**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF AT MBARARA**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF THE JUDICATURE (JUDICIAL REVIEW) RULES, 2009**

**MISCELLANEOUS CAUSE NO. 0038 OF 2012**

1. Taremwa Kamishani Thomas
2. Rugoora Katarinyeba
3. Stephen Sabiiti
4. Baguma Patrick
5. Rev. Canon Herbert Begumanya
6. Turyakira Osbert
7. Rubahamya Magambo
8. Arinaitwe Humphrey
9. Dr. Nathan Ndyanabangi :::::::::::::::::::::::::::::: APPLICANTS

**VERSUS**

1. The Attorney General
2. Uganda National Roads Authority
3. Reynolds Construction Company (U) Ltd. (RCC) ::::::::::::::::::::::::::::::RESPONDENTS

**BEFORE HON.MR. JUSTICE BASHAIJA K. ANDREW**

**RULING**

At the commencement of the hearing Mr. Ndibarema Mwebaze, Counsel for the 1st Respondent, raised two preliminary objections. Firstly, that in this suit a representative order was obtained for nine people to represent numerous others, but only two affidavits, of the 8th and 9th Applicants, have been filed in support of the application. That the two are not competent to swear on behalf of the rest because the representative order is in respect of nine.

In addition, counsel submitted that the two do not show in what capacity they swear on behalf of the Applicants, which is irregular. Counsel relied on the case of ***Makerere University v. St. Mark Education Institute &O'rs, H.C. Civ. Suit No. 378 of 1993,*** to the effect that where there is no authority to swear on behalf of the others, the affidavit is defective. Counsel also relied on the case of ***Edrisa Mutaasa &Or's v.IGG, Lyantonde District Administration & An'or, H.C. Misc. Cause No. 06 of 2010;*** to buttress his contention. Counsel maintained that the application is incurably defective and should be struck off.

The second objection is that the application is time barred. That the 9th Applicant, Dr. Ndyanabangyi, swears (in paragraph 7 of his affidavit) that in 2011 he pursued his claim for compensation and found the Respondents in breach and *ultra-vires* their powers. According to the Respondents this is when the cause of action arose. The Applicants brought this application in March 2012 approximately nine months after the cause of action arose, which is after the time limit stipulated under the ***Judicature (Judicial Review) Rules, 2009,*** specifically ***R.5 (1)*** where the time limit prescribed is only three months. Counsel submitted that the Rule is mandatory and there was no extension of time, hence this application is bad in law and should be struck off.

Mr. Munanura Andrew Counsel for the 2nd Respondent added another ground of objection that the Applicants seek to vindicate their rights, which should have been by way of an ordinary suit, not by Judicial Review. Counsel cited ***Uganda Taxi Operators and Drivers Association v. Kampala Capital City Authority & A'nor, H.C Misc. Appl. No. 137 of 2011,*** to the effect that the scope of Judicial Review is supervisory in nature, and not to vindicate the rights of parties. Further, that in this application the parties have not attached evidence of ownership of the land for which they claim compensation as theirs. Counsel also prayed that application be struck out with costs.

Mr. Walubiri Peter, Counsel for the Applicants, responded that the objections have no merit and should be dismissed with costs. Regarding the objection that Arinaitwe and Dr. Ndyanabangyi (8th and 9th Applicants respectively) had no authority, Counsel submitted the two obtained a representative order issued in ***Misc. Application No. 37 of 2012*** which is sufficient authority for them to file the application. The authority implicitly allows them to file on their own behalf and on behalf of the other over 5000 people. It was a mandate given to them by court; not only for the nine but for the over 5000 people.

Counsel referred to paragraph 1 of the 8th and 9th Applicants' Affidavits, which disclose the capacity in which they swear the affidavits. For instance, the 9th Applicant in paragraph 1 of his affidavit swears that he is a duly nominated representative and swears in that capacity, and in paragraph 15 thereof, he also states that he is swearing the affidavit in a representative capacity for over 5000 people.

Counsel distinguished the case of ***Makerere University v. St. Mark Education Institute (supra)*** in that it dealt specifically with a person who swore the affidavit without authority, and it was not stated in what capacity the applicant was swearing. Similarly, the case of ***Edirisa Mutaasa v. IGG (supra)*** was distinguished in that it was not a representative suit.

