THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
[CIVIL DIVISION]

MISCELLANEOUS CAUSE NO. 001 of 2019

1. **GRACE NAMULONDO**
2. **HAJAT JANAT NAMUGENYI KAYEMBA**
3. **KIYONGA GEORGE KIRUMIRA**
4. **NAMATA SARAH ========== APPLICANTS**

VERSUS

1. **JONE JOHNS SERWANGA SALONGO(Administrator of the estate of the late Yowana Yakuze)**
2. **SENYONGA PATRICK**
3. **THE COMMISSIONER FOR LAND REGISTRATION==========RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicants filed an application under Article 28 and Sections 14, 33, 36(1) and 38 of the Judicature Act and Section 140, 142 & 168 of the registration of Titles Act and Section 98 of the Civil Procedure Act and Order 52 rules 1,2 & 3 of the Civil Procedure Rules for orders that;

1. The proceedings and the decision made by the 3rd respondent, were unfair, conducted with manifest bias, illegal, unfair and contravened the right to be heard.

2. A declaration that the actions and decision of the 3rd respondent in the proceedings held at the Kampala Land Office, were irrational, ultra vires, were irregularly made in contravention of the law and in contempt of court and ought to be quashed for unreasonableness.

3. An Order of *Certiorari* to issue against the 3rd respondent to reverse his decision.

4. A declaration that the 3rd respondent acted ultra-vires when he entertained a complaint based on fraud.

5. That punitive and or aggravated damages, be awarded against the respondents, jointly and severally.

6. That the respondents pay costs of this application.

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavit in support of the applicant by Hajat Janat Namugenyi Kayemba but generally and briefly state that;

1) The 3rd respondent unlawfully, illegally and or irregularly entertained a complaint of fraud lodged by the 1st and 2nd respondents, and purportedly rectified the suit Title, in disregard and abuse of his legal mandate and without authority.

2) The respondents jointly and severally disregarded various judgments, orders and Rulings of court declaring them and their predecessors in title as having no proprietary interests in the suit land, since the year 1973.

3) The 3rd respondent, aware of the various judgments against the 1st respondent's predecessors in title, has entertained administrative meeting over the said land in contempt of court.

4) The 1st and 2nd respondents and predecessors in title having been decreed not to have interests in the suit land, had no residual right to complain for rectification of title.

5) The respondents jointly and severally denied the applicants a right to be heard, when they unlawfully, fraudulently and or disregarded the applicants' issue that were to be referred to High court for determination during the purported proceedings for rectification of Title to wit; Whether the 1st Applicant after losing several cases over the suit land, was vested with residual right to lodge a complaint of rectification?; Whether the complaint was barred by the law of limitation by judgment, among others?

6) That the actions of the 3rd respondent be referred to the Inspector General of Government, for Investigation.

7) The land comprised in Masaka Buddu Block 367 Plot 3 was adjudged to belong to the 2nd applicant and other applicants in HCCS No. 12 of 2014-Hajjat Janat Namugenyi Kayemba & Another vs Kiyonga George Kirumira & 3 Others.

8) That the late Yowana Yakuze is a father to the 1st and 2nd Respondents, and the 2nd applicant's auntie Nakabembe Victoria in Masaka C.S No. 73 of 1984-Victoria Nakabembe vs Yowana Yakuze; before his Worship the Chief Magistrate-B.F.B. Babigumira litigated on inter alia the issue of a will; that the suit land had been bequeathed

to the 1st and 2nd respondent's father, the plaintiff therein was successful.

9) The 1st and 2nd respondent's father Yowana Yakuze as the unsuccessful party appealed to the High Court in Civil Appeal No. 10 of 1986-Yowana Yakuze vs Victoria Nakabembe before Justice C.K Byamugisha and the same was dismissed in 1989.

10) That in Miscellanoeus Application No. 17 of 1993, arising from Administration Cause No. 09 of 1984-Victoria Nakabembe vs John Jones Serwanga Salongo, before Justice Kityo the suit land was consequentially adjudged to belong to the estate of the late Atienyi Mukasa.

