafumbira in Gatera Village, Gitovu Parish, Busanze Sub County in Kisoro District.

Further, that in the past, Mgahinga forest was used as a burial ground for their ancestors. Therefore, some Batwa have a spiritual attachment to Mgahinga Forest which they believe to be the home of their gods whom the Batwa look to for food availability, protection and cure of diseases. She stated that some Batwa used to go to Mgahinga forest to carry out their religious ceremonies.

Following the restriction of entry of the Batwa into Mgahinga forest, the Batwa have been left with no sustainable source of food, herbal medicine, among other things. The Batwa have not been provided with alternative means of survival and have been left prone to exploitation at the hands of

the Bafumbira community who overwork them with very little pay. The only assistance rendered to the Batwa has come from NGOs, some of which have bought land for the Batwa. The 11th petitioner believes that if this Court were to grant a special order for affirmative action to be taken, it will help in remedying the injustice, discrimination, marginalization, subjugation and sexual violence which the Batwa have experienced as a result of being evicted from the relevant lands.

I note that the evidence contained in the affidavits of the 2nd, 3rd and 11th petitioners epitomizes the evidence adduced for all the petitioners. It is therefore unnecessary to refer to all the respective affidavits of the other petitioners. The evidence of the petitioners is that previous generations of the Batwa had an interest in the land on which the present day Echuya Forest Reserve, Bwindi Impenetrable National Park and Mgahinga Gorilla National Park are presently situated. The Batwa were illegally and forcefully evicted from the relevant land and were resultantly rendered landless. No compensation was paid by previous successive Governments or the present Government prior to the eviction of the Batwa.

The evidence of the petitioners was supported by expert evidence adduced in support of the Petition. Dr. Chris Kidd, an academic and a British Citizen deponed 3 affidavits in support of the Petition. He states that he has undertaken courses of study through which he acquired knowledge about the Batwa, mainly as he carried out academic research. He had also lived among the Batwa and acquired firsthand knowledge about their affairs. The Batwa had lived on the forest in South Western Uganda which encompasses the relevant lands, for over 2000 years prior to being evicted therefrom. Evidence of long possession of the relevant lands by the Batwa is demonstrated, among other ways, by their perception by academics as "a forest people" and not just a "forest adjacent people".

In his affidavit dated the 24th day of May, 2018, Dr. Kidd traces the history of the relevant lands as discerned from materials he sourced from the National Archives of the United Kingdom. At page 9 of the affidavit, it is stated the archive materials reveal that in December 1929, the Governor of

the then Uganda Protectorate informed the UK Secretary of State for the Colonies by letter about a recommendation by the Game warden against creating a game reserve in South Western Uganda. The letter in question is attached to the said affidavit and was written by the Governor to the Secretary in response to an earlier letter in which the Secretary recommended the creation of game reserve to protect gorilla in the area. The Governor wrote as follows:

> **"I have the honour to acknowledge the receipt of your dispatch No. 409 of the 29th August, 1929, and its enclosures and to refer to my No. 339 of the 26th of August 1929 on the subject of the protection of the gorilla in the area of this territory adjacent to the Parc National Albert in the Belgian Congo.**
>
> **The report of the Game warden referred to in my dispatch, made after his inspection of the areas in question, has now been received.**
>
> **The Game Warden reports adversely on the proposal to create a Game Reserve on the grounds that the total prohibition of hunting which the ordinance provides for in the case of the Reserves would preclude the local tribe of pygmies (the Batwa) from obtaining the various small animals which to a greater extent constitute their normal diet. In this I agree with him."**

Dr. Kidd further states in his affidavit that review of the archive material indicates that in May 1930, the Acting Governor of the Uganda Protectorate assured the UK Secretary of state that mountain gorillas in South West Uganda were sufficiently protected in law as well as in fact and observed that an absolute sanctuary for all wild life could not be reconciled with the needs of the Batwa, a local people who inhabited the area and lived by hunting small animals. Further that in a letter (Annexture 3 to his affidavit) to the UK Colonial Office in July 1930, a Foreign Office official reported that the Governor now proposed to stop short of declaring a National Park "chiefly because of the difficulty engendered by the inhabitation by the Batwa pygmies of the district in Uganda now in question. The letter notes that the Batwa "do not pursue the gorillas for which they have some kind of superstitious veneration". The evidence of Dr. Kidd as sourced from the relevant archive materials is that the Uganda Protectorate Government

considered the Batwa as locals in the area where the South Western Forest was situated, and by 1929, were considered as inhabitants of the relevant forest. It is on that forest that the present day Echuya Forest Reserve, Bwindi Impenetrable National Park and Mgahinga Gorilla National Park are situated.