Mr. Walubiri went on to argue that in a representative suit a person swears on his/her own behalf and on behalf of others he/she represents; and if it is not a representative suit one needs the authority of others. The representative suit procedure is meant to "cure the evil" of having too many people putting in affidavits or appearance in court at the same time.

Regarding whether the matter is time barred, Counsel submitted that it was not. It is the "taking possession" of the Applicants' land before payment of a fair and adequate compensation that constitutes the basis of the application. The 8th Applicant swears (in paragraph 4 of his affidavit) that his land must be or will be affected together with that of other people whose land lies on the road, and is not saying his land has been taken over by the Respondents, but that there is imminent threat to do so.

In paragraph 11 of his affidavit, the 8thApplicant states that the threat became real especially when he saw the 2nd Respondent start to grade at Rwentobo in Ntungamo in March 2012. He states, in paragraph 13 of his affidavit, that the process should not continue as the evidence which is the basis of the compensation will be destroyed. Similarly in paragraph 15 of his affidavit the 9th Applicant expresses similar fear on behalf of other 5000 people. Counsel maintained that the illegality complained of - the taking possession of the land – occurred in March 2012, and is well within time.

Counsel went to submit that what happened before March 2012 was preparation by Respondents to commit illegality, and it would be premature for the Applicants to come to court. It was in March 2012 when the Respondent moved to take possession that the imminent threat became real, and the Applicants came to court and got an Interim Order. Counsel further argued that the

project will take several years, and that it would require each of the 5000 to file the suit as and when the road reaches their land, which would only create unnecessary multiplicity of suits.

Regarding the issue that the Application seeks to vindicate rights and should be by way of an ordinary suit, Counsel submitted that the Applicants are seeking court to inquire into the process of the acquisition of land by Respondents for road construction. That the issue is whether the acquisition is being done in accordance with the requirements of the Constitution, which provides that compensation be paid before acquisition.

Further, that the orders sought are, firstly, an injunction so that the Applicants' land is not taken before being demarcated, valued and compensated before the road project goes on. The second remedy sought is for inquiry into the valuation process for compensation. The third order sought is for mandamus to compel the authorities to comply with the procedure. The fourth order sought is that land should be surveyed and properly acquired before it is taken.

Counsel argued that the Applicants are not in court to be declared owners of the land, but to seek that the process of acquisition be complied with, and that that is within the supervisory mandate of the High Court, and does not require 5000 suits in the ordinary manner.

In rejoinder Mr. Ndibarema argued that it was not enough for the 8th and 9th Applicants simply to swear that they represent the rest and were nominated when there is no proof; and they do not disclose the capacity in which they took oath. Counsel maintained that the case of ***Makerere University v. St. Mark Education Institute (supra)*** is applicable because for a party to say he/she was nominated when there is no proof is not enough. To that extent Counsel was of the strong view that the 8th and 9th Applicants cannot usurp the powers of the other seven.

Further, that the case of ***Edrisa Mutaasa*** (supra) is also applicable in that it is an application for judicial review, and there was a representative order from which the party departed. Authority from the others was needed, and since it was lacking there was a defect.

Counsel further reiterated that ***Rule 5 (1(supra))*** is mandatory and that the instant application was filed in breach and is time barred. Counsel for the 2nd Respondent also reiterated the argument that the application for judicial review is not a proper one in this suit because there is an alternative remedy of an ordinary suit, and that prerogative orders should be saved for their purpose and should not be abused.

Further that ***Article 26 (supra)*** deals with ownership of land, which is in issue, and there is no proof of ownership by the Applicants on record. Counsel Mr. Tushabe Grace added that ***Article 26(supra)*** prescribes rights that can be vindicated not adjudicated over in judicial review. Counsel Mr. Ndyagambaki also added that paragraph 6 of the Affidavit of Cameo shows that the issue of compensation arose in May 2011 and the 3rd Respondent took possession in August 2011, and therefore, the cause of action is compensation, and issues of compensation do not come under the ambit of ***Section 36*** of the ***Judicature Act (Cap.13)***.

