

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 208 OF 2013

ATTORNEY GENERAL.....APPELLANT

VERSUS

1. YUSTUS TINKASIMIIRE
2. NYABONGO R. STEPHEN
3. BIKANGAGASAM
4. MATSIKO YORAMU
5. KANIHURA IVAN
6. NAMANYA ZADOCK
7. MULISA BERNERD
8. TURYAMUREEBA CHARLES
9. TURYAMUREEBA MOSES
10. TIBORUHANGA MICHAEL
11. KWESIGA MOSES
12. BITANAKO ADRIAN
13. KAMUHANDA JOHN
14. BITARE MOSES
15. KAMUGISHA PATRICK
16. KAMANZI BENON IVAN TUMUHIMBISE
17. IVAN TUMUHIMBISE
18. KAGARUKAHO GEOFFREY
19. ELISHA BYARUGABA & OTHERS RESPONDENTS

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Mr. Justice F.M. S Egonda-Ntende, JA

Hon. Mr. Justice Cheborion Barishaki, JA

JUDGMENT OF THE COURT

This appeal arises from the Judgment of the High Court in High Court Miscellaneous Cause No.35 of 2012 dated 5th April 2013 before Mwangusya J, (as he then was].

Background

The respondents were applicants at the High Court by way of notice of motion, brought under Sections 33, 36 and 38 of the Judicature Act (CAP 13) and the Judicature (Judicial Review) Rules. They sought Judicial review reliefs of certiorari and prohibition calling for and quashing the decision of Dr. Malinga a government Minister at the time made on 6th March 2012 ordering the appellants to vacate or forcefully be removed from the land they were occupying.

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

- a) The Applicants and thousands other residents and inhabitants of an area commonly known as Rwamwanja in Nkoma Sub county, Kibale county Kamwenge District are threatened with eviction by the Respondents vide a press statement issued on 6/3/2012 by the 2nd Respondent.*
- b) The Applicants have lived on the land for a long period of time uninterrupted having acquired the land lawfully.*
- c) The Respondents forcefully surveyed their land falsely alleging that it was a refuge settlement camp which allegation is denied by the Applicants. The Applicants were never involved though they were affected.*
- d) The Applicants have homes and developments on the land and cannot be arbitrarily and hurriedly displaced. They contend that it is illegal and a violation of their human rights to own property.*

The Applicants contend that the allegation contained in the said press statement is not correct in that;-

- a) The Applicants are residents of the disputed land, some inheriting title from their grand fathers who have lived there for ages.*
- b) Other residents got settled in the land through allocations by the Tooro Kingdom.*
- c) Others occupied the area through outright purchase from indigenous owners.*
- d) There are institutions in the area preceding the influx of Rwandese refugees in 1964 such as Nkoma Church of Uganda which is now an archdeaconry which was established long ago and has a land title issued in 1930.*
- e) Refugees from Rwanda were settled in a small portion of the disputed area apparently by an understanding between the kings of Tooro Kingdom and Rwanda and was later legitimized by publication in the Uganda Gazette.*
- f) The refugee camp never displaced or unsettled the natives in the area who have stayed there ever since.*
- g) The refugees later left the area in 1994 leaving the natives in peace.*
- h) The Tooro Kingdom gave part of this former refugee camp to people who applied to it vide a Kingdom land allocation committee chaired by the Kingdom's saaza chief for Kibaale County.*
- i) Many people have lawfully acquired land in the area and have ever since obtained certificates of title.*
- j) The Respondents forcefully and in violation of a court order, surveyed the said land in 2005 and the survey covered a very wide area outside the former refugee camp and affecting the applicants and other affected residents.*

- k) *The Applicants raised the matter with the various offices including Prime Minister, the Vice President and later the President who advised in 2009 to halt the process.*
- l) *The Respondents did unilaterally and arbitrarily and without notice, forcefully enter the land and ordered the Applicants to vacate the area and gave the Applicants an ultimatum of 27/3/2012.*
- j) *The Applicants are aggrieved by the said decision and challenge it as illegal because;*
- a. It ignores the Applicants legal proprietary and constitutional rights to their land.*
 - b. It covers an area far wider than the former refugee camp.*
 - c. It lumps up all the occupants on the land as encroachers and squatters despite the fact that some have lived there for ages and others even have certificates of title.*
 - d. It is very illegal, arbitrary and intended to displace the applicants and render them destitute.*

The application is supported by the affidavits of Mastsiko Yoram, Kanihura Ivan, Bikangaga Sam. We have not found it necessary to reproduce them here, suffice it to state that they expound on the grounds of the motion which we have already set out above.