In another affidavit, deponed on 30th November, 2012, Dr. Kidd sets out the period in which the gazetting of the relevant lands started. In 1930, Mgahinga Forest was gazetted as a Gorilla sanctuary and in 1932, Bwindi Forest was gazette as Kayonza and Kasatoro Crown Forest Reserves. In the late 1930s, Echuya Forest was gazette as a Forest Reserve. In 1942, Kayonza and Kasatoro Crown Forest Reserves were combined to form Bwindi Impenetrable Central Crown Forest. In 1961, Bwindi was additionally gazetted as a Game Reserve rendering it impossible for Batwa individuals to farm, hunt and live inside the forest. In 1991, Bwindi and Mgahinga were gazette as National Parks and access thereto was restricted.

An affidavit of Dr. Liz Alden Wily, sworn on 20th March, 2018 was also deponed in support of the Petition. She is a female British Citizen stated to be an independent land tenure specialist with over 40 years' experience, and an acknowledged expert on customary land tenure and natural resource governance, who has contributed to policy and legal reforms in several African countries. Dr. Liz is also stated to be an associate fellow of the Van Vollenhoven Institute at the University of Leiden School of Law in the Netherlands. She has conducted research on the Batwa people and produced a report entitled "A report on a study of the Abayanda Pygmies of South Western Uganda for Mgahinga & Bwindi Impenetrable Forest Conservation Trust". According to Dr. Liz, the report which was attached as annexure "C" to her affidavit contained a factual narration of the history of the Batwa People. The findings in the said report are summarized at paragraph 17 of the affidavit, as follows:

> "17. (a) **The Batwa are generally accepted as the original and sole inhabitants of south-western Uganda forest, and especially over the last century have been both physically and socio-economically marginalized as the forest has declined and their residence of, and access to, the forest has been**

excluded as a direct result of the designation of those forests as fully protected areas.

(b) That the Batwa are a distinct people is evident from the aforementioned as well as the many distinct socio-economic and cultural characteristics referred to in my report including that the Batwa are a forest people with hunter-gatherer origins. As a result of the closure of the Parks and Reserve the Batwa have been dispossessed of their lands, territories and resources, are an oppressed, exploited minority and represent probably the poorest of the poor in Uganda.

(c) At the time immediately prior to the establishment of the British protectorate in Uganda each Batwa band had its own, often large territory, the boundaries of which had been defined over millennia [page 8]. The Batwa themselves considered (and still considered) that this territory, including the forest areas since gazette as the Parks and Reserve as well as lands in the vicinity of those areas, to be their land and forest, i.e belonging to them, and this fact was traditionally recognized by the neighbouring pre-colonial non-Batwa chiefs [pages 2, 4-5, 88].

(d) Although the colonial authorities gazetted large parts of these territories in the early 1930s, they did not do this to exclude the Batwa. Their purpose was to regulate the extractive exploitation of commercially valuable material such as timber and minerals, and to control or even prevent the clearance of forest for agricultural settlement. This is reflected in the fact that, after the gazettements, the Batwa continued to use all three forests for traditional hunting and gathering activities...

(e) I was able to identify at least seven traditional territories which, prior to the creation of the Parks, the Batwa continued to regard as in some sense their own. If Batwa from one band visited the territory of another they regarded themselves as guests on the other band's property...

(f) Based both on interviews with the affected communities and on what we were told by a Senior Park Guide it was clear

that the Batwa had been evicted and excluded from their lands by the government – with the most recent evictions of the Batwa being from Mgahinga and Bwindi National Parks. The Batwa informed us that at least five households in Mgahinga had been so intimidated by their eviction that they had fled to the comparative security of Rwanda or, in one case to Zaire.

(g) ...

(h) The Batwa's strong sense of territoriality had nevertheless survived the formation of the Parks. In my opinion, this explained why, although over 80% of the Batwa are now landless squatters outside the Parks and the Reserve, most still lived close or even close to their boundaries. [page 11, 13, 99-103, 112, 116, 196]

(i) "Not even a single Umuyanda [Mutwa] wished to move outside the general range of his/her traditional territory."

