

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
[Coram: Egonda-Ntende, Musoke, Madrama, Mugenyi & Gashirabake, JJCC]

Constitutional Petition No. 03 of 2019

BETWEEN

Citizens' Concern Africa=====Petitioner

AND

Attorney General=====Respondent

JUDGMENT OF FREDRICK EGONDA-NTENDE, JCC

Introduction

- [1] The Petitioner brings this action seeking a declaration that Section 91(1) (2)(3)(7)(8)(10) and (11) of the Land Act Cap 227 as amended by Section 37 of the Land (Amendment) Act, 2004 is unconstitutional in so far as it contravenes Articles 21(1), 26, 28 (1) and 44 (c) of the Constitution of Uganda.
- [2] The petitioner contends that Section 91 (1) (2)(3)(7)(8)(10) and (11) of the Land Act Cap 227 as amended by Section 37 of the Land Act (Amendment) 2004 gives the respondent powers through the Commissioner, Land Registration to cancel land titles issued by herself or her predecessor on the direction of the respondent after hearing and determining the matter herself, and without prior and adequate compensation to the proprietors. It is further contended that the impugned provision gives powers to the Commissioner, Land Registration to cancel titles even when the cancellation has an effect of the land reverting to the respondent and or his agencies.

- [3] The petitioner contends that the provisions deprive the affected persons of the right to a fair hearing before an independent and impartial tribunal in contravention of the right to a fair hearing guaranteed in Articles 28 and 44(c) of the Constitution. The petitioner also contends the impugned provision contravenes Article 26 for depriving the victims of their property without adequate compensation.
- [4] The petition was supported by an affidavit sworn by Sam Mucunguzi, the National Coordinator at Citizens' Concern Africa.
- [5] The respondent opposes this petition and in his response to the petition contended that this petition did not raise any questions for constitutional interpretation. Secondly, the respondent contended that none of the impugned provisions contravenes any provisions of the Constitution. Thirdly that the impugned provision for the procedure followed by the Commissioner, Land Registration before taking any action on a title. The respondent contended that the petitioner is not entitled to any of the declarations sought and should be dismissed with costs.
- [6] The answer to the petition was supported by an affidavit sworn by Ssekitto Moses, Senior Registrar of Titles with the Ministry of Lands, Housing and Urban Development.

Legal Representation

- [7] At the hearing, Mr Allan Baryo appeared for the petitioner while Mr. Geoffrey Madate, State Attorney, appeared for the respondent. Both parties filed written submissions.

Analysis

- [8] I will start by setting out the principles that have been accepted in this jurisdiction as the guiding principles in constitutional interpretation. They have been summarised by Mwendha, JSC, in *David Tusingwire v Attorney General*, [2017] UGSC 11, as follows:

‘(i) The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of its inconsistency (see Article 2 (2) of the Constitution. Also, see **Presidential Election Petition No. 2 of 2006 (SC) Rtd Dr. Col. Kiiza Besigye v. Y. K. Museveni**

(ii) In determining the constitutionality of a legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining the constitutionality of either effect animated by the object of the legislation intends to achieve see **Attorney General v. Silvatori Abuki Constitutional Appeal No. 1988 (SC)**

(iii) The entire Constitution has to be read together as an integral whole with no particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness (see **P. K. Ssemwogere and Another v. Attorney General Constitution Appeal No I of 2002 (SC) and the Attorney General of Tanzania v. Rev Christopher Mtikila (2010) EA 13**

(iv) A constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given dynamic, progressive, liberal and flexible interpretation keeping in view the ideals of the people, their social economic and political cultural values so as to extend the benefit of the same to the maximum possible. See **Okello Okello John Livingstone and 6 others v. The Attorney General and Another Constitutional Petition No I of 2005, South Dakota v. South Carolina 192, USA 268. 1940.**

(v) Where words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense.

(vi) Where the language of the Constitution or a statute sought to be interpreted is imprecise or ambiguous a liberal, general or purposeful interpretation should be given to it. (See **Attorney**

**General v Major David Tinyefunza Constitutional Appeal
No. I of 1997 (SC)**

(vii) The history of the country and the legislative history of the Constitution is also relevant and useful guide to constitutional Interpretation. See (**Okello John Livingstone and 6 others v. Attorney General and Another** (Supra)).

