

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

HOLDEN AT KAMPALA

CONSTITUTIONAL APPLICATION NO. 07 OF 2014

ARISING FROM CONSTITUTIONAL APPLICATION NO. 05 OF 2014

AND

ARISING FROM CONSTITUTIONAL PETITION NO. 06 OF 2014

HORIZON COACHES LIMITEDAPPLICANT

VERSUS

- 1. MBARARA MUNICIPAL COUNCIL**
- 2. MBARARA DISTRICT LAND BOARD**
- 3. THE ATTORNEY GENERAL.....RESPONDENTS**

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA

(SINGLE JUSTICE)

RULING

This is an application for an interim order of injunction seeking to restrain the respondents from transferring, alienating, disposing and in anyway dealing with the property comprised in Plots 24 and 32 - 40 Mbaguta Street Mbarara Municipality, pending the disposal of Constitutional application No. 5 of 2014, which is an application for a substantive order of temporary injunction herein.

Both this application and Application No. 5 of 2014 from which it arises, arise from Constitutional Petition No. 6 of 2014.

The pertinent grounds of this application set out in the notice of motion are as follows:-

1. *“The applicant filed Constitutional petition No. 6 of 2014 before this Honourable Court challenging the constitutionality of the acts of the respondents and the petition is pending hearing before this Honourable Court.*
2. *The applicant has also filed Constitutional application No. 5 of 2014 seeking an injunction to issue against the respondents, their agents and/or employees or anybody acting in their name upon the same terms sought herein until the disposal of Constitutional petition No. 6 of 2014.*
3. *If the application for the interim order is not granted, there is an imminent danger of the property comprised in Plots 24 and 32-40 Mbaguta Street Mbarara being alienated, transferred, disposed or unlawfully dealt with before the disposal of the Constitutional petition No. 6 of 2014 as well as Constitutional application No. 5 of 2014.*
4. *Both Constitutional petition No. 6 of 2014 as well as Constitutional application No. 5 of 2014 will be rendered nugatory if an interim order is not issued restraining the respondents, their agents, servants and/or the employees, or anybody acting in their name from, transferring, alienating, and disposing any further dealings in the property comprised in Plots 24 and 32-40 Mbaguta Street Mbarara.*
5. *The applicant has a prima facie case with high probability of success as the acts of the respondents in relation to the property comprised in Plots 24 and 32-40 Mbaguta Street Mbarara are irregular and rise issues of Constitutional interpretation.*
6.
7.

8.

9. *The main application of temporary injunction has high chances of success.*

10. *The balance of convenience, favours the applicant.”*

The notice of motion is supported by the affidavit of Charles Muhangi who is stated be to a Uganda citizen and a Director of the applicant company.

At the hearing of this application Mr. Paul Byaruhanga learned counsel appeared for the 1st respondent, Mr. Ndibarema Mwebaze Principal State Attorney appeared for the 2nd and 3rd respondents, while Mr. Okello Oryem Alfred together with Mr. Julius Galisonga appeared jointly for the applicant.

The first respondent filed an affidavit in reply deponed to by Mr. Johnson Munono Baryantuma, the Town clerk of the 1st respondent council in opposition to the application in which he raised a number of issues of law and fact which I shall deal with later in this ruling.

The second respondent also filed an affidavit in reply deponed to by one Ms. Nayebare Godlive the A.g. Secretary to the 2nd respondent board, opposing this application and contending that the matter in issue in this application and in the main application concern the ownership of **Plots 24 and 32-40 Mbaguta Street Mbarara**, a matter that was subject of order of the **Supreme Court** *vide Supreme Court Civil Appeal No. 14 of 2009*. That the Supreme Court finally determined the issues herein and as such the matter is now *res-judicata*.

She deponed that application is intended to circumvent the order of the Supreme Court.

She also deponed that there was no *status quo* to maintain.

Mr. Okello Oryem learned counsel for the applicant submitted that the respondents had filed a petition and a substantive application for injunction both of which are pending and have great likelihood of success. That in view of the above if this application is not granted the respondents' petition and the substantive application will be rendered nugatory.

On the other hand Mr. Byaruhanga submitted in reply for 1st respondent that the petition had no likelihood of success at all.

That the issues in respect of **Plots 24 and 32-40 Mbaguta Street Mbarara** the subject matter of the main petition are *res-judicata* the same having been resolved by the Supreme Court.

He submitted further that there was no directive by His Excellency The President addressed to the 1st respondent at all and if there was it was complied with, as the said letter was only requesting for meetings between the parties which meetings were in fact held.

He submitted that at the time of hearing this application property in issue had already been leased to other persons and as such there is no *status quo* to maintain.

Mr. Ndibarema submitted that the said Presidential directive pre-dates the Supreme Court Judgment on the matter. That it was thus over taken by events.

That there is no *status quo* to maintain and thus this application is not tenable.