(j) We identified a specific "nexus" or link between the places where many Batwa communities now live and the traditional territory to which each belonged. [page 98]

(k) I concluded that it was "highly likely" that each of the nexi I had listed were founded on ancient hunter-gatherer bands. [page 98, 196]. This is probably why, even after their exclusion from the Parks and the Reserve, the Batwa continued to feel a "sense of ownership" over their traditional forests. [page 207]

(l) Once the Parks were formally established the Batwa were denied further access to them. In particular, they lost access to the honey, wild vegetables and meat which had been "the most critical element of their subsistence", as well as access to important medicines. This in turn had made the Batwa increasingly dependent on their "landlords" of whom they had become "serfs". [pages 149-150]

(m) Many of the Batwa to whom I spoke saw the 1995 survey as an opportunity to express their views about how these effects might be mitigated. I found that the "focus of their

requests was, consistently across communities, upon land and forest use rights." [page 15]

(n) **I was concerned that unless effective steps were taken to address these requests they were likely to "fester into a human rights issue". The Parks, I believed, had "the potential to become a cause-celebre of indigenous rights of substantial proportions and impact" [page 214]**

(o) **In order to reduce this risk and to secure the conservation of the Parks for the longer term, I considered that Batwa should be helped to find secure places where they could live and farm, and should also have the right to use specified areas in the Parks in an agreed and sustainable way. I referred particularly to the right to visit sites of socio-cultural importance and to harvest honey, plant foods and medicines [page 214]. I also explained how I though this should be done. [Page 217 et seq]**

(p) **Those recommendations on how to address the immediate priorities of landlessness, and forest user and access rights in relation to the Batwa were expressly without prejudice to the imperative to properly and permanently address the fundamental land issue. In respect of this I was clear that the ancestral rights of the Batwa to the Echuya, Bwindi and Mgahinga forest areas must be explicitly acknowledged and recognized, and that for the Batwa this means "ownership". I considered that ideally, a constitutionally binding form of guardianship by Government should be sought and found, which explicitly acknowledges the special relationship of Abayanda [Batwa] with the forests and holds those forests as stable and conserved areas, in trust in perpetuity for them. [pages 206-210]. Any process for dealing with the land issue must allow for the Batwa themselves to be mandated with the responsibility for working through the alternatives, selecting realistic possibilities and making the key decisions accordingly, including on the final outcome."**

The affidavit of Dr. Liz Alden Wily further reinforces the evidence for the petitioners about the inhabitation of the Echuya, Mgahinga and Bwindi Forest areas by the Batwa on the strength of historic settlement on the said land.

In the affidavit of Charles Tumwesigye stated to be an official of the 2nd respondent, also deponed in support of the 1st and 2nd respondent's Answer, it is averred in relevant part, as follows:

"4. **THAT I know that the 2nd Respondent's mandate is to ensure that the integrity of the wildlife protected areas is maintained including ensuring that there are no encroachments on and illegal activities in the National parks and other wildlife protected areas.**

5. **THAT I know that since the inception of the 2nd Respondent in 1995 I know that Mgahinga Gorilla National Park and Bwindi Impenetrable National Park were gazetted by the Government of Uganda in the 1920s.**

6. **THAT I know that the Mgahinga Gorilla National Park and Bwindi Impenetrable National Park were formerly gazetted as forest reserves before being upgraded to the status of National parks in the 1990s.**

7. **THAT by virtue of my employment with the 2nd respondent, I know that Mgahinga forest has been partly encroached by the Batwa, Bakiga and Bafumbira who settled in zone 3 of the forest.**

8. **THAT I know that owing to the above, in 1991, the encroachers were evicted and all those who had structures and gardens therein were duly compensated by Government of Uganda through its collaborators and partners.**

9. **THAT I know that the encroachers of the forest were compensated and received their monies from the Uganda Commercial Bank, Kisoro Branch. A list of persons compensated is attached hereto and marked annexture "UWA1".**

10. **THAT I know that the encroachers were not compensated for the land but for the structures and food crops grown in the forest since the land has always been gazetted as public land for conservation and belongs to the government.**