(viii) The National objectives and Directive principles of state policy are also a guide in the interpretation of the Constitution. Article 8A of the Constitution is instructive for applicability of the objectives.’

- [9] Secondly the burden of proof rests with the petitioner to raise a *prima facie* case that a fundamental right or freedom has been contravened. Once this is established the burden shifts to the state or respondent to rebut or justify the limitation. See Charles Onyango Obbo and Anor v Attorney General, [2004] UGSC 81.
- [10] Thirdly where article 43 of the Constitution is called in aid to allow the limitation to the fundamental right the court must engage in a limitation analysis starting with the criteria laid down therein. Does the enjoyment of the fundamental right or freedom prejudice the fundamental rights and freedoms of other persons or the public interest? If the answer is in the affirmative, is the limitation acceptable and demonstrably justifiable in a free and democratic society, or is it provided by the Constitution? Mulenga JSC, (RIP) in Charles Onyango Obbo and Anor v Attorney General (supra) formulated the limitation analysis in the following words,

‘Similarly, under Article 43(2) democratic values and principles are the criteria on which any limitation on the enjoyment of rights and freedoms guaranteed by the Constitution has to be justified. In determining the validity of the limitation imposed by section 50 on the freedom of expression, the court must be guided by the values and principles essential to a free and democratic society. In Mark Gova & Another vs. Minister of Home Affairs & Another, [S.C. 36/2000: Civil Application No. 156/99], the

Supreme Court of Zimbabwe formulated the following summary of criteria, with which I agree, for justification of the law imposing limitation on guaranteed rights-

- *'the legislative objective which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right;*
- *the measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations;*
- *the means used to impair the right or freedom must be no more than necessary to accomplish the objective.'*

[11] Any limitation analysis that I may have to engage in shall be guided by the foregoing principles which I am obliged to follow.

Issues for Consideration

[12] There are 3 issues that arise on this petition. Firstly whether Section 91(1) (2)(3)(7)(8)(10) and (11) of the Land Act Cap 227 as amended by Section 37 of the Land Act (Amendment) 2004 is inconsistent with Articles 26 of the Constitution. Secondly, whether sections 91(1) (2)(3)(7)(8)(10) and (11) of the Land Act Cap 227 as amended by Section 37 of the Land Act (Amendment) 2004 contravene Articles 28 (1) and 44 (c) of the Constitution. Thirdly, whether section 91(1) (2) (3) (7) (8) (10) and (11) of the Land Act Cap 227 as amended by Section 37 of the Land Act (Amendment) 2004 contravene Article 21 Constitution.

Issue 1:

Whether Section 91(1) (2)(3)(7)(8)(10) and (11) of the Land Act Cap 227 as amended by Section 37 of the Land Act (Amendment) Act, 2004 contravenes Articles 26 of the Constitution

[13] It was submitted for the petitioner that the impugned section deprives victims of their property without prompt payment or fair and adequate compensation contravening the right to own property guaranteed under Article 26 of the Constitution. It was contended that upon issuance of a title, the recipient or proprietor acquires interest in land and conclusive proof of ownership of land.

- [14] It was further submitted that the impugned section places an obligation on the Commissioner, Land Registration to issue a notice to the persons likely to be affected to show cause why the title should not be cancelled and after consideration of their submissions, the Commissioner, Land Registration makes a decision to cancel the respective titles. However, in circumstances where titles are cancelled in respect of reserved land, it has the effect of reverting the land to the respondent and or her agents and the victim is deprived of his or her land without compensation.
- [15] Counsel for the respondent submitted that the right to own property is not an absolute right envisaged under Article 44 of the Constitution. It was further submitted that the right to compensation before deprivation of property applies where the person affected holds the land legally. He invited this Court to interpret Article 26 in contrast to Articles 237 and 235 of the Constitution.
- [16] Counsel further submitted that the powers of the Commissioner, Land Registration to cancel titles issued in error or illegally, is reserved for land like wetlands in conformity with Article 8A of the Constitution and objective XXVII of the National Objective and Directive principles of state policy.
- [17] Counsel for the respondent argued that the Commissioner, Land Registration cancels the certificates of title issued in respect of reserved land pursuant to Articles 237 and 245 of the Constitution.
- [18] It's the petitioner's contention that the impugned provision contravenes the right to own property and adequate compensation enshrined in Article 26 of the Constitution.
- [19] Article 26 of the Constitution provides that;
- (1) every person has a right to own property either individually or in association with others.
 - (2) no person shall be compulsorily deprived of property or an interest or right over property of any description except when the following conditions are satisfied-