It appears that this application has a long and checkered history. The applicant had obtained a title to the said **Plots 24 and 32-40 Mbaguta Street Mbarara** sometime in 1995. The 1st respondent disputed the validity of the applicant's title to those plots and a dispute ensued.

The applicant filed a suit at High Court in 1996 against the 1st respondent and others seeking to assert his claim in respect of the said disputed plots.

During this dispute His Excellency The President wrote a letter to the Minister of Local Government advising the parties to find a way of resolving the dispute amicably. Apparently attempts were made at a settlement but were unsuccessful.

The legal battle was fought up to the Supreme Court.

The Supreme Court upheld the decision of the Court of Appeal and that of the High Court that the applicant had procured registration of the Plots 30-40 Mbaguta Road by fraud.

The title to the plots was then vested in the 1st respondent.

The applicant then filed a Constitutional petition in this Court seeking declaration to the effect that the 1st respondent acted unconstitutionally when it did not comply with the Presidential directive to allocate to him the said disputed plots.

This application arises out of the said petition and a substantive application made there under.

I have read the notice of motion and the accompanying affidavit. I have also read the affidavits in reply referred to above together with their annexures.

I have also listened carefully to the submissions of all counsel in this matter and perused the authorities they have cited to me.

It is now trite law that a party seeking an interim order of injunction as this has to satisfy Court the main application and the petition are not frivolous or vexatious and that *prima facie* they have a likelihood of success. That a party stands to suffer irreparable loss should the application not be granted and in case of doubt the matter can be resolved on a balance of convenience. See ***Humphrey Nzeyi vs Bank of Uganda and the Attorney General (Constitutional Application No. 1 of 2013)***. Per. Remmy Kasule JA.

The first issue to be resolved here therefore is whether the petition and the substantive application for injunction herein from which it arises discloses triable issues and a such have a likelihood of success.

In order to determine the above, Court has to look at the face of the petition and the application and is not required at this stage to inquire any further than that;

In the case of ***Ismail Serugo versus Kampala City Council and the Attorney General Constitutional Appeal No. 2 of 1998*** (unreported). W.W Wambuzi CJ put it in the following words.

“In my view for Constitutional Court to have jurisdiction the petition must show on the face of it that the interpretation of the Constitution is required”

I have perused the petition herein and I have failed to find anything on the face of it that requires Constitutional interpretation.

The pertinent part of the petition that would have disclosed triable issues or questions for Constitutional interpretation are set out in the petition as follows;

2. That your humble petitioner states that it has an interest in and is aggrieved by the following matters, raised in this petition, the same being inconsistent with and in contravention of the Constitution of the Republic of Uganda 1995 as amended whereby it contends inter alia that;

a) The acts of the 1st and 2nd respondent herein, in failing to fully and completely implement His Excellency the President of the Republic of Uganda's Presidential Directives and/or instructions as set out in His Excellency the President of Uganda's letter dated the 31st day of August 2009 are inconsistent with and contravene articles 1(1) , 2(1) and (2), 21, 26, 28, 42, 99(1), 126 and 128 of the Constitution in as far as;

I. The same amount to and /or result in disobedience of executive authority and/or a Presidential Directive.

II. The same subordinates the Executive orders of the President of the Republic of Uganda, thereby causing him to act in vain.

I. The same results in the deprivation of your petitioner from enjoyment of his right to own property.

II. The same results in the petitioner being treated unfairly and unequally before the law.

b) The acts of the 1st respondent in illegally passing a resolution allocation and /or distributing to several individuals the land comprised in plot 24 and 32-40 Mbaguta Street Mbarara, which then belonged to your petitioner, deprives your petitioner chance to enjoy his right to property, which action is inconsistent with and in contravention of Article 26 of the Constitution.

The petitioner who is also the applicant then goes on to seek the following declarations.

1. Declarations that:

- a) *The actions of the respondents denying the petitioner enjoyment of his right to property is unconstitutional.*
- b) *The actions of the respondents in acting in bias against the petitioner while favoring the allocatees of his land described herein above, denies the petitioner enjoyment of his right to equal treatment before the law which is inconsistent and as such the same is unconstitutional.*
- b) *The actions of the respondents jointly and severally subjecting the petitioner to physical and mental torture, anguish and un told suffering is unconstitutional.*

Clearly from the above there is nothing on the face of the petition that requires Constitutional interpretation at all. All the issues raised here may probably be subject of enforcement of Rights under **Articles 50** of the Constitution in another competent Court.

I am aware that this is an application for an interim order, but it also arises from the petition herein. It is not possible for this Court to determine this application without referring to the petition from which it arises.

The substantive application herein can only stand if the main petition itself is sustainable.

The High Court in Civil No. 243 of 1996 between Edward Rurangaranga, Mbarara Municipal Council and the Attorney General, Horizon Coaches, Waiswa Moses and Mukwano Enterprises held as follows at pages 18-19 of the Judgment of Justice Tabaro J dated 8-12-2006.

