THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

MISCELLANEOUS APPLICATION No. 021 of 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW SEEKING PREROGATIVE ORDERS OF MANDAMUS

1. **MOSES KAKUNGULU**
2. **RITAH KAKUNGULU** :::::::::: **APPLICANT**

Versus

1. **TOWN CLERK, JINJA MUNICIPAL COUNCIL** :::::::::: **RESPONDENTS**
2. **JINJA MUNICIPAL COUNCIL**

BEFORE: HON. JUSTICE MICHAEL ELUBU

RULING

This is an application for Judicial Review filed under Sections 36 (1) (a) of **the Judicature Act** (As amended); Rules 3 (1) (a), 6 (1) and 8 of **The Judicature (Judicial Review) Rules, 2009**.

The applicants are Moses Kakungulu and Ritah Kakungulu. The respondents are named as 1. The Town Clerk of Jinja Municipal Council and 2. The Jinja Municipal Council.

The applicants seek orders that:

a. The prerogative order of Mandamus doth issue directing the Respondents to approve building plans of the applicants in respect of Plot 5 Odaka Close, Masese Division, Jinja Municipality submitted on the 21st of September 2016.
b. General damages
c. Consequential orders
d. Costs of the application

The notice of motion has the grounds which are particularised in the accompanying affidavit.

It is stated that on the 21st of September 2016 the applicant's submitted building plans, to the respondents for approval, in respect of Plot 5 Odaka Close in Masese Division in Jinja Municipality. That they waited for several months without a response before the first applicant asked his lawyers to remind the respondents (who still adamantly refused to approve the plans and gave no reasons why they had refused). That the National Water and Sewerage Corporation wrote to the applicants informing them that they had no objection to the approval of the plans. That the applicants have a prima facie case both on the facts and the law. That they are aggrieved by the actions of the respondents both jointly and severally. The applicants contend that the delayed approval is unconstitutional, illegal and unfair and that they will seek general damages of fifty million shillings as they have been gravely affected by the delay.

The respondents oppose this application. One Byabagambi Francis swore an affidavit in reply. He is the 2nd respondent's Town Clerk and he asserts that this is not a proper case for Judicial Review because it is premature; that the respondents are still considering the approval of the applicants building plans and a final decision will be communicated. He avers the delay arose as a result of an objection from the

National Water and Sewerage Corporation that the area had high pressure water pipes and development there would lead the pipes to burst. That National Water and Sewerage Corporation sought to rescind their earlier 'no objection'. That the respondents were considering this objection to the application. That the applicants had not suffered any loss. That this application should therefore not be granted and the respondent is left to make a decision.

The applicant was represented by Mr Arthur Abaliwano and the respondents by Mr Ivan Geoffrey Mangeni. The parties were granted leave to file written submissions which are on record and will not be reproduced here but will be referred to in resolving the issues here?

I have framed three issues for resolution:

a. Whether the application was in time?
b. Whether the applicant is entitled to the prayers sought?
c. What remedies were available?

a. Whether the application was in time?

It is the contention of the respondents that this application was filed out of time and should be dismissed. That the applicant lodged his building plans with the 2nd respondent on the 21st of September 2016. That the 2nd defendant ought to have rendered a decision, whether or not to approve them, within 30 days of receipt. That when the applicants filed this matter on the 18th of April 2017 it was outside the time provided by law. According to the respondents, Rule 12 of **the Public Health and (Building) Rules** the plans ought to have been approved within 30 days of receipt. It was at the expiry of those 30 days of receipt that the cause of action in this matter arose.

It is submitted that the application offends Rule 5 of **The Judicature (Judicial Review) Rules 11 of 2009** which stipulates,

> An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of the application first arose, unless the Court considers that there is good reason for extending the period within which the application shall be made.

The applicants on the other hand argue that the application is in time. That Rule 12 of **The Public Health and (Building) Rules** does not provide for a decision being made within 30 days but for a time frame within which a decision must be made.

Rule 12 states,

> If, within thirty days of the receipt of any plans and notice or further particulars delivered in accordance with these Rules, the local authority fails to intimate to the person submitting the plans its disapproval of the building or work which the person intends to erect, the person submitting the plans may proceed with the building or work in accordance with the plans, but not so far as to contravene any of the provisions of these Rules or any other law in force for the time being.

That the above provision gives the applicant the liberty to go ahead with his proposed works if no approval was made within 30 days. The applicant however submits the applicant stands to face worse ramifications if he proceeded as provided. That this was therefore a case of a continuing breach where once the delay in making the decision got too long it became unreasonable and actionable. The applicants relied on the High Court Decision in **Katungi Tonny vs A-G MA No 266 of 2016 – Civil Division (*unreported*).**

It is true this application was lodged on the 18th of April 2017, and that the application for the approval of the building plans was presented to the respondents

on the 21st of September 2016. I do not agree that there is a statutory time frame within which the approval must be given. Rule 12 is unequivocal in this regard but that however is not a licence to laxity. An applicant should expect a decision after a reasonable wait. In this case the applicant had been waiting 8 months. Failure to render the said decision within a reasonable time would make this matter amenable to judicial review.