11) That in H.C.C.S No. 012 of 2014-Grace Namulondo & Hajjat Janat Namugenyi Kayemba vs Kiyonga George, Namata Sarah & Nakitto Lucy, the suit land was by consent before Justice Keitirima in 2017 agreed/decreed to belong to the 2nd applicant and the other co-applicants, jointly.

12) That in H.C.C.S No. 170 of 2005- Nakitto Lucy vs Patrick Senyonga, the 2nd respondent's similar claims in his case before Justice Henry I. Kawesa on 5/4/2018 found that 2nd applicant's claims and counterclaim were ***res judicata.***

The respondents opposed this application and filed their respective affidavits in reply for the 1st and 2nd respondent and 3rd respondent Katwesige Christine- Senior Registrar of Titles.

The 1st & 2nd applicants' affidavit was mainly premised on advice of counsel but the specific response was equally technical reply; that the

applicants premise their claim and interest on the judgment in HCCS No. 73 of 1984 and HCMA No. 19 of 1993 arising from Administration Cause No. 09/1984 and CACA No. 10 of 1986, but they have never executed the decrees or orders in the said matters, whereof they are now caught by the law of limitation and estopped from seeking to execute expired decrees and orders.

That the complaint of the 1st and 2nd respondent lodged before the 3rd respondent in respect of the suit land as persons claiming beneficial interest therein was a valid complaint and was in exercise of their rights as persons affected by transactions.

The 3rd respondent's on their affidavit they contended that;

1. The 3rd respondent's office received a complaint from John Jones Sserwanga the administrator of the Estate of the late Yowana Mukasa Yakuze dated 1st day of January 2018 to the effect that Victoria Nakabembe(Administrator of the estate of the late Atienyi Mukasa) was erroneously registered on the certificate of title for the suit land comprised in Buddu Block 367 Plot 5.

2. That the 3rd respondent retrieved and perused the register and discovered that the title was first registered in the name of Yowana Yakuze vide MR Vol. 308-19 of 2/3/1962. An entry of Atieni Mukasa was entered and thereafter cancelled with the word 'error' inscripted against the entry, on the 17th day of July 1987 vide instrument No. MSK 66355 a one Victoria Nakabembe (Administrator of the estate of the late Atieni Mukasa) got registered and subsequently transferred to Kasule Raphael, Nkaada Edward, Ssebowa Alex, Kiyonga George, Nakitto Lucy and Namatta Sarah under Instrument No. MSK 83879 of 15.3.2001.

3. That upon discovering that there were errors indeed the office of the 3rd respondent invoked its powers under section 165 of the Registration of Titles Act and issued summons twice on 26th day of April 2018 and 6th day of April 2018 for inspection of documents.

4. That thereafter the 3rd respondents office issued a notice to effect changes on the register, in which notice to all parties including the applicants herein were invited for a public hearing and the same was conducted on 17th September 2018.

5. That having complied with the due process of the law, the office of the Commissioner land registration made a decision to rectify the register by cancelling the erroneous entries on the certificate of title for the suit land comprised in Buddu Block 367 Plot 5 Land at Kingo.

6. That there is nothing illegal, irregular or irrational about the decision making process that was taken by the office of the Commissioner Land Registration.

7. That the 2nd applicant was not entitled to notice since he is not a registered proprietor of the suit land.

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

The following issues were agreed upon for court's determination;

1. ***Whether there is a valid and competent application on record in respect of 1st, 3rd and 4 applicants?***

2. ***Whether in arriving at his decision, the 3rd respondent accorded the applicant's a fair hearing.***

3. ***Whether the decision of the 3rd respondent was irrational, ultra-vires and was made in contravention of the law?***

2. ***What remedies are available to the parties.***

The 1st 2nd & 3rd applicants were jointly represented by *Mr.Masanga Isaac* while the 4th respondent was represented by *Mr.Ruhinda Maguru* whereas the 1st and 2nd respondents were jointly represented by *Mr Kyazze Joseph* and *Mr Ssekitto Moses and Wamala Ali* represented the 3rd respondent.

