

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NUMBER 179 of 2011

(Appeal from the decision of the High Court of Uganda at Fort Portal, before Hon. Justice Mike J. Chibita dated 24th April 2012)

KABAROLE DISTRICT LAND BOARD :::::::::::::::::::::::::::::: APPELLANT

VERSUS

GAPCO (UGANDA) LIMITED :::::::::::::::::::::::::::::: RESPONDENT

CORAM: HON. MR. JUSTICE REMMY KASULE, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT

The background to this appeal is that the appellant leased to the respondent land comprised in Plot 18, Lugard Road, Fort Portal town where the respondent operated a petrol station. The respondent's initial lease expired on 1st February, 1980 and it was granted an extension of 10 years from 2nd February 1980 to 1st February 2011. On 30th November 2010, the respondent through its lawyers M/s Sekabojja & Co. Advocates applied for extension of the lease term. Previously, Fort Portal Municipal Council, had written letters addressed to and received by the respondent (applicant for lease extension) about the state of the petrol station which

11

A

4

w
e
r
e

n
o
t

r
e
s
p
o
n
d
e
d

t
o
.

S
u
b
s
e
q
u
e
n
t
l
y
,

t
h
e

4

a
p
p
e
l
l
a
n
t

B
o
a
r
d

t
a
k
i
n
g

i
n
t
o

a
c
c
o
u
n

t

t
h
e

c
o
m
m
u
n
i
c
a
t
i
o
n

f
r
o
m

t
h
e

O
f
f
i
c
e

o
f

t
h
e

4

T
o
w
n

C
l
e
r
k

F
o
r
t

P
o
r
t
a
l

M
u
n
i
c
i
p
a
l

C
o

u
n
c
i
l
,

u
p
o
n

a

t
e
c
h
n
i
c
a
l

r
e
p
o
r
t

p
r
e
p
a
r
e
d

b
y

4

t
h
e

i
n
s
p
e
c
t
i
o
n

t
e
a
m

a
b
o
u
t

t
h
e

a
p
p
a
l

l
i
n
g

s
t
a
t
e

o
f

t
h
e

s
u
i
t

p
r
o
p
e
r
t
y
,

t
h
e

a
p

p
e
l
l
a
n
t

4

u
n
d
e
r

m
i
n
u
t
e

K
D
L
B
.
M
l
N
.
N
o
.
0
4
/
0
3
/
2

0
1
1

(
C
)

(
6
)

o
f

3
r
d

t
o

4
t
h

M
a
r
c
h
,

2
0
1
1
,

r
e
j
e
c
t
e
d

4

t
h
e

r
e
s
p
o
n
d
e
n
t
,
s

r
e
q
u
e
s
t

f
o
r

r

e
n
e
w
a
l

o
f

t
h
e

l
e
a
s
e

o
n

g
r
o
u
n
d
s

o
f

b
r
e
a
c

10 B
Y 4

1
5
l
e
t
t
e
r

d
a
t
e
d

6
t
h

M
a
r
c
h

2
0
1
1
,

t
h
e

a
p
p

e
l
l
a
n
t

i
n
f
o
r
m
e
d

M
/
s

S
e
k
a
b
o
j
j
a

&

C
o
.

A
d
v

o
c
a
t
e
s

4

c
o
u
n
s
e
l

f
o
r

t
h
e

r
e
s
p
o
n
d
e
n
t

o
f

t
h

e

d

e

c

i

s

i

o

n

d

e

c

l

i

n

i

n

g

e

x

t

e

n

s

i

o

n

o

f

t

h

e

r

e
s
p
o
n
d
e
n
t
,
s

l
e
a
s
e
h
o
l
d

o
n

t
h
e

p
r
o
p
e
r
t
y
.

4

T
h
e

a
p
p
e
l
l
a
n
t

B
o
a
r
d

f
u
r
t
h
e
r

a
p
p
r
o
v
e
d

M
u

g
a
s
a

4

S
t
e
p
h
e
n

a
n
d

L
e
o
p
o
l
d

M
u
s
i
n
g
u
z
i
,

s

a
p

p
l
i
c
a
t
i
o
n

f
o
r

a

l
e
a
s
e
h
o
l
d

o
n

t
h
e

s
a
m
e

p

r
o
p
e
r
t
y

4

w
h
i
c
h

h
a
d

b
e
e
n

m
a
d
e

o
n

4
t
h

J
a
n
u

a
r
y

2
0
1
1
.