11. **THAT persons who missed out on compensation lodged complaints and claims which were duly handled by the relocation screening committee. A copy of the committee report is attached hereto and marked annexture "UWA2".**

12. **THAT I know that the Batwa used to enter into the forest for hunting and food gathering and would thereafter leave the forest.**

13. **THAT I know that the Batwa have never owned any land in the Park and neither did they own any houses in the forests.**

14. **THAT I know that some Batwa who had structures in the Park like a one Munyanziza were duly compensated."**

I pause here to comment about the above evidence for the 1st and 2nd respondent. The Batwa case as set out in the present Petition as I understand it is that they are the present day generation of a people whose ancestors inhabited the relevant lands prior to the establishment of colonial rule in Uganda. The Batwa's case is that their inhabitation of the relevant lands amounted to ownership and possession of the relevant lands in a manner that vested some sort of interest in the Batwa for the land. The relevant land is the land to which the Batwa heritage is attached, and therefore their eviction therefrom left them landless. The Batwa's evidence sets out the history of their eviction from the suit land which was conceived starting from the 1920s and effectively executed by 1991. The Batwa give accounts which establish their case as I have found earlier.

The 1st and 2nd respondents' evidence on the other hand attempts to paint the Batwa as people who merely encroached on the relevant lands. Mr. Elisha Bafirawala avers that the land was public land vested in the Government from about 1962. Mr. Charles Tumwesigye's affidavit is primarily based on facts that took place commencing in about 1996 to the present day. Although Mr. Charles Tumwesigye claims that Mgahinga Gorilla National Park and Bwindi Impenetrable National Park were gazetted as such in the 1920s, I find that his evidence on this point is not verified at all. I find the evidence of the petitioners alluded to earlier to be more compelling. This is because it charts the history of the Batwa and their connection to the relevant lands, better than that for the 1st and 2nd respondents.

I now turn to consider the pleadings and evidence for the 3rd respondent. As far as relevant to the history of the connection between the Batwa and the relevant lands, the 3rd respondent's Answer to the Petition alleges as follows:

"8. **In specific reply to paragraph 18 (b) of the amended petition, the 3rd respondent shall contend that the Batwa have never inhabited nor customarily owned the lands and forests including the area ethnically encompassing Echuya Central Forest Reserve. The Batwa migrated from the Ituri forest of the Democratic Republic of Congo in search of wild animals (game meat) and fruits. They therefore came to Echuya Central Forest Reserve in search for forest produce but not for settlement hence they are not inhabitants of Echuya Forest Reserve but are just like any other communities adjacent to Echuya CFR (Bafumbira and Bakiga) which are all benefitting from Echuya Central Forest.**

9. **In further reply to paragraph 18 (b) of the amended petition, the 3rd respondent shall contend that the Batwa after migrating to Uganda established settlements along the boundaries of Echuya CFR with scattered households in villages in Murubindi, Kashasha, Gitebe-Kanaba, Biizi-Rugeshi-Murora, Mukasaayi, Karengyere-Rwamahano and Kinyarushengye. The Batwa only had user rights over Echuya CFR but have never had ownership rights over land in Echuya CFR."**

Therefore, the case for the 3rd respondent related specifically to the Echuya Central Forest reserve is that the Batwa have never had any possessory rights to the forest reserve land. The Batwa only went onto that land in search of fruits and therefore obtained only user rights thereon. The evidence in support of the 3rd respondent's case is contained in two affidavits, one of Ms. Mugenyi Christine and another of Maniraguha Stuart.

Ms. Mugenyi Christine averred that she is an official of the 3rd respondent in the position of Partnership Officer. She is in charge of initiation, formulation, implementation, monitoring of collaborative forest management between the 3rd respondent and adjacent communities, partners and stakeholders. Ms. Mugenyi refers to the Batwa as part of the communities that live adjacent to the relevant forest reserve. She supports the case that the Batwa only have user rights on the relevant forest reserve land. The Batwa, she says, still exercise their user rights on the relevant forest reserve land from where they obtain timber and non-timber supplies, water for domestic use, ropes, handicraft material, honey, rainfall, general income, tourism, grass for

thatching, vegetables, herbal medicine, tree planting, fruits, sand/murram, honey, mushrooms and employment opportunities; paragraph 10 of Ms. Mugenyi's affidavit. At paragraph 12, Ms. Mugenyi states that the Batwa have been utilizing the relevant forest land since the 1940s with the permission and in conjunction with the 3rd respondent. At paragraph 13, that the 3rd respondent perceives the Batwa community as key forest users who use Echuya Forest to sustain their daily lives. Throughout her affidavit, Ms. Mugenyi refers to the Batwa either as members of the communities adjacent to the relevant forest reserve or as persons with user rights to the forest land. The supplementary affidavit in support of the 3rd respondent's Answer reiterates the notion that the Batwa are merely users of the relevant forest land.