- (a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and
- (b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for-
 - (i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and
 - (ii) a right of access to a court of law by any person who has an interest *or right over the property.* ”

[20] Section 91 of the Land (as amended) provides,

- (1) Subject to the Registration of Titles Act, the commissioner shall, without referring a matter to a court or a district land tribunal, have power to take such steps as are necessary to give effect to this Act, whether by endorsement or alteration or cancellation of certificates of title, the issue of fresh certificates of title or otherwise.
- (2) The Commissioner shall, where a certificate of title or instrument—
 - (a) is issued in error;
 - (b) contains a wrong description of land or boundaries;
 - (c) contains an entry or endorsement made in error;
 - (d) contains an illegal endorsement;
 - (e) is illegally or wrongfully obtained; or
 - (f) is illegally or wrongfully retained;
 give not less than twenty-one days’ notice, of the intention to take the appropriate action, in the prescribed form to any party likely to be affected by any decision made under this section”; and
- (2a) The Commissioner shall conduct a hearing, giving the interested party under subsection (2) an opportunity to be heard in accordance with the rules of natural justice, but subject to that duty, shall not be bound to comply with the rules of evidence applicable in a court of law.
- (2b) Upon making a finding on the matter, the Commissioner shall communicate his or her decision in writing to the parties, giving the reasons for the decision made, and may call for the duplicate certificate of title or instrument for cancellation, or correction or delivery to the proper party.”

(3) If a person holding a certificate of title or instrument referred to in subsection (2) fails or refuses to produce it to the commissioner within a reasonable time, the registrar shall dispense with the production of it and amend the registry copy and where necessary issue a special certificate of title to the lawful owner.

(4)

(5)

(6)

(7) Any error or any entry corrected or supplied under this section shall have the same validity and effect as if the error had not been made or entry not omitted.

(8) In the exercise of any powers under this section, the registrar shall—

(a) give not less than twenty-one days' notice in the prescribed form to any party likely to be affected by any decision made under this section;

(b) provide an opportunity to be heard to any such party to whom a notice under paragraph (a) has been given;

(c) conduct any such hearing in accordance with the rules of natural justice but subject to that duty, shall not be bound to comply with the rules of evidence applicable in a court of law;

(d) give reasons for any decision that he or she may make.

(9)

(10) Any party aggrieved by a decision or action of the registrar under this section may appeal to the district land tribunal within sixty days after the decision was communicated to that party.

(11) Where the registrar has cancelled a certificate of title or an entry in the Register Book, a party in whose favour the cancellation is made shall not transfer the title until the expiry of the time within which an appeal may be lodged; and where an appeal is lodged against the cancellation, he or she shall not transfer the title until the determination of the appeal.'

[21] The petitioner contends that the impugned provision empowers Commissioner, Land Registration to cancel certificates of title issued by him or her against the principle of indefeasibility of title and in contravention of Article 26 of the Constitution which provides for the right to own property.

- [22] The powers of the Commissioner, Land Registration are not absolute. They are limited to cancellation of title issued in error; or containing wrong description of land or boundaries; or containing an entry or endorsement made in error; contains an illegal endorsement and is illegally or wrongfully obtained, or is illegally or wrongfully retained.
- [23] Black's law dictionary defines illegality as follows:
- (i) An act that is unauthorised by law.
 - (ii) The state of not being legally authorised
 - (iii) The state or condition of being unlawful
- [24] A certificate of title issued illegally cannot be said to be evidence of any interest in the land and does not confer ownership of land onto the holder. It is a complete nullity and could never become the root of a title to subsequent transferees. Thus the protective cloak of indefeasibility does not arise. It is only in circumstances where the registered proprietor has acquired the land lawfully that the title is indefeasible and conclusive evidence of ownership.
- [25] The Commissioner, Land Registration under section 91 does not have the power to cancel the title of a registered proprietor unless under express order of court. Therefore, he / she is unable to interfere with one's right to ownership of property legally acquired.
- [26] I am unable to see how the impugned provision contravenes in any way the provision of Article 26 of the Constitution.

