

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION MISCELLANEOUS CAUSE NO. 18 OF 2012

MUGABI EDWARD

VERSUS

- 1. KAMPALA DISTRICT LAND BOARD**
- 2. WILSON KASHAYA**

BEFORE THE HONORABLE JUSTICE S B BOSSA

RULING

The applicant through his attorney John Kakolokombe brought this application for judicial review under sections 41 and 42 of the Judicature Act and rules 3, 4, 5, 6, 7, and 8 of the Judicature (Judicial Review) Rules SI No. 11 of 2009 seeking for the following orders;

1. A prerogative order of certiorari be issued against Kampala District Land Board quashing its decision made against the applicant on December 19, 2011 in respect of Plot No. 1-3 Nadiope Street Mbuya Kampala.
2. An injunction and prohibition restraining the respondents, their officers employees, agents or any one working under them from executing the said decision dated December 19, 2011 regarding Plot Nos. 1-3 Nadiope Street Mbuya-Kampala in as much as it relates to the applicant.
3. General damages.

The application is supported by the affidavit of John Kikolokombe and the grounds for the application are;

- i. The applicant is the duly recognized owner of the suit land /kibanja comprised in Plot No. 1-3 Nadiope Street Mbuya Kampala having bought the same from one Haji Mawanda.
- ii. Several disputes have subsequently arisen pertaining to this parcel of land wherein the 2nd respondent has always claimed ownership thereof and fraudulently acquired a lease on the said disputed parcel of land.
- iii. The applicant has since filed HCCS No. 898 of 2007 as against the said 2nd respondent seeking inter alia cancellation/rectification of the requisite

- certificate of title which he had fraudulently acquired and which suit is still pending to date.
- iv. The then Kampala District Land Board which was operational in 2001 visited the suit land and found that the 2nd respondent had misrepresented facts before it prior to applying for a certificate of title thereof and subsequently recommended its cancellation.
 - v. The 2nd respondent subsequently filed a suit in the Magistrate's Court of Nakawa vide Civil Suit No. 003 of 2010 against the applicant and others but subsequently withdrew the matter as against the applicant herein.
 - vi. On October 17, 2011, the 1st respondent made another site visit on the disputed plot and came up with a decision dated December 19, 2011.
 - vii. The said decision of the 1st respondent has adversely affected the unregistered proprietary interests of the applicant.
 - viii. In the foregoing circumstances therefore and in the interests of justice, it is just and equitable that this honorable court grants the applicant the prerogative orders of certiorari, injunction, and prohibition against the respondents.

According to the submissions of the applicant, he is challenging the decision taken by the 1st respondent on December 19, 2011 in which it was decided to extend a lease in favor of the 2nd respondent for a further period of 10 years with effect from August 1, 2008, subject to compensation of the sitting occupants and agreeing on a settlement. He questions its legality on the basis that it was taken when it was within the knowledge of Kampala District Land Board (KDLB) that with the coming in force of the Kampala Capital City Authority Act No. 1 of 2010, vide SI No 8 of 2011, its mandate to perform any duties/functions had since lapsed.

In support of his contentions, learned Counsel for the applicant submitted that:

- a. A critical perusal of paragraphs 2-5 of the affidavit in support considered alongside Annexure B1, B2, and B3 reveals the incontrovertible evidence/proof of the applicant's unregistered interest in the suit land.
- b. Paragraph 5 of the said affidavit together with Annexures C1 and C2 reveals that the preceding Board (precursor to the 1st respondent) was very much alive to the emerging disputes surrounding the said land and a resolute stand was accordingly taken after a thorough analysis.
- c. It is therefore mind-boggling that the 1st respondent chose to divert from a firm stand taken by his predecessor Board in complete disregard of the available information on record without addressing the core issues at hand.

- d. The averments of paragraph 10 of the accompanying affidavit together with Annexure G thereof do attest to the gross miscarriage of justice which the applicant has been subjected to at the hands of the 1st respondent whereas the applicant went to great lengths to prove his incontrovertible claims/interests to the suit land there was nothing on record from the 2nd respondent on which the 1st respondent would have based itself to decide as it did.

From the submissions of the applicant and paragraphs 2, 3, 4, 5, 9 and 10 of his affidavit quoted above, it is clear that the applicant is challenging the decision of the KDLB, largely on the ground that it was not legally constituted and that it should have acknowledged his unregistered interest in the land. On legality, Counsel for the applicant submitted that the KDLB did not have legal capacity to pass that decision since the inception of the Kampala Capital City Authority Act No 1 of 2010.