My view of the evidence adduced for the 3rd respondent is that it, too, is not as insightful about the connection of the Batwa to the relevant land. The evidence for the 3rd respondent, like that for the 1st and 2nd respondents limits itself to the situation the Batwa find themselves in the present day. The Batwa, on the other hand, hinge their case on the perceived historical ties to the relevant land and the injustice they suffered at the hands of the successive previous Governments as well as the present Government, which decided to evict the Batwa people from the relevant lands in order to establish protected areas thereon.

When taken together with the evidence adduced for the petitioners, I cannot but conclude that the assertion that the Batwa only migrated to the relevant lands in search of fruits and other food, is incorrect. Earlier, I made reference to correspondence written in 1929 in which the Governor of then Uganda Protectorate recognized that the Batwa were a local tribe present in the South Western Uganda forest at that time. This goes to show that the Batwa inhabited the relevant land much earlier than the 3rd respondent wants to acknowledge.

I have considered the further submission of counsel for the petitioners that the Batwa had an interest in the suit land by virtue of the common law doctrine of pre-existing rights also known as the doctrine of native or

aboriginal title. Counsel contended that this arises because the Batwa occupied and used the relevant lands under customary law, long before the Uganda Protectorate was established. Those pre-existing rights remained in place after the Uganda Protectorate was established and were never extinguished under colonial rule, or in the post-independence period. Counsel further contended that in the post-independence period, the Batwa rights were protected by the 1962 and 1967 Constitutions and at present by the 1995 Constitution.

I note that the doctrine of native title was articulated in the High Court of Australia decision in **Mabo and Others vs. Queensland (No. 2) [1992] HCA 23**, there Brennan, J. stated:

> **"The term "native title" conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants."**

Brennan, J. discussed the nature and incidents of native title; as well as the requirements to be satisfied for native title to be held to exist in any given case. In my view, however, it is unnecessary to express an opinion on the applicability of the doctrine of native title in the present case. The present case requires only this Court to determine whether it is necessary to take affirmative action measures in favour of the Batwa; and further, to determine what those measures might be.

I now turn to that analysis. As stated earlier, affirmative action is enshrined in **Article 32 (1)** of the **1995 Constitution**, which provides as follows:

> **"32. Affirmative action in favour of marginalised groups.**
>
> **(1) Notwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them."**

The provision enjoins the State to take affirmative action in favour of certain groups. Two things must be satisfied. First, those groups must have been

marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom; and second, the affirmative action must be for purpose of redressing imbalances existing against the marginalized groups. In interpreting the provisions of Article 32 (1), it is worth remembering one of the principles of constitutional interpretation as set out in the Canada Supreme Court decision of **R v. Van der Peet [1996] 2 R.C.S 507** (per Lamer C.J) quoting from an earlier decision of the Court to the effect that:

> **"...a constitutional provision must be understood "in the light of the interests it was meant to protect."**

To ascertain the interests which the provisions of Article 32 (1) were meant to protect, we must construe the words employed therein. It is now a settled principle of constitutional interpretation that in relation to provisions of a constitution "where words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense"; **David Welsey Tusingwire vs. Attorney General, Supreme Court Constitutional Appeal No. 4 of 2016.** It is necessary to determine whether the Batwa are a group who have been marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom within the meaning of Article 32 (1). According to the **Merriam-Webster Dictionary (2021)** to "marginalize" is to relegate to an unimportant or powerless position within a society or group. It is the case for the Batwa that they have been relegated to an unimportant or powerless society within our society; and in their respective affidavits, the 2nd through to the 12th petitioner adduced evidence in support of this assertion.