In Uganda, the principles governing Judicial Review are well settled. Judicial review is not concerned with the decision in issue but with the decision making process through which the decision was made. It is rather concerned with the courts' supervisory jurisdiction to check and control the exercise of power by those in Public offices or person/bodies exercising quasi-judicial functions by the granting of Prerogative orders as the case my fall. It is pertinent to note that the orders sought under Judicial Review do not determine private rights. The said orders are discretionary in nature and court is at liberty to grant them depending on the circumstances of the case where there has been violation of the principles of natural Justice. The purpose is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected to. ***See; John Jet Tumwebaze vs Makerere University Council & 2 Others Misc Cause No. 353 of 2005, DOTT Services Ltd vs Attorney General Misc Cause No.125 of 2009, Balondemu David vs The Law Development Centre Misc Cause No.61 of 2016.***

For one to succeed under Judicial Review it trite law that he must prove that the decision made was tainted either by; illegality, irrationality or procedural impropriety.

The respondent as a public body is subject to judicial review to test the legality of its decisions if they affect the public.

The respondent as a public body is subject to judicial review to test the legality of its decisions if they affect the public. In the case of ***Commissioner of Land v Kunste Hotel Ltd [1995-1998] 1 EA (CAK)*** ,Court noted that;

"Judicial review is concerned not with the private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he is being subjected."

Whether there is a valid and competent application on record in respect of 1st, 3rd and 4 applicants?

The respondent's contend that the 1st, 3rd and 4th Applicants' application is invalid because it is not supported by their affidavits. The respondent submitted that the law is set out in Order 3 rule 2 and Order 1 rule 12. It is a mandatory requirement that the persons deponing a single affidavit purportedly on behalf of others must do so with their authority. The deponent must aver that he is deponing also on behalf of the other applicants with their authority. The authority must be in writing attached to the affidavit. He cited the case of ***Nteyafa Kaddu Mukasa & Another versus Zion Construction HCCS 901 of 2015 and Ready Agro Suppliers Limited versus Uganda Development Bank HCT-CC No. 039 of 2005***

I find the authorities cited in support of the respondents' arguments to be very distinguishable from the present case. The Notice of Motion is clearly supported by evidence or affidavit by the 1st applicant. Justice Egonda Ntende in *Ready Agro Suppliers v Uganda development Bank* dismissed the

application because it was an application for leave to appear and defend and the 2nd applicant was duty bound to give his defence in the application by way of affidavit evidence. The affidavit of one of the parties could not suffice for another party.

The 1st applicant does not state that she deposes to the affidavit on behalf of others but rather she is well conversant with the matter and facts before court. The application is complete on its own and an affidavit could only be filed if a party feels there is some evidence needed to support it.

Order 52 rule 3 provides; *Every notice of motion shall state in general terms the grounds of the application, and, where any motion is grounded on evidence by affidavit….*
It therefore means that the other applicants could premise their application on grounds of law that would not require any evidence to support them. In addition any evidence of one would be enough to support the application.

The evidence adduced by the 1st applicant as a person who has sufficient knowledge of the facts would suffice and it would not be necessary to have additional affidavits by the other applicant in the circumstances of the case and this would not render their application incompetent.

Provisions of law are not mere formulae to be observed as rituals. Beneath the words of a provision of law, generally speaking, there lies a juristic principle. It is the duty of the Court to ascertain that principle and implement it. See ***Raj Narain v Indira Nehru Gandhi (1972)3 SCC 850***

Our laws of procedure are based on the principle that, as far as possible, no proceeding in a court of law should be allowed to be defeated on mere technicalities. The provisions of the Civil Procedure rules, therefore must be interpreted in a manner so as to subserve and advance the cause of justice rather than to defeat it.

The modern trend is to regard a defect as an irregularity which can be remedied, rather than as a nullity. Every omission or mistake in practice or procedure is henceforth to be regarded as an irregularity which court can and should rectify, so long as it can do so without injustice and is not an abuse of court process. See ***Harkness v Bell's Asbestos Ltd [1966] All ER 843***

Therefore the failure by the rest of the applicants to depose affidavits and relying on the affidavit of the 1st applicant is a mere irregularity which would not defeat their application. This is premised on the fact that they are relying on the same facts and evidence. Otherwise it would have been very different if they were relying on different grounds that required different evidence to support them.