Issue No. 2:

Whether 91(1) (2)(3)(7)(8)(10) and (11) of the Land Act Cap 227 as amended by Section 37 of the Land Act (Amendment) 2004 contravene Articles 28 (1) and 44 (c) of the Constitution.

- [27] It was submitted for the petitioner that the impugned provision contravenes Article 28(1) of the Constitution in far as it deprives the affected persons of the right to a fair hearing before an independent and impartial tribunal. It was further submitted that the right to a fair hearing is further protected by article 44 (c) which renders it non-derogable. The petitioner complains that under the impugned section the Commissioner, Land Registration is the complainant and a judge in his or her case. The Commissioner, Land Registration, generates a complaint, notifies the persons likely to be affected by the cancellation to show cause why the land title should not be cancelled. The Commissioner conducts a hearing and decides whether to cancel the land title or not.
- [28] Petitioner's Counsel submitted that the for tribunal to be deemed fair, it ought to be disinterested in the case for trial. Counsel referred Bakaluba Peter Mukasa Vs Betty Bakireke SCCA No. 4 of 2009 (unreported) in support of his argument.
- [29] It was submitted that it is unfair, unjust and unconstitutional for the respondent to try and determine proceedings which have an effect on the title issued by the Commissioner, Land Registration and revert it.
- [30] Counsel for the respondent submitted that the impugned is not inconsistent with Articles 28(1) and 44(c) of the Constitution. A clear reading of sections 91(2) of the land act as amended lays down the procedure for cancellation of titles that safeguards the right to a fair hearing.
- [31] Counsel further submitted that section 91 (2) of the Land Act, which gives not less than twenty-one-day notice to the affected party, is in conformity with the spirit of Article 28 of the Constitution. Counsel for the respondent submitted that the notice is evidence that the party likely to be affected is presumed to be innocent, also informs him or her of the intended action and gives him or her time to prepare for his or her defence as provided for under Article 28 (3) (a) (b) (c) of the Constitution.

[32] Counsel for the respondent submits that the Commissioner, Land Registration conducts a hearing in accordance with the rules of natural justice and the affected person is permitted to appear in person or at that person's own expense, by a lawyer of his or her choice.

[33] Counsel for the respondent, therefore, concluded that the impugned provisions do not contravene Articles 28 (1) and 44(c) of the Constitution.

[34] Clearly a hearing before the Commissioner, Land Registration is not a hearing before a court of law. The Commissioner, Land Registration is an administrative official, with functions related to the administration of the Land Act, the Registration of Titles Act and other related laws. The law applicable to hearing before such officials is governed by article 42 of the Constitution. It states,

‘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.’

[35] In my view articles 28 (1) and 44 (c) of the Constitution do not apply to hearings before administrative officials. Such hearings are governed by article 42 and when a person affected by such decision applies to a competent court to deal with such decision then the court to which he applies must comply with the requirements of articles 28 (1) and (44 (c) of the Constitution.

[36] Article 28 (1) of the Constitution provides,

‘In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law’

[37] Article 44(c) of the Constitution provides.

‘Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the right to fair hearing’.

[38] It is clear the Constitution guarantees the right to a fair hearing to a person appearing before a court or tribunal. Under the impugned section the proceedings before the Commissioner, Land Registration are not before a court of law or tribunal. Such proceedings are before an administrative official. In which case recourse must be had to article 42 of the Constitution, which states,

‘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.’

[39] The hearing of the Commissioner, Land Registration, under the impugned provisions must comply with the above provisions which protect any person affected by those proceedings and decisions made in relation thereto. Recourse is available to court to challenge any such decisions.

[40] For the foregoing reasons, I do not find that Articles 28(1) and 44(c) of the Constitution are applicable to hearings before the Commissioner for Land Registration. In the result no contravention of the same arises. Neither are the impugned sections of the Land Act inconsistent with the said articles of the Constitution.

Issue No. 3: Whether the impugned sections violate and contravene Articles 21 of the Constitution

[41] The petitioner also complains that the impugned section contravenes article 21 (1) of the Constitution in so far as it gives the respondent powers to issue land titles and cancel the same without prior compensation to the victims and no action is taken against the official responsible for the aforesaid issuance.