The 2nd petitioner states that following the eviction of his family from the Echuya Forest Reserve where his family homestead was, coupled with the fact that no compensation was paid to him; they "were left with no alternative but to settle as squatters of the landlords who owned land outside the forests mainly from dominant ethnic particularly the Bakiga and Bafumbira"; paragraph 10 of 2nd petitioner's affidavit. Further in paragraph

11, "that as the search for alternative land became a basic necessity; the Batwa became disintegrated and traversed in the neighbouring districts of Kabale, Kisoro, Kanungu, and Bundibugyo in search for resettlement land." The 2nd petitioner's affidavit further highlights the fact that the Batwa have been turned into a destitute people left at the mercy of Non-Governmental Organizations to support their livelihoods as well as have a chance at access to land. At paragraph 14, the 2nd petitioner states that it is those NGOs which "have endeavored to buy and offer to some of the Batwa communities certain pieces of land on which to live..." The evidence of the 2nd petitioner highlights the situation of the Batwa in relation to all the relevant lands, and clearly indicates that the Batwa are a marginalized group in the meaning stipulated in Article 32 (1). Their marginalization has arisen due to their eviction from the relevant lands without payment of compensation or with inadequate compensation, if any was paid. The Batwa are now relegated to a lesser class of citizens, inherently landless and fated to be encroachers on other people's land.

As to whether the marginalization of the Batwa has been caused by any of the reasons set out in Article 32 (1), I find that it has. In terms of Article 32 (1), the marginalization of the Batwa has been caused by "any other reason created by history". This reason which is clearly brought out by the evidence for the petitioners is the eviction of the Batwa from the land where their ancestors had lived for years, centuries or even millennia, by agents of the Government, without seeking their consent and without the Government making provision for payment of adequate compensation or at all, to the Batwa.

I observe that the Canada Supreme Court has a body of authority concerning the meaning and interpretation of a provision of Canadian law which focuses on affirmative action. In **R vs. Kapp [2008] 2 SCR 483**, the Court expressed views to the effect that affirmative action or ameliorative action clauses are intended for the betterment of disadvantaged groups, which is aimed at ensuring substantive equality. In the judgment of Maclachlin, C.J and Abella, J. it was stated as follows:

"Substantive equality, as contrasted with formal equality, is grounded in the idea that: "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration"

In my view, Article 32 (1) requires the state to take measures aimed at ensuring that the marginalized groups, who are citizens like the rest, feel secure and confident in the knowledge that they are recognized in society as human beings equally deserving of concern, respect and consideration. The state must take the necessary measures which the peculiar facts of each case require so as to redress the imbalance which exists against the marginalized group. Therefore, I find that the circumstances of the Batwa highlighted above call for the taking of all necessary steps in the interest of affirmative action in their favour.

I now turn to the remedies available to the petitioners. The petitioners prayed this Court to grant several declarations and orders. However, it is unnecessary to grant most of those prayers, given that this petition has been disposed of only on the question of whether the concept of affirmative action as stipulated in the 1995 Constitution has any application to the circumstances of the present Petition. In my view, apart from the relevant declarations which I will make later, the remedies available to the petitioners focus on what affirmative action measures may be taken with respect to the petitioners. I reiterate my finding that the Batwa are a group of individuals who have been marginalized on the basis of historical reasons following their eviction from the relevant lands without adequate compensation being paid to them. I find that no adequate compensation was paid to the Batwa despite the fact that some monies were paid to some Batwa in about 1991. I am alive to Mr. Charles Tumwesigye's affidavit in support of the 1st and 2nd respondent's case which attempted to give evidence on payment of compensation to the Batwa. The relevant paragraphs are as follows:

"6. ...

7. **THAT by virtue of my employment with the 2nd Respondent, I know that Mgahinga forest has been partly encroached by the Batwa, Bakiga and Bafumbira who had settled in Zone 3 of the forest.**

8. **THAT I know that owing to the above, in 1991, the encroachers were evicted and all those who had structures and gardens therein were duly compensated by Government of Uganda through its collaborators and partners.**

9. **THAT I know that the encroachers of the forest were compensated and received their money from then Uganda Commercial Bank, Kisoro Branch. A list of persons compensated is attached hereto and marked annexture "UWA1".**

10. **THAT I know that the encroachers were not compensated for the land but for the structures and food crops grown in the forest since the land has always been gazetted as public land for conservation and belongs to the Government.**