Dr. Stephen Malinga the second respondent filed an affidavit in reply. The pertinent parts read as follows:-

- "1. THAT I am currently the minister in charge of disaster preparedness, relief and refugees, in the government of Uganda, conversant with the subject land in issue and duly competent to depone this affidavit in that regard.*
- 4. THAT the application for judicial review is incompetently commenced against me in my personal capacity, yet the applicant's allegations against me relate to acts or omissions allegedly committed in my official capacity as a minister in charge of - Disaster Preparedness, Relief and Refugees, in the government of Uganda, whereof my said lawyers shall apply to have me struck off the suit.*
- 5. THAT without prejudice though, the refugee settlement at Rwamwanja was established by the government of Uganda and the refugees thereon were settled by the government in compliance with its international obligations and not by me as a person, whereof I cannot be personally liable for actions of government officials implementing a government program.*
- 6. THAT I have been advised by my said legal counsel that the crux of the subject matter before this honorable court as ascertained from the applicants pleadings and affidavits is a land ownership dispute between the applicants and the government of Uganda, which cannot be resolved by way of an application for judicial review.*
- 7. THAT I have been advised by my said legal counsel that the applicants have no locus whatsoever to present and prosecute the application on behalf of the alleged thousands of residents or inhabitants, who are not party to the suit.*
- 8. THAT the press statement issued by the Ministry of Disaster Preparedness, Relief and Refugees only notified the applicants and other illegal occupants on the land to peacefully vacate the refugee settlement to pave way for the government to settle the refugees from the Democratic Republic of Congo.*

9. *THAT according to the records at the ministry of Disaster Preparedness, Relief and Refugees, the land at Rwamwanja is government owned land that was designated as a refugee settlement as far back as 1964. A copy of the gazette notice is attached hereto marked 'A'*

12. *THAT I am aware that there are arrangements by the government to try and resolve the dispute over ownership of the said land through an amicable settlement, with any occupants, who shall be proved to have valid claims over the land.*

13. *THAT I am aware that the offices of the Prime Minister and the Attorney General have had a preliminary meeting with the applicants to map out ways of finally resolving the dispute over ownership of the suit land, a process that is ongoing.*

14. *THAT I am further aware that the office of the Prime Minister sanctioned a meeting of the parties and their respective lawyers at Rwamwanja in an attempt to work out a temporary and agreeable arrangement for the government and the applicants, though I am advised that no conclusion has so far been reached."*

There is also a supplementary affidavit deponed to one Bafaki Charles the relevant parts state as follows

"1. THAT I am currently employed as Senior Settlement Officer in the ministry of Disaster Preparedness, Relief and Refugees, in the government of Uganda, well acquainted and duly conversant with the facts pertaining to the suit land and duly competent to depone this affidavit in that regard.

3. THAT I have over-time had the opportunity of reading through a number of correspondences available at the Ministry of Disaster Preparedness, Relief and Refugees on the history of the suit land at Rwamwanja Refugee settlement and he various activities that have taken place at the settlement.

4. THAT I have been to Rwamwanja on several occasions in execution of government work in resettlement of refugees and I am conversant with the relevant facts pertaining to the dispute before court and thus in position to depone this affidavit.

5. THAT according to the records available at the ministry of Disaster Preparedness, Relief and Refugees, Rwamwanja is land formerly constituted as crown land during the colonial government, which reverted to the Government of Uganda in 1964, then estimated to be 54 square miles in measurements.

6. THAT the records further indicate that the said land at Rwamwanja was vacant with no occupants or squatters and was in 1964 Gazetted as a Refugee Settlement and has since then been maintained as such. A copy of the Gazette Notice is attached hereto marked "A".