The objections raised and the responses thereto, as I appreciated them, raise three major issues. They are:-

***(i) Whether the 8th and 9th Applicants have capacity/authority to swear on behalf of the rest named in the representative order and the other 5000.***

***(ii) Whether the suit is time barred***

***(iii) Whether Judicial Review is the proper procedure to adopt in this case***.

***Order 1 Rules 8 (1) Civil Procedure Rules*** which governs the procedure for representative suits states as follows:-

> ***"Where there are numerous persons having the same interest in one suit, one or more of such persons may, with permission of the court sue or be sued, or may defend in such suit, on behalf of or for the benefit of all persons so interested. But the court shall in such case give notice of the institution of the suit to all such persons either by personal service or where from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the court in each case may direct."***

The reading of the above provision clearly shows that in a representative suit, what is required as authority is an order of court for one or more persons to sue or defend on behalf of all in the same interest. I could not read into the provision any requirement that the rest or all on whose behalf the representative action is taken should give permission or authority to the representative. Authority of such a representative is directly derived from the order by the court, and the parties so represented need not to give any further authority.

***Order 1 Rule 8(1) CPR*** is a rule of convenience prescribing conditions upon which such persons when not made parties to a suit may still be bound by the proceedings therein. The question which may arise is in case where a person is made party to a suit without his/her authority or permission. ***Order 1 Rule 10 (2)(supra)*** provides a remedy that court may at any stage of the proceedings, either upon or without the application of either party, order the name of such a party to be struck out.

In the instant application, the Applicants obtained the representative order to represent the other over 5000. Notice was duly served on the other Applicants as per the list in the ***"ORUMURI"*** Newspaper of March 19 -25, 2012. To my mind the prescribed procedure for a representative action was duly complied with. This is as far as the nine Applicants named in ***Misc. Application No. 37 of 2012*** are concerned.

Regarding point that the 8th and 9th Applicants have usurped the powers of the remaining seven named in the order, I believe that that argument is simply misleading for two main reasons. Firstly, the two Applicants, apart from being parties to the Application, are also witnesses and their affidavits constitute evidence, which is subject to the rules of evidence under the ***Evidence Act (Cap 6). Section 133*** thereof, stipulates that no particular number of witnesses shall in any case be required for proof of any fact. Consequently, it would be futile to require that all the nine witnesses put in affidavits repeating same thing prove the fact in issue. It is not the "law of large numbers".

Secondly, the relevant terms of the representative order are clear that:-

> ***"Leave has been granted to the Applicants to sue by way of the representative action on their behalf and behalf of and/or for the benefit of numerous persons---"***

The word "Applicants" as used in the order must be construed to mean and include some and/or all of them named in the order; and the 8th and 9th Applicants are such Applicants named to whom leave was granted. To construe the word to mean "all the Applicants" would lead to absurdity, as to do so would only serve to proliferate the record with multiple affidavits saying the same thing. In such a case the mischief intended to be cured by representative actions would be in vain and the purpose of ***Order 1 Rules 8 (1) (CPR)*** would be lost. All or any of the nine Applicants were vested with same and equal authority to represent themselves and all the others

in the same interest, and could swear affidavits in that capacity. To that extent there is no usurping of the power of the other seven by the 8th and 9th Applicants.

I have had occasion to read the cases of ***Makere University v. St Mark Education Institute (supra); and Edirisa Mutaasa & A' nor v. IGG & Lyantonde D.C (supra).*** In the former, the affidavit was defective by reason of being sworn on behalf of another without showing that he had the authority of the other. The applicants were joined as co-defendants but there was no representative order. Had there been one, I believe the learned trial judge would have held otherwise. In the latter case, one of the objections raised, which is related to the instant case, was raised by the same counsel now representing the 1st Respondent. It was that the applicant could not affirm to an affidavit on behalf of the other applicants when it was not a representative suit. Clearly, the objection was raised out of the recognition that a representative order is sufficient authority for a party to swear on his/her own behalf and on behalf of the others.

Let me state clearly that where the party obtains a representative order it is sufficient authority to represent himself/ herself and others in the same interest and he or she can swear an affidavit on his or her own behalf and on behalf of the others represented. Conversely, where a party swears an affidavit on his or her own behalf and on behalf of the others without the others' authority when it is not a representative suit, the affidavit becomes defective for want of authority.

A court order to a party in a representative suit is a mandate for the party to represent itself and the others even without having to seek further authority from the others represented. But where there is no court order and a party swears affidavit on his/ her own behalf and on behalf of others, there is need to obtain the others' authority to prove the capacity in which he or she swears the affidavit. This court has held so in ***Vincent Kafero & 11 Or's v. Attorney General H.C. Misc. Application. No 48 of 2012;*** and has not departed from that position.