11. **THAT persons who missed out on the compensation lodged complaints and claims were duly handled by the relocation screening committee. A copy of the committee report is attached hereto and marked annexture "UWA2"."**

The 2nd respondent acknowledged that it has treated the Batwa people as encroachers on the relevant land, whom the Government evicted therefrom. It further admitted that the Batwa were paid compensation, not for the loss of the relevant land, their ancestral land, but for loss of structures thereon. Thus, it is unnecessary to go into a detailed consideration of annexture "UWA1" to Mr. Tumwesigye's affidavit, a document purporting to show the compensation allegedly paid to Batwa for their interest in the relevant land, for three reasons. First, the compensation set out in UWA1 was admittedly not paid in respect to loss of the relevant lands, but was made to persons, some of whom were Batwa, who were found to be encroachers on the relevant land on which is located the MGNP and BINP. Secondly, and relatedly, persons from other groups like the Bakiga and Bafumbira, not being Batwa were also paid. Thirdly, the document "UWA1" itself is dubious and does not, on the face of it, indicate its author or the purpose for which it was made.

For those reasons, I find that no compensation was paid out to the Batwa for their eviction from the relevant lands. As a result, the Batwa have been left disadvantaged, owing to their eviction from the said land, and also due to the nonpayment to them of adequate compensation which would have facilitated in their relocation to similar lands. This had rendered them landless, and has severely affected not only their livelihoods, but has destroyed their identity, dignity and self-worth as a people and as equal citizens with other Ugandans.

It is therefore necessary for this Court to determine the affirmative action measures, which must be taken in favour of the Batwa for the purpose of ameliorating their plight as highlighted. I note that the petitioners sought for the following orders of redress, set out at pages 7 to 8 of their Petition:

"1) **The respondents shall recognize the right of ownership of the Batwa to the ancestral Batwa forest lands and shall ensure that the Batwa are formally registered as the lawful owners of the ancestral Batwa Forest lands.**

2) **The respondents shall within 12 months from the date of the notification of the judgment, pay to the Batwa fair and just compensation for all material and immaterial damages caused by the eviction, exclusion, or dispossession and consequent impoverishment, loss of economic, social and cultural amenity and opportunity and other harms suffered by the Batwa, from the earliest date of the same, up until either:**

   (a) compliance by the respondents with order 1; or

   (b) in the alternative, and without prejudice to orders 1 and 3, compliance by the respondents with order 4.

3) **The respondents shall, within 3 months from the date of notification of the judgment, commence negotiations with the Batwa in relation to the continued protection of the conservation values and environmental services of ancestral Batwa forest lands, with a view to agreeing a mutually-acceptable and human rights-compliant basis for the environmental protection of ancestral Batwa forest lands and the distribution of revenue and developmental benefits accruing from the ancestral Batwa lands.**

4) **In the alternative, and without prejudice to order 1 and orders 2 and 3, that the respondents shall:**

   (a) **provide the Batwa people with alternative land of equal size, quality, type and value to the ancestral Batwa lands and shall commence this process within three months from the notification of the judgment, and complete this process within three years from such date;**

   (b) **accord to the Batwa the right of access to the ancestral Batwa forest lands to freely exercise their cultural, religious and spiritual rights immediately upon notification of the judgment, and shall within 12 months of notification of the judgment, put in place effective and adequate institutional mechanisms, designed and implemented with meaningful participation and free, prior and informed consent of the Batwa for joint collaborative ad participatory management of the ancestral Batwa forest lands.**

   (c) **with the free, prior and informed consent of the Batwa people, set up a fair and equitable system for directly sharing with the Batwa, the financial and development benefits accruing to the respondents from the ancestral Batwa forest lands within 12 months of notification of the judgment.**