7. THAT further information from the records at the ministry indicates that the land at Rwamwanja having been gazetted as a Refugee Settlement was used

by government to settle Rwandese refugees from 1964, till about 1994-1995, when most of them returned to Rwanda leaving the land vacant.

8. *THAT the records further indicate that in 1979, there was a proposal by the Permanent secretary/director of refugees to streamline the boundaries and cause a survey of all the settlements at Rwamwanja, further confirmation that the settlement was part of government owned land. A copy of the said letter dated 13th February 1979 is attached hereto marked annexure 'B'.*
9. *THAT according to the records, the government position on Rwamwanja was further re-iterated in 1982 when in an endeavour to avert the disputes between refugees and a few nationals, the then minister in charge, who addressed the refugees and the nationals succinctly stated that the lands on which the refugee settlements are established are never leased out to the refugees but remains the property of the government of Uganda. A copy of the said letter dated 8th June 1982 is attached hereto marked annexure 'C'.*
10. *THAT the records also indicate that in 1986, the Ministry of Lands wrote a letter to the Department of Refugees confirming Rwamanja as government land demarcated for refugee activities. A copy of the said letter is attached hereto marked annexure "D"*
11. *THAT further, in 1994, a question was raised by way of (Notice of question in the NRC then) as to whether Government could consider giving part of the vacated land to the people of the area to use as farm land, which question was determined in the sense that land in refugee settlements in this country was held in trust by the Ministry for refugee use and any decision to allocate the land to landless citizens was subject to cabinet approval. A copy of the said loose minute dated 4-8-1994 is attached hereto marked annexure 'E'.*
12. *THAT the records indicate that amidst some complaints that the refugees had exceeded the boundaries of Rwamwanja Settlement and encroached on land occupied by the nationals, it was recommended that the refugees should be restricted to within the boundaries of the settlement. A copy of the said letter dated 30th May 1986 is attached hereto marked annexure 'F'.*

13. *THAT a follow up exercise was undertaken to demarcate the boundaries of Rwamanja Refugee Settlement land, and upon a survey, the total area constituting the settlement was 42 sq. miles.*
14. *THAT the records indicate that the problem of illegal occupants was equally - identified at this stage and the matter was drawn to the attention of the chiefs and Resistance Councils. A copy of the said letter dated 20th June 1988 is attached hereto marked annexure 'G'.*
15. *THAT upon the departure of the Rwandese refugees in 1995, the land at Rwamanja remained empty and as a result, nationals started encroaching on the land parceling it into individually owned plots, some of which are now claimed by the applicants.*
16. *THAT the records indicate that notices and circulars were issued warning the encroachers and demanding that they vacate the land. The RCIII chairman of Nkoma, who appears to have been encouraging the encroachers, was also notified. A copy of the said letter dated 17th July 1995 is attached hereto marked annexure "H"*
17. *THAT in response to the issue of illegal occupation of Rwamanja by the nationals! the Permanent Secretary/Director of Refugees re-confirmed government position on refugee settlements previously occupied by Rwandese refugees as not available for occupation by the nationals. A copy of the said letter dated 25th August 1995 is attached hereto marked "T".*
18. *THAT in 1996, the records indicate that the nationals continued with their illegal encroachment on the land, despite prior notification of the illegal occupation. A copy of the letter dated 8th June 1996 is attached hereto marked 'J'.*
19. *THAT in, 2005, Government decided to survey the land for purposes of acquiring a freehold title, which was issued in 2008 to the government in the names of the Uganda Land Commission and the titles in possession of the applicants must have been illegally procured. A copy of the certificate of title is attached hereto marked 'K'.*
20. *THAT neither the government nor the Uganda Land Commission has ever allocated the land to the applicants and their claims of acquisition of the suit land from Tooro Kingdom are false, as the suit land is not kingdom land.*

21. *THAT in 2012, there was an influx of Congolese refugees into Uganda, whereof government duly notified the applicants to vacate the suit land, illegally occupied by them and indeed quite a number vacated including Hon. Butime, Mr. Kajumbi, Mr. Chemasweti, Mr. Tugume Mr. Mugume and others.*
22. *THAT the refugees have been settled only on land, owned by the government, parts whereof are encroached on by the applicants, who forcefully entered onto the land, without any colour of right, taking advantage of the departure of the refugees.*
23. *THAT the records do not indicate that the land has ever reverted to or been allocated to the Tooro Kingdom, thereby rendering the applicant's allegations that the land was allocated to them by the Kingdom false."*

The application heard and granted at the High Court, against the Attorney General. The claim against the 2nd respondent Dr. Malinga was dismissed. The issue of **locus standi** was determined in favour of the application.