H
o
w
e
v
e
r
,

t
h
e

a
p
p
e
l
l
a
n
t
,
s

s
a
i
d

d
e
c
i
s
i
o
n

w
a
s

f
o
r
m
a
l
l
y

c
o
m
m
u
n
i
c
a
t
e
d

t
o

O
n

20

t
h
e

2
3
r
d

d
a
y

o
f

M
a
y

2
0
1
1
,

t
h
e

r
e
s
p
o
n

d
e
n
t

4

b
e
i
n
g

d
i
s
s
a
t
i
s
f
i
e
d

w
i
t
h

t
h
e

a
p
p
e
l
l

a
n
t
,
s

d
e
c
i
s
i
o
n

d
e
c
l
i
n
i
n
g

t
o

e
x
t
e
n
d

i
t
s

l
e
a
s
e

4

o
n

t
h
e

s
u
i
t

p
r
o
p
e
r
t
y

b
r
o
u
g
h
t

a
n

a

P
P
l
i
c
a
t
i
o
n

f
o
r

j
u
d
i
c
i
a
l

r
e
v
i
e
w

i
n

t
h
e

H

i
g
h

4

C
o
u
r
t

o
f

U
g
a
n
d
a

a
t

F
o
r
t

P
o
r
t
a
l

f
o
r

r
e
l
i
e
f
s

o
f

c
e
r
t
i
o
r
a
r
i
,

p
r
o
h
i
b
i
t
i
o
n

a
n
d

m
a
n
d
a
m
u
s

4

w
h
i
c
h

w
e
r
e

g
r
a
n
t
e
d

o
n

g
r
o
u
n
d
s

t
h
a
t
:

a) T
h
e

a
p
p
e
l
l
a
n
t
,

s

d
e
c
i
s
i
o
n

d
a
t
e
d

6
t
h

M

a⁴

r

c

h

,

2

0

1

1

w

a

s

u

l

t

r

a

v

i

r

e

s

a

n

d

c

o

n

t

r

a

r

y

t
o

t
h
e

p
r
o
v
i
s
i
o
n
s

o
f
S
e
c
t
i
o
n
s

4
0
(
1
)
a
n
d

5

9

⁴

(

1

)

o

f

t

h

e

L

a

n

d

Act

and

contr

ary to

Articl

es

26(2)

and

237

of the

Const

itutio

n;

i

b) T

h

e

a

p

p

e

l

l

a

n
t
,
s

d
e
c
i
s
i
o
n

w
a
s

i
l
l
e
g
a
l
a
n
d

f
r
a
u
d
u
l
e
n
t
a

n
d

4

p
u
r
p
o
r
t
s

t
o

d
i
s
p
o
s
e

t
h
e

r
e
s
p
o
n
d
e
n
t
o
f

i
t
s

p
r
o
p
e
r
t
y

a
n
d

b
u
s
i
n
e
s
s
s
;

c) T
h
e

a
p
p
e
l
l
a
n
t

c
o⁴
l
l
u
d
e
d

w
i
t
h

M
r
.
S
.
S

M
u
g
a
s
a

a
n
d

L
o
e
p
o
l
d

M
u
s
i
n
g
u
z
i

- d) The lease agreement has a clause for automatic extension for 49 years upon expiry but the appellant breached it and unilaterally refused to renew it;
- e) The appellant's decisions was made without giving the respondent a hearing contrary to the principles of natural justice.

The Court decided in favour of the respondent and granted orders of certiorari, prohibition and mandamus. Being aggrieved, the appellant filed this appeal premised on the following grounds:

- 1. The learned trial Judge erred in law and fact when he found that the appellant's decision refusing to extend the lease and offering it to S.S Mugasa was illegal.**
- 2. The learned trial Judge erred in law and fact when he found that the judicial review orders of certiorari, prohibition and mandamus should issue against the Appellant's decision.**
- 3. The learned trial Judge erred in law and fact when he failed to properly evaluate all the evidence before him thus arriving at a wrong conclusion occasioning a miscarriage of justice to the appellant.**

Representations

Mr. Grace Ndibarema Mwebaze, Principal State Attorney appeared for the Appellant represented the Mr.Kyateka Ivan holding brief for Mr.Tumusiime Enos respondent.

Both the appellant and respondent adopted their conferencing notes filed in this Court on 8th April 2013 and 11th June 2013 respectively.