5) **any other remedies that this Honourable Court may deem fit."**

In the submissions relevant to the issue on redress, counsel for the petitioners reiterated the prayers made in the Petition for this Court to grant orders aimed at ensuring: First, that the respondents respect, uphold and promote the Batwa's interest in or right over the relevant lands pursuant to **Articles 20 (2)** and **26** of the **1995 Constitution**._Second, that the respondents respect, uphold and promote the ancestral land rights of the Batwa connected to the relevant lands; and to refrain from denying the Batwa access to, use and occupation of Bwindi Impenetrable National Park, Mgahinga Gorilla National Park and Echuya Forest Reserve, despite the designation of those areas as protected areas. Third that the respondents allow the Batwa to go onto the respective lands and observe their religious ceremonies at their places of worship on the land. Fourth that the Batwa are

paid fair and just compensation for all the damages resulting from the actions of the respondents in breach of the 1995 Constitution. Fifth, an order that the respondents establish a fair, participatory ad equitable mechanism by which to directly share with the Batwa the financial and development benefits accruing to the respondents from the public use of the relevant lands. Fourth, that the respondents adopt [further, in addition to those granted by the Courts] measures of affirmative action to ensure access by the Batwa to education, health services, work, poverty-alleviation programmes and political participation and decision-making in the areas they live. Sixth, counsel for the petitioners prayed that any issues of redress arising following the disposition of this Petition be referred to the High Court for determination.

I have found in this judgment, that the present Petition succeeds, to the extent that affirmative action measures should be taken in favour of the Batwa people. However, like in any other Constitutional matter, evidence in the present matter was given by way of affidavit evidence. The evidence is, in my view, insufficient to determine the point as to the affirmative action measures which must be taken to improve the Batwa people's situation.

Article 137 (4) of the **1995 Constitution**, provides for redress in constitutional matters, and stipulates as follows:

> **"(4) Where upon determination of the petition under clause (3) of this article the constitutional court considers that there is need for redress in addition to the declaration sought, the constitutional court may—**
>
> **(a) grant an order of redress; or**
>
> **(b) refer the matter to the High Court to investigate and determine the appropriate redress."**

Due to insufficient evidence, I would move, under **Article 137 (4) (b)** to refer this matter back to the High Court to investigate and determine the appropriate affirmative action measures for the Batwa people. In doing so, I would urge the High Court that the most important consideration is that the situation of the Batwa people must improve. The Batwa find themselves in a vulnerable and appalling situation, which it is necessary to ameliorate.

The evidence for the petitioners shows that the Batwa are a poverty-stricken people with very low literacy levels. The High Court should ensure that any affirmative action measures it orders to be put in place do not expose the Batwa people to further exploitation, are practically effective and are enjoyed by all the Batwa people.

I should not be understood to fetter the High Court's discretion as to which affirmative action measures, it may order, but in my view, the orders prayed for in the Petition, to wit; award of damages as compensation for the illegal eviction, provision of alternative land, among others, are illustrative.

In conclusion, I would allow the Petition on the terms stated hereinabove, and make the following declarations and orders:

a) The ancestors of the present generation of the Batwa people inhabited, had an interest in and/or owned, in accordance with their customs and/or practices, the whole of or part of the area of land on which is located a forest in the South Western region of Uganda, and on which the present day Echuya Forest Reserve, Mgahinga Gorilla National Game Park and Bwindi Impenetrable Forest National Game Park are situated. The Batwa people so inhabited the land until their eviction therefrom in around 1991 to 1996 by the present Uganda Government. The eviction was the culmination of policies of successive Governments beginning with the colonial Government in the 1920s to the NRM Government in 1991, aimed at turning the relevant lands, then inhabited by the Batwa, into protected areas.

b) No adequate compensation was paid to the Batwa people by the Government for loss of their land, which left the Batwa unable to acquire alternative land for settlement, and has rendered them a landless, destitute people living as squatters on land adjoining the relevant protected areas. This has not only affected the Batwa's livelihood but has also destroyed their self-esteem, and their identity as a people; and left them a disadvantaged and marginalized people, needing affirmative action. As a result, and pursuant to **Article 32 (1) of the 1995 Constitution**, it is necessary that appropriate affirmative

action measures be taken in favour of the Batwa people to ameliorate the appalling situation in which they find themselves.

c) Having regard to the fact that this Petition proceeded by way of affidavit evidence, which is insufficient to determine the appropriate affirmative action measures, it is necessary and I would order that this matter be referred to the High Court to expeditiously hear evidence and determine the appropriate affirmative action measures which may be undertaken to ameliorate the appalling situation caused to the Batwa by the illegal eviction from the relevant lands.

d) I would order that the costs of this petition be paid by the respondents, jointly and/or severally, to the Petitioners.

Dated at Kampala this ....19th.... day of....Aug....2021.

.....

Elizabeth Musoke

Justice of the Constitutional Court