The Attorney General being dissatisfied with the decision of the Court filed this appeal on the following grounds;-

- "1. The learned trial Judge erred in law and fact when he found that the prerogative order of prohibition could issue yet there were no circumstances meriting its issuance.*
- 2. The learned trial Judge erred in law and fact when he ignored and failed to apply the provisions of S.36(5) of the Judicature Act.*
- 3. The learned trial Judge erred in law and fact when he held that locus standi of the Respondents was immaterial in the circumstances of the case.*
- 4. 4. The learned trial Judge failed to properly evaluate the evidence on record and erred in allowing the Respondent's Application: Misc. Cause No. 35 of 2012."*

Representations

When this appeal was called for hearing Principle State Attorney Mr. **Philip Mwaka** appeared for the appellant while learned Counsel **Mr. Arthur Murangira** appeared for the respondents.

The appellant's case

Mr. Mwaka argued only ground one having abandoned the rest.

In respect of ground one Counsel faulted the learned trial Judge for having issued an order of prohibition in addition to other orders that had been sought. He submitted that, the prohibition order against the appellant and in favour of the respondents effectively determined the question of ownership of the disputed land as it 15 permitted the respondents to remain in occupation of the said land without the dispute between the parties having been determined.

Further that, the order of prohibition completely constrains the appellant from managing any further encroachment on the disputed land allowing more people to illegally settle there.

Counsel asked Court to set aside the order of prohibition arguing that, its setting aside would enable government to approach the matter afresh without prejudice to the rights of the respondents.

The Respondent's reply

Mr. Murangira opposed the appeal and supported the Judgment of the trial Court.

He submitted that Judicial review is not concerned with the adjudication of the rights of parties but rather with the decision making process.

Counsel submitted that the trial Court was justified when it issued an order of prohibition against the appellant. He contended that, the eviction of the respondents by the appellant had continued even after Court had issued an interim order staying the implementation of the Minister's order. Further that, had the order of prohibition not been issued, the appellant would have proceeded to unlawfully evict the respondents from the disputed land.

Counsel further argued that the decision of the lower Court only prohibits the implementation of the order of the Minister and does not constraint the appellant in any other way.

Consideration by the Court

We have carefully listened to both parties, read the pleadings and studied the 10 relevant law.

We have a duty as the first appellate Court to re-appraise the evidence adduced at the trial Court and to

come up with our own inferences on all issues of law and fact. See: Rule 30 (1) of the Rules of this Court and *Fr. Narcensio Begumisa & others vs Eric Tibebaaga (Supreme Court Civil Appeal No. 17 of 2002)*.

We shall proceed to do so.

The only issue for us to determine is, whether or not the learned trial Judge erred in law and fact when he issued an order of prohibition against the appellant and in favour of the respondents in the Judicial review proceedings before him.

It was submitted for the respondent that the learned trial Judge acted beyond his jurisdiction in Judicial review proceedings when he issued against the appellant an order of prohibition in favour of the respondents and others who were not parties to the proceedings, which order effectively determined the dispute between the parties.

For the respondent it was submitted that the issuance of the order of prohibition was legal and justified taking into account the circumstances of the case, especially the fact that appellant had acted unreasonably and in a higher handed manner.

Further that the order of prohibition was necessary because during the trial the Court had issued an interim order of prohibition which had not been complied with by the respondent. The issuance of the substantive order of prohibition, Counsel submitted, did not have the effect of determining the land dispute between the parties in favour of the respondents to the prejudice of the appellant.

We have already set out the facts giving rise to this appeal as presented to the trial Judge earlier in this Judgment. We find no reason to reproduce them here.