The application is valid and competently before court. This issue is resolved in the positive

Whether in arriving at his decision, the 3rd respondent accorded the applicant's a fair hearing?

The applicants' counsel submitted that during the exercise and performance of the 3rd respondent's duties while presiding over the impugned hearing, the 3rd respondent refused to refer issues of law to the high Court and that according to him amounted to denial of the right to be heard.

The applicants' counsel during the hearing, challenged the legality of the complaint before the 3rd respondent on grounds of limitation, locus standi and res judicata and moved the 3rd respondent to refer the matter to High Court for determination.

The respondent's counsel contended that the applicants were not denied a right to be heard but rather that the 3rd respondent did not agree with objections.

Secondly, section 91of the Land Act under which the court was moved does not require the 3rd respondent to refer any question to the High Court. Secondly the power to refer any question to High Court is discretional and is only exercisable where the 3rd respondent thinks that the matter before him merits an opinion of the High Court.

Determination

It is clear that the applicant appeared before the 3rd respondent for a hearing and in the course of the said hearing he attempted to raise objections and points of law which in his view would have necessitated the 3rd respondent to refer the matter to High Court.

However, because the 3rd respondent refused to refer the matter to High Court or to entertain the objections/points of law then the applicants' were denied a right to fair hearing.

Fairness is highly a variable concept. Therefore, courts will readily accept that fairness is not something that can be reduced to one-size-fits-all formula. This therefore means that the courts shall answer questions of fairness on a case by case basis, having regard to factors such as complexity and seriousness of the case.

Essentially, procedural fairness involves elementary principles that ensure that, before a right or privilege is taken away from a person, or any sanction is otherwise applied to him or her, the process takes place in an open and transparent manner. It is also called fair play in action and embraces the means by which a public authority, in dealing with members of the public, should ensure that procedural rules are put in place so that the persons affected will not be disadvantaged.

In working out what is fair the courts are wary of over-judicialising administrative process. They recognise that administrative decision-makers

are not courts of law, and that they should not have to adopt the strict procedures of such court.

In the present case the applicants were given the bear minimum requirements of the right to be heard and this was fair enough. The fact that the 3rd respondent did not agree with applicants' counsel submission on preliminary objections would not mean or infer that they were denied a right to be heard. The applicants are at liberty to challenge the decision for legality but not to insist that they were not heard.

Whether the decision of the 3rd respondent was irrational, ultra-vires and was made in contravention of the law?

The applicant's counsel contended that the 3rd respondent made an illegal decision by acting without jurisdiction or ultra vires and making a decision based on a complaint which is barred by limitation and or res judicata.

The 1st and 2nd respondents lodged a complaint based on fraud to the 3rd respondent. They accused the applicants and their predecessor in title, the late Victoria Nakabembe, of 'fraudulently' and in 'unknown circumstances' and with no instrument number at all and illegally getting registered on the suit land and through concealment while aware of fraud, purportedly transferring the same in the names of the 3rd and 4th applicants.

The applicants' counsel submitted that fraud cannot be raised and casually proved before the 3rd respondent and that powers of 3rd respondent under Section 91 of the Land Act are subject to the provisions of the Registration of Titles Act.

The applicant further contends that it was irrational for the 3rd respondent to reopen cases or the issue of ownership of land that had been closed in the several cases as way back as 1984 by re-instating the title back to someone whose interests were determined by courts of law.

The respondents' counsel contended that if the applicants' claim of right arose out judgments, they ought to have extracted a decree and executed the judgment. They should have registered the decree and they ought to have been registered as proprietors as per the decree. According to counsel for the respondent, the applicants and their predecessors in title were illegally, erroneously and fraudulently and in unknown circumstances and with instrument number at all registered on the suit land through concealment of fraud.