“I am therefore of the view that Mbarara Municipal Council reserved Plots 24 and 32-40 Mbaguta Road and on the same in 1982 gave a lease to Edward Rurangaranga while the rest of the plots 24-30 were leased to Uganda Transport Company(UTC) the area was sold to Mukwano Enterprises and subsequently to Horizon Coaches Limited. Instead of sticking to what had been bargained for the company through its officials, decided to commit the fraud in

question. The title held by Horizon Coaches shall therefore be cancelled so that it retains Plots 24-30 Mbaguta Road only”

The applicant herein appealed against the said decision of the High Court to this Court *vide Court of Appeal Civil Appeal No. 34 of 2007. Horizon Coaches Limited versus Edward Rurangaranga and Mbarara Municipal Council.*

Hon. A.E.N. Mpagi- Bahigeine JA (as she then was) who wrote the lead Judgment dated 11th August 2008 concluded as follows;-

“I entirely agree with the leaned Judge’s findings and order”

Justice Byamugisha JA was in agreement with the above conclusion and went on to note as follows;-

“The appellant was neither a purchaser nor an allocatee of the piece of land that was illegally included in his certificate of title by the Registrar of Land Registration. The inclusion could not have been without the active participation of the appellant through its managing Director. There is sufficient evidence to prove fraud on the part of the appellant”

The applicant again appealed to the Supreme Court *vide Supreme Court Civil Appeal No. 14 of 2009,*

Odoki C J who wrote the lead Judgment held as follows at page 19 of his Judgment.

“I entirely agree with the concurrent findings of the two lower Courts that the appellant obtained registration of the suit land by fraud.”

The Supreme Court then dismissed the appeal on 27th January 2011.

I accordingly find that this matter is *res-judicata*.

I agree with the submission of learned counsel Mr. Paul Byaruhanga and Mr. Ndibareba Mwebaze that the applicant is attempting to obtain in this petition and application what he failed to do in the said civil suit and the subsequent appeals.

The applicant is attempting to reverse or otherwise circumvent the decision of the Supreme Court referred to above by disguising his claim as a Constitutional matter.

This Court cannot allow itself to be used as an instrument for perpetuating fraud however disguised it maybe.

The letter written by the President to the Hon. Minister Of Local Government is dated 31st August 2009. By this time, the applicant had long taken the dispute to Court. By then the applicant had already lost the first appeal at the Court of Appeal, where the Judgment had been delivered on 11th August 2008. The matter by then appears to have been pending before the Supreme Court. It is the applicant who had appealed to the Supreme Court

It could not have been the intention of His Excellency The President to reverse a Judgment of the Court of Appeal by an executive directive. In any event such a directive would have been of no effect as it would have contravened **Article 128** of the Constitution which guarantees the independence of the Judiciary.

The reading of that letter written by The President clearly reveals that it is not a directive at all but simply advice to all the concerned parties to settle the issues raised therein amicably.

The pertinent part of that letter reads as follows;-

“The purpose of this letter therefore, is to urge you to organise a meeting with all concerned parties to help in resolving the particular complaint. Arrive at an amicable solution and therefore advise on the way forward.”

This is not a directive by the President to the 1st respondent to grant a lease to the applicant. The letter is not even addressed to the 1st respondent and as such it could not be construed to be a directive to the 1st respondent. The letter does not even refer to the property in issue and as such it cannot be construed as a directive relating to that property.

There is nothing in Article 99(4) of the Constitution that suggests that Public bodies or Public servants must comply with executive orders or directives as submitted by Mr. Okello Oryem. The

authority of the President can only be exercised in accordance with the Constitution and the laws of Uganda.

I have already found that on the face of it the petition raised no question for Constitution interpretation. I have found also that the letter of His Excellency the President referred to in this application and in the petition is not an Executive Directive. That even if it were, it could not reverse the decision of the Supreme Court or any other Court. I have determined that the issue in this application in respect of the suit land is *res-judicata*.

This is conceded by Mr. Okello Oryem but only in respect of Plot 30-42 Mbaguta Road Mbarara. However it is also my finding that the decision of Supreme Court also covered Plots 24-30 Mbaguta Street.

That dispute in respect of Plots 24-30 Mbaguta Street, Mbarara is also *res-judicata*.

I agree with counsel for the respondents that this application is nothing but a futile attempt to resurrect a matter long settled by the Supreme Court by disguising it as a Constitutional matter.

On the face of it I find that both the substantive application herein and the petition itself *prima facie* disclose no triable issues or questions for Constitutional interpretation.

I find that this application is devoid of any merit, it is frivolous and vexatious and an abuse of Court process.

I accordingly dismiss it with costs to the respondents.

I would direct the Registrar of this Court to fix the petition for hearing and disposal.

It is so ordered.

Dated at Kampala this 12th day of March 2014.

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HON. MR. JUSTICE KENNETH KAKURU, JA
JUSTICE OF APPEAL