Role of the Court

This is a first appeal. Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions (S.I. 13-10 hereinafter referred to as "the Rules of this Court") provides:

"... (1) On any appeal from a decision of the High Court acting in the exercise of Its original Jurisdiction, the court may—

10 (a) re-appraise the evidence and draw inferences of fact; and in its discretion, for sufficient reason, take additional evidence..."

This position has also been well adjudicated on by the Supreme Court which confirmed the holding of the Court of Appeal by justice **Amos Twinomujuni** in the case of Frederick **J.K Zaabwe V Orient Bank** Civil Appeal 04 of 2006 where he held:

“The duty of this court as the first appellate court is well settled. It is to evaluate all the evidence which was adduced before the trial court and to arrive at its own conclusions as to whether the finding of the trial court can be supported.....

We shall now proceed to address the appeal.

Grounds 1 and 3 Case for the appellant

Counsel for the appellant submitted that the trial Judge erred in holding that the appellant’s decision to refuse to extend the lease and granting it to a third party was illegal because the action taken by the appellant does not fit within the definition of illegality as understood from **Black’s Law Dictionary** and several authorities. He submitted that the Land Board has the power and authority to grant or reject an application for extension under Section 59(1) of the Land Act, Cap 227. Counsel argued that even under Section 103(b) of the Registration of Titles Act [RTA], the appellant as lessor was entitled to re-enter the land upon breach which in this case was based on cleanliness and building covenant breaches by the respondent. He pointed out that the respondent’s last lease extension had expired on 31st January 2011 and no automatic renewal was ever part of the lease agreement. Counsel stated six instances where the trial Judge did not evaluate the evidence on record. These include:

- a) Evidence of the lease covenant that upon the expiry of the lease, renewal was not simply automatic.
- b) Evaluation of the failure to meet those covenants by the respondents.
- c) Evidence of notifications (letters) about the appalling status of the structures and their receipt being ignored by the respondent.
- d) Evidence that the particular lease that had just expired was extended specifically to enable the respondent address the status of the structures and this was not rebutted.
- e) Evidence that at the time of the new grant, the rejection of the extension was no longer subsisting from 17th May 2011 when the lease was offered to a third party. Counsel argued that from this date, the respondent had 71 days which was ample time to appeal the appellant’s decision or seek review and not judicial review.

f) There was evidence of the public interest for the people of Kabarole when the Land Board became concerned about the appalling state of the respondent's structures.

Case for the Respondent

5

Counsel for the respondent argued that breaches do not arise because a lease has expired but rather from non-compliance with the terms of the lease agreement. He pointed out that the appellant Board never brought to the respondent's attention any of the breaches alleged. Instead the letters referred to were written by the Town Clerk (another authority altogether) and the appellant Board was privy to only one of them. Counsel for the respondent maintained that the trial Judge properly evaluated the evidence on record, pointing out that the Judge made reference to the letters allegedly written by the Municipal Council and addressed them. Regarding the appellant's contention that judicial review was premature in the circumstances of this case, counsel argued this two-fold. First, that the respondent's complaint was the manner in which the decision was reached which warrants judicial review. Secondly, that the statutory remedy suggested by counsel for the appellant that the respondent sue in the magistrates Court could not apply because the Magistrate Court cannot hear an application for judicial review and it does not have the pecuniary jurisdiction to handle a matter worth over Ushs. 410,000,000/= Counsel prayed that these grounds and the appeal be dismissed.

Resolution

The contention in this appeal is that the trial Judge found

I.

the appellant not to renew the respondent's lease in respect of the suit land to be illegal, irrational and procedurally improper. In his judgment at page 11 of the record, the trial Judge held that:

"... They did not bring to the attention of the applicants the nature of breach and the consequences that accrue from such breach. They did not respond to their letters applying for renewal of the lease. They did not give the applicants a fair hearing.

They did not act in accordance with the law, vide section 59(1) of the Land Act. They therefore acted illegally to entertain the application from S.SMugasa while quietly declining to renew the applicant's lease when he was still in occupation and had apparent ownership" (Emphasis added)

He further held [at page 12] that:

The decision of the respondents not to respond to the applications for renewal and instead to go ahead and lease it out while continuing to write to the applicant was diversionary, irrational and procedurally improper.

Black's Law Dictionary, 9th Ed, at p.815 defines "*illegality* to mean an act that is not authorized by law, or state of not being legally authorized. Illegality is also when the decision making authority commits an error of law in the process of taking its decision. A decision maker who incorrectly informs him/herself as to the law or who acts contrary to the principles of the law is guilty of an illegality.