That the 3rd respondent noted the anomaly, error or illegality and fraud and offered the applicants a hearing. The 3rd respondent noted and in counsel's view rightly so that the applicants ought to have followed the lawful and proper procedure of being registered through execution of a decree.

That the respondents' counsel further submitted that since the decree has been executed in a proper manner then their claims are stale and barred by limitation and that this is not a proper forum for enforcing judgments or decrees which are stale.

The respondent further contended that the decision of the 3rd respondent to rectify the register through cancellation of illegally procured registration thereon by the applicants and their predecessors in title was intended to secure the sanctity and integrity of the register.

According to counsel for the respondent, the applicants claim is founded in judgments of 1984, 1985, 1986 and 1993. That since the decree was never executed in the proper procedure then the land should revert back to the respondents as successors in title.

Determination

It is clear from the facts that the 1st and 2nd respondents' moved the 3rd respondent to rectify the title because according to them the applicants' registration was procured illegally and fraudulently. They seem to base

their case on failure to follow the proper procedure for executing a decree and thus this qualifies for a case of cancellation of registration.

The 1st and 2nd respondent donot dispute the fact the dispute and claims they have were determined by competent court and they lost and the issue of ownership was conclusively resolved in favour of the applicants and or their predecessors in title.

This case now revolves around the exercise of power by the 3rd respondent to purportedly rectify the register because they have been forced to discover an anomaly in register through the 1st and 2nd respondent. This exercise of power is derived from section 91 of the Land Act.

The purpose of administrative law is to identify the excesses of power and endeavours to combat them. Power may be exercised for purposes other than those for which it has been conferred by the Constitution or the law.

The will of the power-holder becomes the sole justification for the exercise of power. This is the essence of arbitrariness. Like in the present case, the 3rd respondent decided rectify the register in exercise of power so vested and decided to act in favour of the 1st and 2nd respondent against the applicants at the instance of the 1st and 2nd respondent.

The 3rd respondent appears to have been acting within his powers and jurisdiction but in reality he was acting outside it. He was acting within his powers and jurisdiction but was predisposed towards the 1st and 2nd respondents who had moved his office about the rectification of the register that had been done in 1986 by the same office.

It was not an innocent rectification of the register but it was triggered by persons who had lost any interest in the said land through a number of court cases and they were bent at finding a way out of the decided court cases. It is clear that if powers are used outside the ambit of statutory purposes, it is not only ultra vires but also one of arbitrariness.

Where a public authority or decision maker has directed itself correctly in law, the court on judicial review will not interfere, unless it considers the decision was irrational. The court will however only quash a decision if the error of law was relevant to the decision making process. This could be ascertained where there is ulterior purpose or motive.

Powers given to a public body for one purpose cannot be used for ulterior purposes which are not contemplated at the time the powers are conferred. If a court finds that powers have been used for unauthorised purposes, or purposes 'not contemplated at the time when the powers were conferred', it will hold that the decision or action is unlawful.

The 3rd respondent is vested with power to rectify the register but the manner in which it was done would leave no doubt that it was made with an ulterior motive to vest the land in the hands of the 1st and 2nd respondent.

The exercise of power by the 3rd respondent was intended to reverse the decisions of court (Judgments) made in 1986, 1988 & 1993 and not to rectify the register. The actions of the 3rd respondent become questionable, in light of the fact that information by way of judgments made over 30 years ago was availed before the decision was made. The 3rd respondent acted fraudulently or dishonestly or at the very least was conscious that the action was unlawful.

Power or discretion conferred upon a public authority must be exercised reasonably and in accordance with law. An abuse of discretion is wrongful exercise of discretion conferred because it is the exercise of discretion for a power not intended. Accordingly, the courts may control it by use of the *ultra vires doctrine.* The courts task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances. See *Minister of Environment Affairs and Tourism v Bato Star Fishing (Pty) Limited 2004 (7) BCLR 687 (CC); 2004 (4) SA 490 (CC) para 49.*

It can equally be said that fettering of one's discretion is to abuse that discretion. The law expects that public functionaries would approach the decision making process with an open mind. Reason and justice and not arbitrariness must inform every exercise of discretion and power conferred by statute. See ***Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA 132***

Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely-that is to say, it can validly be used only in the right and proper way which Parliament conferring it is presumed to have intended.