Counsel for the 2nd respondent opposed these submissions submitting that the applicant's claims are not tenable by way of judicial review because he seeks to enforce his rights, which he should do by way of ordinary suit. He further submitted that court cannot properly investigate allegations of fraud, and re-evaluate evidence by way of judicial review.

He further submitted that the applicant had failed to explain to court that the 1st respondent is a body established by the Constitution and that there is no amendment which has changed the legal status of the 1st respondent.

The two issues for determination are:

1. Whether the instant application is tenable.
2. If so, what remedies are available

Applicable law

1. The purview of judicial review

Administrative bodies are charged with supervisory and regulatory powers in their respective areas of concern. In exercising this power, they may adjudicate in a formal or informal way. The action taken and discretion exercised by an administrative body is final unless it is proved that the body did not adhere to rules of natural justice and the person was not accorded a just and fair treatment. This principle is encapsulated in *Article 42 of the Constitution of the Republic of Uganda*. That article provides;

"Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her."

A decision of an administrative body can only be challenged before court for illegality, procedural impropriety, irrationality and other grounds (See *Council of Service Unions v Minister for the Civil Service [1985] AC 374*). A court before who an administrative decision is challenged will review the acts, decisions, and omissions of an administrative authority in order to establish whether they have exceeded or abused their powers.

In his book on Judicial Review of Administrative Action, Hillary Delony Maxwell at pages 5 and 6 writes as follows:

"Judicial review is concerned not with the decision, but the decision making process. Essentially judicial review involves an assessment of the manner in which a decision is made, it is not an appeal and the jurisdiction is exercised in a supervisory manner. ...not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality."

Thus in judicial review, a litigant does not come to court to challenge the correctness of the decision that was made, but rather the manner in which it was made.

2. Illegality

Illegality has been explained by Lord Diplock in the case of *Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374* thus:

"Illegality, by illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulated his decision-making power and must give effect to it. Whether he has or not is par excellence a justifiable question to be decided in the event of dispute by those persons the Judge, by whom the judicial power of the state is exercised..."

Michael Allen, Braun Thompson and Bernadette Walsh in their book, *Cases and Materials on Constitutional and Administrative Law*, also explain what amounts to illegality as under;

- a. An authority must not exceed its jurisdiction by purporting to exercise powers which it does not possess.
- b. An authority must direct itself properly on the law.
- c. An authority must not use its powers for an improper purpose.

- d. An authority must take into account all relevant considerations and disregard all irrelevant considerations.
- e. An authority must not act in bad faith.
- f. An authority acts unlawfully if it fails to fulfill a statutory duty.

I will resolve the issue of whether this application is tenable under judicial review first. Resolution of this issue entails examination of the remedies that the applicant seeks. The applicant is challenging the decision dated December 19, 2011 made by KDLB on the grounds that it was fraudulently made and adversely affected the unregistered proprietary interests of the applicant. In essence he is arguing that KDLB took the wrong decision. In this regard the applicant is seeking vindication of his rights.

In Oscar Industries Limited v The Commissioner for Land Registration Miscellaneous Cause No. 181 of 2011, Musoke E J. held that "the other key word is vindication of rights. In exercising jurisdiction under judicial review this court is not required to vindicate anybody's rights but merely to examine the circumstances under which an act is done and determine whether the standards set out...have been met.... It is clear that allegations of fraud have been made by one party against the other. An allegation of fraud is a serious matter, which requires an ordinary suit where particulars of fraud would be pleaded and proved. In any case where the court is required to inquire into the issue whether fraud was committed or not, this court would be going beyond the scope of judicial review..."

I entirely agree with the statement, which I consider to be a correct statement of the law.

As already noted, judicial review is not concerned with the decision but the decision making process. It is not an appeal. The applicant alleges fraud in the proceedings that led to the granting of the lease. Fraud must be specifically pled, investigated and proven. (*See Fredrick Zaabwe v. Orient Bank and five others, SCCA No 4 of 2006 (Katureebe JSC)*). It is a very serious matter that cannot be determined through the procedure of judicial review.

The applicant has deponed that he filed HCCS No. 898 of 2007 as against the said 2nd respondent seeking inter alia cancellation/rectification of the requisite certificate of title which the respondent had fraudulently acquired and which suit is still pending to date. This action is meant to investigate the circumstances in which the 1st respondent granted a lease to the 2nd respondent, despite the existence of an earlier decision to the contrary. That is the appropriate forum in which to ventilate the applicant's grievances regarding the decision that was made and to prove any fraud, if it existed. It is

therefore my ruling that this application is misconceived and is not tenable under judicial review.