[see **Katungi Tonny vs A-G MA No 266 of 2016 – Civil Division (*unreported*)**
Gen Davis Sejusa vs A-g MC 176 of 2015 – Civil Division (*unreported*)]

The preliminary objection is overruled.

b. Whether the applicant is entitled to the prayers sought?

The applicant prayed that the prerogative order of Mandamus doth issue directing the Respondents to approve building plans in respect of Plot 5, Odaka Close, Masese Division, Jinja Municipality which plans were submitted on the 21st of September 2016.

The facts set out earlier show that the applicant has a plot said to be near the location of underground water pipes belonging to the National Water and Sewerage Corporation (NWSC). That he submitted for approval, building plans for a construction on this plot. The NWSC in a letter signed by the General Manager dated the 16th of December 2016, stated that they had made a site visit to the plot and established there were no water pipes running across the plot or across the neighbouring plots.

Attached to the affidavit in reply is another letter of the NWSC, under the hand of the very same General Manager, dated the 19th of May 2017, in which he stated that the plot cannot be developed because it has very high pressure transmission pipes

which pose a grave danger to human life in the event of rupture. He adds that the NWSC has plans to build a new water treatment plant and the area will be a passage for the existing and planned water storage tanks.

The respondents aver that the delay to communicate a decision to the applicants stems from this second letter of objection by the NWSC.

The relief sought here is the prerogative writ of Mandamus which is defined in the *Essential dictionary of law* **Sphinx Publishing** 2008 as,

> We command; a writ issued by a superior court to a lower court, corporation, or officer, ordering it to do some act that is a duty required of it by law.

In *Judicial Review Procedure and Practice* by Peter Kaluma **Law Africa** 2009 at pg 122 Mandamus is defined as a Latin word meaning 'we command'. It is a command issued by the High Court to an administrative authority or inferior tribunal directing it to perform a peremptory duty imposed on it by law.

The author adds at pg 122 that when a body omits to decide a matter which it is bound to decide, it can be commanded to do so by an order of mandamus.

This court reminds itself that that in exercising judicial review, the Courts inquiry is to the legality of the decision making process and not to the merits of the decision. The Court therefore examines whether the decision maker acted illegally, irrationally or with procedural impropriety. The inquiry is not an appeal but an exercise of a judicial role to supervise those who exercise public power; and to ensure such is exercised with due regard to natural justice and within the confines of the particular legislation i.e. 'intra vires' and not 'ultra vires' their mandate.

It was held by Lord Hailsham of Marylebone with regard to the remedies in Judicial Review that,

....But it is important to remember in every case that the purpose of remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by law.

The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized or joined by law to decide from itself a conclusion which is correct in the eyes of the court."

See: Chief Constable of North Wales Police vs Evans [1982] 3 ALL ER 141 at P.143 h-144

Judicial review concerns itself not with the decision but with the decision making process. Essentially it involves an assessment of the manner in which a decision is made (see **John Kasibo vs Comm of Customs. Misc Appln. No 44/2007**).

In the instant case the respondent had not made a decision in the seven months from the 21st of September 2016 when the application for approval of the building plans was lodged with the respondent to the 18th of April 2017 when the present motion for judicial review was filed.

I find that this delay is unreasonable in the circumstances. The applicant demonstrated his reasons for urgency in his application. He was due to retire and the delay affected his financial projections. Justice Musota held in **Katungi** (supra) above, where an application had been made for enrolment as an advocate and no decision given in two years that was an unreasonable and unfair delay and could be

held to be ultra vires and therefore illegal as parliament could never have intended for an applicant for enrolment can be left in the dark without a decision for almost two years.

I also quoted *Judicial Review Procedure and Practice* (supra) where it was stated that when a body omits to decide a matter which it is bound to decide, it can be commanded to do so by an order of mandamus.

In these circumstances I find that an order of Mandamus is clearly deserved in the instant case. The applicant however prayed that the court issue orders directing the respondent to approve the building plans.

This court does not have the mandate to make such an order in an application of this kind. The mandate of the court in judicial review is limited to ensuring that the applicant receives fair treatment in the decision making process by having a decision communicated to him by the respondents. The court in its supervisory role under judicial review cannot direct a decision be given, one way or the other, on the merits of the building plans.

In the result I order:

1. That the respondent communicate a decision to the applicant within 21 days of the reading of this ruling.
2. That the applicant shall have the costs of this application.

.....

Michael Elubu

Judge

17.7.18