The learned trial Judge correctly set out the law regarding judicial review when at page 8 of his Ruling he stated as follows:-

*"The purpose of Judicial Review is concerned not with the decision but with 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. The case of Koluo Joseph Andrew & others versus the Attorney General and others Misc Cause No.106 of 2010 is instructive."***

As rightly observed by the trial Judge, in judicial review proceedings the Court is not required to

vindicate anyone's rights but merely to examine the circumstances under which the impugned act is done to determine whether it was fair, rational and or arrived at in accordance with rules of natural justice.

In this regard, the Constitution provides as one of the basic fundamental human 25 rights, a right to just and fair treatment in administrative decisions under **Article 42** which stipulates as follows

" 42. Right to just and fair treatment in administrative decisions.

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. "

In this case the underlying issue between the parties is a land dispute. The remedy for this dispute can only be obtained by way of an ordinary suit filed by either party. This is what the trial Judge found when at P.9 of his Ruling he stated as follows:-

"From the pleadings of the parties, there is controversy on proprietorship of the suit land and whether the respondents' action infringed the applicants' rights to the ownership of the said land, in such an instance the remedy would lie in an ordinary suit with a fully fledged hearing; where proprietorship of the land would be tried and finally resolved, and not in the prerogative remedies. But this case is not all about the dispute relating to the proprietorship of the land which can only be resolved in ordinary suit rather than in an application for Judicial Review."

Ordinarily the trial Judge ought to have dismissed the application at that point. However, he went on further to find that, the appellant, who is the Attorney General representing the Government of Uganda, instead of instituting a suit against the respondents issued an order of eviction against them through a Ministerial order. While discussing this issue the trial Judge stated as follows at page 11 of his Ruling.

"In summary while this Court recognises the obligation of the Government to settle the refugees that flocked in the country from a neighbouring country the decision to evict the applicants from their occupation of the land was unfair to the applicants because they were treated as trespassers to the land without being given an opportunity to explain the circumstances under which they occupied the land. This is the decision that this court was required to call are quash and court satisfied that the applicants have established the sufficient grounds for quashing I"

We have found no reason to fault him on this decision. The Government and the respondents all claim to have legal interest over the disputed land. The government, 10 because it has the power and the coercive machinery of the state at its disposal, issued a ministerial order of eviction against its' citizens who have a claim over the same land. We find as did the Judge that such an order was irrational, unfair and offended all the rules of natural justice. This is conceded to by the appellant's Counsel. He is not contesting the order of **certiorari** quashing the decision of the 15 Minister.

What the appellant now seeks, is to set aside the order of prohibition issued by the High Court in the Judicial Review proceedings against the appellant. He contends that the order has had the effect of determining the dispute between the parts in favour of the respondents to its prejudice.

The government which also claims to have interest in the disputed land is prohibited by the said order from effectively occupying it while allowing the respondents to do so. The order appears to be open ended since it is couched in permanent terms.

We are unable to agree with Counsel for the appellant that the dispute between the parties has been determined permanently by the restraining order. The restraining order issued in these proceedings although couched in permanent terms is not cast in stone. It does not bar the bringing of an ordinary suit to settle the dispute.

In our humble view the appellant ought to have taken a leaf from the Judgment of the trial Judge that, the parties ought to have their dispute determined by way of an ordinary suit in the appropriate Court.

We find that, instead of filing this appeal, the appellant should have filed an ordinary suit at the High Court. If we were to allow this appeal and set aside the order of prohibition, there is nothing that would stop the appellant from issuing a fresh order of eviction against the respondents and that would be unjust.

The appellant should therefore consider the available remedy and file a suit against the respondents for recovery of the land.

Accordingly we find that this appeal is misconceived and lacks merits.

We accordingly dismiss it with costs to the respondents

It is so ordered.

Dated at Kampala this.....21.....day of.....May.....2018.

Hon Justice Kenneth Kakuru

JUSTICE OF APPEAL

Hon. Justice F.M.S Egonda-Ntende

JUSTICE OF APPEAL

Hon. Justice Cheborion Barishaki

JUSTICE OF APPEAL