On illegality, the issue here is whether the KDLB exercised powers that it did not have. Article 240(1) of the *Constitution* establishes the KDLB and provides: "*There shall be a district land board for each district.*"

Furthermore, article 241(2) of the *Constitution* provides for the independence of all land tribunals in the following terms;

"In the performance of its functions, a district land board shall be independent of the Uganda Land Commission and shall not be subject to the direction or control of any person or authority but shall take into account national and district council policy on land."

According to Rule 2 of Kampala Capital City (Commencement) Instrument, 2011, "*The 1st of March, 2011 is appointed as the day on which the Kampala Capital City Act, 2010, shall come into force.*" It is hereafter referred to as the KCCA Act. Under section 85(1) of that Act,

"All rights assets liabilities and obligations of any entity existing in the Capital City area immediately before the commencement of this Act are transferred to the Authority or the corresponding entity under the Authority."

The KDLB is supposed to act independently of any institution, including KCCA.

The *Constitution* also provides for its supremacy over all other laws. In article 2, it provides;

"2(1). This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2). If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail and that other law or custom shall, to the extent of the inconsistency, be void."

In the case of *Twinobusingye Severino v Attorney General, Constitutional Petition No. 47 of 2011*, it was held that ... "*there is no dispute as to the supremacy of the Constitution of Uganda, 1995 (article 2). Everybody, including institutions and organs of the government are bound and must respect it...*"

It is therefore clear that the KCCA Act must be read subject to all the above constitutional provisions as the Constitution of Uganda is the supreme law of Uganda.

KDLB is established by the Constitution and until the Constitution is amended to do away with its existence, it remains an independent body that is not subject to the direction of anyone.

Furthermore, while the KCCA Act is an Act of Parliament, it does not purport to amend the Constitution that established the KDLB as an independent body. The Constitution provides for its own procedure of amendment in article 259 as follows;

"259. Amendment of the Constitution

- (1) *Subject to the provisions of this Constitution, Parliament may amend by way of addition, variation or repeal, any provision of this Constitution in accordance with the procedure laid down in this Chapter.*
- (2) *This Constitution shall not be amended except by an Act of Parliament-*
 - (a) *The sole purpose of which is to amend this Constitution; and*
 - (b) *The Act has been passed in accordance with this Chapter."*

"This Chapter" in that article refers to Chapter Fifteen, which concerns Land and Environment. Article 262 provides for amendments by Parliament. It provides that:

"A bill for an Act of Parliament to amend any provision of the Constitution, other than those referred to in Articles 260 and 261 of this Constitution, shall not be taken as passed unless it is supported at the second and third readings by the votes of not less than two-thirds of all members of Parliament."

Thus if the KCCA Act were to amend the Constitution, it would have to specifically say so and be passed by two thirds of all members of Parliament on the second and third reading. In its preamble, the KCCA Act does not mention that it was passed for the sole purpose of amending the Constitution. On the contrary, it provides as follows:

"An Act to provide, in accordance with article 5 of the Constitution, for Kampala as the capital city of Uganda; to provide for the administration of Kampala by the Central Government; to provide for the territorial boundary of Kampala; to provide for the development of Kampala Capital City; to establish the Kampala Capital City Authority as the governing body of the city; to provide for the composition and election of members of the Authority; to provide for the removal of members from the Authority; to provide for the functions and powers of the Authority; to provide for the election and removal of the Lord Mayor and the Deputy Lord Mayor; to provide for the appointment, powers and functions of an executive director of the Authority; to provide for lower urban councils under the Authority; to provide for a Metropolitan Physical Planning Authority

for Kampala and the adjacent districts; to provide for the power of the Minister to veto decisions of the Authority in certain circumstances and for related matters."

After perusing the KCCA Act, I am satisfied that it was not an Act of Parliament "the sole purpose of which was to amend this Constitution." Its preamble clearly establishes the purpose for which the Act was passed. Therefore, it could not have amended the Constitution to bring KDLB under the KCCA, let alone abolish the KDLB, as learned Counsel for the applicant submitted. That being the legal position, I find no merit in Counsel for the applicant's contention that KDLB did not have the legal capacity to pass the decision of December 19, 2011 given the passing of the KCCA Act No. 1 of 2010. It is therefore my ruling that KDLB had jurisdiction to pass the decision it made.

Taking into account all the above, this application for judicial review is dismissed with costs.


Dated this day of June 19, 2013.



S B Bossa

Judge

Ruling read this ^{9th}..... day of July, 2013 by His Worship Festo Nsenga, Assistant Registrar, Land Division.



His Worship Festo Nsenga

Assistant Registrar

In the presence of

— MR. FREDERICK MUKITA
FOR THE 1st RESPONDENT

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— MR. ABRAHAM OCHIENG, COUNSEL

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