[42] Counsel for the respondent contended that the powers of the registrar to cancel titles issued in error, illegally or wrongfully applies to all citizens affected. He argued that the petitioner did not illustrate the class or group

affected by the impugned provision He therefore concluded that the impugned provisions do not contravene article 21 of the Constitution. Article 21 of the Constitution provides,

‘All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law’.

[43] The petitioner in the supporting affidavit does not adduce any evidence to support the discrimination of the class of ‘people’ and no demonstration of how they are discriminated against by the impugned provision was made out in the petition.

[44] I would answer this issue in the negative.


[45] As all the issues have been answered in the negative I would dismiss this petition.

[46] As the matter under consideration is a matter of public interest that helps to clarify the law I would not consider it appropriate to issue an order for costs against the unsuccessful party.

Decision

[47] As Musoke, Madrama, Mugenyi & Gashirabake, JJCC, agree this petition is dismissed with no order as to costs.

Signed, dated and delivered at Kampala this 30th day of Feb 2023


Fredrick Egonda-Ntende
Justice of the Constitutional Court

**THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 03 OF 2019**

CITIZENS' CONCERN AFRICA:.....PETITIONER

VERSUS

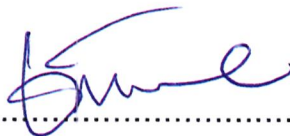
ATTORNEY GENERAL:.....RESPONDENT

**CORAM: HON. MR. JUSTICE FREDRICK EGONDA-NTENDE, JCC
HON. LADY JUSTICE ELIZABETH MUSOKE, JCC
HON. MR. JUSTICE CHRISTOPHER MADRAMA, JCC
HON. LADY JUSTICE MONICA K. MUGENYI, JCC
HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JCC**

JUDGMENT OF ELIZABETH MUSOKE, JCC

I have had the advantage of reading in draft the judgment of my learned brother Egonda-Ntende, JCC. For the reasons he has given therein I agree with him that this Petition should be dismissed with no order as to costs.

Dated at Kampala this 20th day of Feb 2023.



Elizabeth Musoke

Justice of the Constitutional Court

THE REPUBLIC OF UGANDA,
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
(CORAM; EGONDA NTENDE, MUSOKE, MADRAMA, MUGENYI,
GASHIRABAKE, JJCC/JJCA)

CONSTITUTIONAL PETITION NO. 03 OF 2019

CITIZENS' CONCERN AFRICA} PETITIONER

VERSUS

ATTORNEY GENERAL} RESPONDENT

JUDGMENT OF JUSTICE CHRISTOPHER MADRAMA IZAMA, JCC

I have read in draft the Judgment of my learned brother Hon. Mr. Justice Fredrick Egonda – Ntende JCC.

I concur with the Judgment and the proposed orders therein and I have nothing useful to add.

Dated at Kampala the 20th day of Feb 2023



Christopher Madrama Izama

Justice Constitutional Court



THE REPUBLIC OF UGANDA

**IN THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA**

**CORAM EGONDA NTENDE, MUSOKE, MADRAMA, MUGENYI, GASHIRABAKE
JCC**

CONSTITUTIONAL PETITION 03 OF 2019

CITIZENS' CONCERN AFRICA PETITIONER

AND

ATTORNEY GENERAL RESPONDENT

JUDGMENT OF MONICA K. MUGENYI, JCC

1. I have had the benefit of reading in draft the judgment of Hon. Justice F. Egonda - Ntende, JCC in respect of this Petition.
2. I agree with the conclusions and orders issued.

Dated and delivered at Kampala this 20th day of Feb, 2023

Monica K. Mugenyi

Monica K. Mugenyi

Justice of the Constitutional Court

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

*[Coram: Egonda-Ntende, Musoke, Madrama, Mugenyi &
Gashirabake, JJCC]*

CONSTITUTIONAL PETITION NO. 03 OF 2019

CITIZEN'S CONCERN AFRICA:.....PETITIONER

VERSUS

THE ATTORNEY GENERAL:.....RESPONDENT

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JA/JCC

I have had the benefit of reading in draft the judgment prepared by my learned brother, Hon. Justice Egonda-Ntende, JA/JCC. I concur with the judgment and have nothing useful to add.

Dated at Kampala this^{90th} Day of^{Feb}.....2023.

.....

Christopher Gashirabake
JUSTICE OF THE CONSTITUTIONAL COURT