While the arguments advanced by counsel for the appellant suggest otherwise, it is not in contention that the respondent has the authority and discretion under Section 59(1); of the Land Act to accept or reject an application for renewal of a lease. However the gist of this appeal lies in how the decision to refuse to renew the respondent's lease was made resulting into the lease instead being granted it to a third party, one S. S Mugasa.

As both counsel have rightly stated, it is trite and in fact settled law, that judicial review is not concerned with the decision *per se* but with the decision making process. This essentially involves an assessment of the manner in which a decision is made not as an appeal but as an exercise of jurisdiction in a supervisory manner to ensure that public powers are exercised in accordance with basic standards of legality, fairness and rationality. **[See: Council of Civil Service Unions v Minister for the Civil Service (1982) AC 2]**

We have carefully perused the record of appeal, considered the submissions of both parties as well as the authorities provided. According to the record, the respondent applied for renewal of the lease on 30th November, 2010 (Exh.C) but received no response from the appellant Board. Furthermore a reminder by way of a letter dated 11th February 2011 (Exh D) was sent by counsel

for the respondent to the appellant Board.

20 The appellant however contends that various correspondences were made to the respondent who simply ignored them. We have had the occasion to look at the letters of 16th Dec 2010, 17th February 2011 and 2nd May 2011 written by the Town Clerk, Richard Alituha who is different from the appellant Board. In a nut shell, the letters written to the respondent were to bring to their
5 attention the poor sanitation and cleanliness standards of the station as well as the appalling state of the buildings which needed painting from the position of the Town Council. Other matters cited were the station canopy's precariously dangerous state, maintenance of the drive way and green belts in a tidy manner and

that the oil interceptor was not being utilized to filter grease and surface spill-over which was then directed into the water drainage system causing an environment threat.

Once again we note that these letters were written by the Town Clerk, not the appellant. The appellant was only copied in to the letter of 2nd May 2011. Following this communication, the appellant did not notify the respondent of any breaches of the lease agreement but only did so when informing them on 6th March 2011 of the refusal to renew the lease held by the respondent. Regarding these letters therefore, we agree with the trial Judge [at page 10 of the record] that the letters attached by the respondents do not specifically spell out that the lease agreement had been breached and that therefore they were exercising their rights under the agreement to terminate or decline to renew the application.

It could indeed be argued that the respondent may have been in breach of the building covenants. However, the point on which this case turns is the process by which the appellant went ahead to entertain a lease application of 4th January 2011 from S.S Mugasa and granted the lease to them. In the words of the trial Judge:

The decision of the respondents not to respond to the applications for renewal and instead to go ahead and lease it out while continuing to write to the applicant was diversionary, irrational and procedurally improper.”

We agree with this position. Indeed, the unprofessional manner in which they silently granted the lease to a third party smirked of bad faith. This is clearly further evidence of poor corporate governance on the part of the appellant Board. The whole process lacked transparent

communication because at the time of writing to the respondents on 6th March 2011 about rejection of their application to renew the lease, S.S Mugasa’s application (Exh G-I) of 4th Jan 2011 had already been recommended for approval on 19th January 2011 by the South Division Area Land Committee, Kabarole as seen from MIN 3/2011 (Exh. H). Before their application went to the Area Land Committee, S.S Mugasa and another had earlier on 27th December 2010 (Exh. F) applied to the Land Board for a lease.

Counsel for the appellant submitted that by the time of the appellant’s decision, the respondent’s lease had expired on 31st January 2011 and so could not be renewed. How then would the

t

renewal have been possible when the Area Land Committee had by 19th January 2011 already recommended S.S Mugasa for a lease over the same property? The respondent's application and reminder of 30th November 2011 and 11th February 2011 respectively had obviously been disregarded without any notice whatsoever for their course of action. Subsequently, the appellant gave S.S Mugasa a lease offer dated 27th May 2011.

We find that the lack of notice to the respondent who already held a lease interest in the suit property violated the principles of natural justice. The appellant's decision was also procedurally improper and unfair in the circumstances. The opportunity of the respondent being heard over any alleged breaches would have been through documents or correspondences which did not happen.

Accordingly, grounds 1 and 3 fail.