The powers conferred under Section 91 of the Land Act where never intended to be exercised in such a way that would defeat judgments of court delivered 30 years ago. The decision rendered by the 3rd respondent cannot be objectively capable of furthering the purpose for which the power was given under the Land Act and for which the decision was purportedly taken.

It is a requirement of the rule of law that exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect, arbitrary and inconsistent with this requirement. See *Pharmaceutical Manufacturers Association of SA In Re:Ex Parte Application of President of the RSA 2000 (3) BCLR 241(CC)*

The decision of the 3rd respondent was neither rational nor rationally justified with reference to the evidence adduced by the applicants and the reasons given for the decision.

This issue is resolved in the affirmative

What remedies are available to the parties?

The ever-widening scope given to judicial review by the courts has caused a shift in the traditional understanding of what the prerogative writs were designed for. For example, whereas *certiorari* was designed to quash a

decision founded on excess of power, the courts may now refuse a remedy if to grant one would be detrimental to good administration, thus recognising greater or wider discretion than before or would affect innocent third parties.

The grant of judicial review remedies remains discretionary and it does not automatically follow that if there are grounds of review to question any decision or action or omission, then the court should issue any remedies available. The court may not grant any such remedies even where the applicant may have a strong case on the merits, so the courts would weigh various factors to determine whether they should lie in any particular case. See ***R vs Aston University Senate ex p Roffey [1969] 2 QB 558, R vs Secretary of State for Health ex p Furneaux [1994] 2 All ER 652***

Declaration

This court issues a declaratory order that the actions and decision of the 3rd respondent in proceedings held at Kampala Land Office, were irrational, ultra vires and irregularly made in contravention of the law.

Certiorari

The applicant has sought an order of certiorari to quash and reverse the decision of the 3rd respondent.

Certiorari is one of the most powerful public law remedies available to an applicant. It lies to quash a decision of a public authority that is unlawful for one or more reasons. It is mainly designed to prevent abuse of power or unlawful exercise of power by a public authority. See ***Public in East Africa*** *by Ssekaana Musa page 229*

Certiorari is simply concerned with the decision-making process and only issues when the court is convinced that the decision challenged was

reached without or in excess of jurisdiction, in breach of rules of natural justice or contrary to the law.

The effect of the order of certiorari is to restore *status quo ante*. Accordingly, when issued, an order of certiorari restores the situation that existed before the decision quashed was made.

This court therefore issues an Order of Certiorari quashing the decision of 3rd respondent contained in the amendment order dated 27th November 2018.

General, Exemplary and Punitive damages

The applicant prayed for punitive and aggravated damages in the notice of motion. However, in his submissions he asked court to award general damages which he never pleaded for.

In judicial review court does not award those categories of damages but rather in deserving circumstances where there is justification may award damages.

The habit of seeking damages as if it is an automatic right in every application for judicial review should be discouraged. Judicial review is more concerned with correcting public wrongs and not a way to demand or seek to recover damages.

An individual may seek compensation against public bodies for harm caused by the wrongful acts of such bodies. Such claims may arise out of the exercise of statutory or other public powers by statutory bodies.

The fact that an act is *ultra vires* does not of itself entitle the individuals for any loss suffered. An individual must establish that the unlawful action also constitutes a recognizable tort or involves a breach of contract. See ***Public Law in East Africa by Ssekaana Musa pg 245-249***

The nature of damage envisaged is not necessarily categorized as special or general or punitive/exemplary damage. But such damage is awarded for misfeasance or nonfeasance for failure to perform a duty imposed by law.

The tort of misfeasance in public office includes malicious abuse of power, deliberate maladministration and perhaps also other unlawful acts causing injury.

The applicant has not made out any case for award of damages. No damages are awarded.

Costs

The applicants are granted costs of the application but the 4th applicant's counsel is not be awarded any costs.

I so Order.

SSEKAANA MUSA
JUDGE
1st/11/2019