On the issue of whether the application is time barred, there is need to first determine the cause of action in this particular case, since all parties do not seem to agree on what it is. I believe that once the scope of the cause of action has been properly identified, it is be possible to determine precisely the time frame within which it arose.

Counsel for the Respondents advanced the view that the cause of action is based on compensation, and if that is the case, the suit would be time barred under ***Rule5 (1) (supra)***. If, on the other hand, the cause of action is constituted by the "taking possession" of the land, as Mr.

Walubiri put it, then the suit would be in time since the facts constituting it obtained in March 2012.

To determine the nature of the cause of action, in my view, one must look beyond the mere legal definition to the reliefs sought. The nature of remedies sought invariably translates directly from the nature of the cause of action. It follows logically that a particular type of cause of action correspondingly relates to the nature of the reliefs sought, and the reliefs sought for a given cause of action are indicators of the nature of the cause of action.

In the instant case, the remedies sought are prerogative orders for a temporary injunction, among others, to forestall an impending taking possession of the Applicant's land by the Respondents for a road project before payment of compensation. My understanding of the procedure adopted is that the Applicants are not in court to assert ownership of land, which would, *inter alia*, entail seeking declaratory orders as to their proprietary rights; and that cannot be a remedy under Judicial Review. Rather, they are in court to forestall an impending action by the Respondent so that due inquiry can be made into the processes of acquisition of land.

As I understand it, acquisition is a process. More so, when it concerns the public body, it is specifically regulated by law, and primarily the *Constitution.* ***Article 26 (1)(supra)*** which was variously referred to by both sides. The Article encapsulates the *grand principle* which underlies the procedure for acquisition of land by Government. Besides the procedure, it lays down the fundamentals and preconditions that must be complied with. Specifically, in ***clause (2)*** thereof. it stipulates that:-**.**

> ***(2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where 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."***

It would appear correct that the right of a party to ownership of land is explicitly recognized by Government; for which a procedure was put in place under ***Article 26(2) (supra)*** before such a

right can be interfered with. It is within the province of this court to inquire into the legality, or otherwise, of such a process under ***Section 36 Judicature Act (supra)*** to ensure that legality and procedural propriety has been complied with. I believe this puts to rest the issue regarding the procedure of this application by way of Judicial Review as opposed to the ordinary suit.

Going back to the issue of the nature of the cause of action that too, I believe has partly been explained. The Applicants are not in court to assert their proprietary rights, but to forestall the looming threat of taking of possession of their land by the Respondents without following the due process of the law. The question to ask is; when did the impending threat manifest for the Applicants to come to court? Certainly it cannot be in August 2011 as per Shay Cameo's affidavit (paragraph 6) when the site is said to have been effectively handed over to 3rd Respondent. The Applicants were not privy to the dealings of the Respondents. Again it could not be before August 2011 when the 3rd Respondent is said to have commenced on preparatory works for the project. Preparations could not be a mile-stone to determine the time the cause of action arose, for even now when preparations have been or are being done, there are large swaths of land of the Applicants along the road which have not yet been touched by the Respondents.

I agree with submissions of Counsel for the Applicants that the act complained of is the taking possession of the lands by the Respondents, which became apparent in March 2012. As a matter of fact, the affidavit of Arinaitwe (paragraph 11) is precise that the threat of taking possession manifested when the Respondent started to grade Rwentobo in Ntungamo District in March 2012. He implores court (in paragraph 13) to forestall the process so that evidence may not be destroyed.

I am alive to the fact that the 8th and 9th Applicants had before the March 2012 contacted parties associated with or linked to the Respondents for compensation. Arinaitwe's Affidavit (paragraphs 6,7,8,9 and 10) confirms that the two Applicants and the other 52 they represented only "heard" of the road project. Based on that rumor, they feared the possibility of takeover of their land before compensation. They approached the said parties, but it is not known what became of the interface between them, if any. The Applicants only got to know of the real threat of the taking of possession of their land in March 2012, when the Respondents' explicit actions mentioned earlier manifested.

The earlier contact between Applicants and Respondents or their agents, in my view, did not constitute to milestone to determine the time for the cause of action. Similarly it did not amount to a trade - off of the Applicants' right to enforce compliance with procedure in acquisition of land by Respondents when the threat became real in March 2012. Before that, it would certainly have been premature for the Applicants to bring action when there was no apparent threat to their land. I find that this application is not time barred. The objections are overruled and dismissed with costs.

BASHAIJA K. ANDREW

JUDGE

06/06/2012.

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