Ground 2 Case for the appellant

Counsel for the appellant submitted that the remedies of mandamus and prohibition granted to the respondent were not applicable in the circumstances of this case. Regarding prohibition, counsel argued that a decision had already been taken to grant the lease to a third party so there was nothing more to prohibit. Further, that mandamus is only relevant where there is a statutory duty which was not performed on the side of the appellant. In this case there was no statutory duty to grant the extension to the respondent.

Case for the Respondent

Counsel for the respondent contended that the appellant had a statutory duty to entertain the respondent's application for a lease extension fairly. Hence the respondent was entitled to be remedied through mandamus. He further submitted that the prerogative order of prohibition was specific and only related to prohibiting the appellant from implementing the; decision made to lease the suit property to a third party, one Mugasa.

Resolution

In the case of **John Jet Tumwebaze vs. Makerere University Council and others, Civil Application No. 78 of 2005, Justice Kasule (of the High Court as he then was)** held that an order of certiorari issues to quash a decision which is *ultra vires* or vitiated by an error on the face of the record while prohibition goes out to forbid some act or decision which would be *ultra vires*. It was further held that mandamus is issued in order

to compel performance of a statutory duty. It is used to compel public officers having responsibilities in public offices and bodies to perform duties imposed upon them by an Act of Parliament. We agree with that position of the law.

In the instant case, as counsel for the respondent submitted, the prerogative remedies of certiorari, mandamus and prohibition were granted with specific orders. The trial Judge granted the respondent the orders as hereunder:

The order of certiorari is issued to quash the decision of the respondents whereby they refused/failed/neglected to extend the lease of the applicant in respect of Plot 18, Lugard road, Fort Portal.

2. An order of prohibition is issued to prohibit the respondents from implementing the decision made to lease out the suit property, Plot 18 Lugard Road Fort Portal to S.S Mugasa and another.

3. The order of mandamus is issued directing the respondent to renew the applicant's lease on Plot 18 Lugard Road, Fort Portal for a further term as provided for in the lease agreement between the parties... ”

We uphold the grant of certiorari and prohibition orders as issued by the trial Judge considering our findings that the appellant's decision was illegal, unfair and procedurally improper hence *ultra vires*. Concerning mandamus, regard is had to Clause 4 of the Lease Agreement which reads [at page 133]:

“4. When the lessee shall have complied with the building covenant herein and if there shall not at the time be any existing breaches or non-observance on the part of the lessee of any of the covenants and conditions in this lease whether express or implied the said term shall

be enlarged to 49 years from the said 2nd day of January 1980 automatically and this lease shall thenceforth be read and construed as if the term of 49 years had been originally granted hereby.

In our view, the automatic renewal clause is subject to compliance of building covenants by the respondent. It is not simply automatic as such. The respondent's objective assessment of compliance has to be carried out first and if it is satisfactory, then the automatic clause is activated.

We find that in the instant case, even if the effect of a certiorari is to quash the appellant's decision rejecting the respondent's application to renew the lease, the appellant still reserves the power to grant or renew a lease regarding the suit property. This is so because judicial review is concerned not with the decision, but the decision making process. This means that the appellant can still proceed to make a fresh decision but following the correct and proper procedure (ensuring the right to be heard; transparency and accountability).: Otherwise, for Court to direct the appellant to renew the applicant's lease on Plot 18 Lugard Road, Fort Portal for a further term as provided for in the lease agreement between the parties, would in our view amount to usurping the powers of the Land Board (appellant).

The above notwithstanding we need to emphasize as we have earlier pointed out that the respondent still has a duty to objectively re-assess the application for renewal of the lease of the suit property. Given the history of this dispute between the parties and the lack of transparency by the appellant that we have found (*supra*), it may be difficult for the respondent to expect fair treatment from the appellant in this regard. The appellant has to take great care not to allow the history of this dispute to cloud its future decision in the matter and better still, in the spirit of transparency the members of the appellant Board which sat on

March 2011 to reject the respondent's lease renewal should disqualify themselves from sitting to decide on the respondent's renewal application.

Accordingly, this ground succeeds in part to the extent that the order of mandamus is set aside. Given our findings above however, certiorari and prohibition are upheld. **In** the result, this appeal stands dismissed with costs. We so Order.

Dated, signed and delivered, at Kampala this 15th Day of January 2016.

Hon. Justice Remmy Kasule

Justice of Appeal

Hon. Justice Kenneth Kakuru

Justice of Appeal

Hon. Justice Geoffrey Kiryabwire

Justice of Appeal