THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

MISCELLANEOUS CAUSE NO. 0015 OF 2013

1. **ODONGPING PAUL**
2. **OKOT BALMOI**
3. **DWOKA JOHN MAKAMBO**
4. **ODONG SIMON::APPLICANTS**

VERSUS

1. **AMURU DISTRICT LAND BOARD**
2. **OMAYA JOHN**
3. **EMMANUEL OGIK**
4. **ONONO MICHAEL**
5. **LUCY AKETO OGIK:::RESPONDENTS**

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

RULING

This is an unusual ruling on preliminary points of law coming after eleven years of the filing of an application for judicial review, human rights enforcement, and review, in a single action. I say so because whereas this Court Circuit has never been without Judicial Officers and legal practitioners, the Application which was lodged in February, 2013, appears to have fallen through the cracks. The parties appear to have given up on the matter as there is nothing to show that they rigorously followed up the matter with the court. On the court record is a letter dated 02. 11. 2018, received at the Registry of Court on 07.11. 2018 in which

learned counsel for the Applicants, Okello-Oryem & Co. Advocates was notifying court that the learned Judge of the Court at the time had ordered parties to file written submission on three preliminary points of law. The objections were raised by the Respondents' counsel, M.B Gimara Advocates (as it then was). The parties complied with the court directive and lodged written submissions. In their letter to court, Okello-Oryem & Co. Advocates expressed frustration that no ruling was forthcoming from court. Learned counsel added, the case file was irretrievably lost. Apparently when the matter was raised with court on 30. 10.2018, court directed for the opening of a duplicate file. Learned counsel for the Applicants indicated by his letter that, he was supplying the original copies of the pleadings and written submissions to enable court create a duplicate file. Counsel prayed that the duplicate file be created and the Ruling be delivered. He copied his request to counsel for the Respondents. That was the last documented follow-up of the matter by the Applicants.

This court was notified about the existence of the Application in late October 2023 and court duly fixed it for mention on 25. 10. 2023. Mr. Omoloi Ivan of M/s Okello Oryem & Co. Advocates appeared for the Applicants. No counsel appeared for the Respondents. The litigants were not present before court. Mr. Omoloi informed court about the pending ruling on the preliminary points of law and that both sides had long filed submissions in the year 2013. Having been satisfied that both submissions were on record, and were duly filed in June and July, 2013, respectively, court fixed the matter for this ruling.

The factual matrix in which the controversy arises is contained in the averments of the Applicants. There is no opposing affidavit on record. Court cannot with certainty state whether or not a replying affidavit was ever lodged given the fact that the original file got lost. However, from the Notice of Motion and the affidavit in support, the dispute can be summarized below;

The Applicants and 218 other persons whom the Applicants sought to represent in the present action, are alleged to be customary owners of land at Gem Village, Paicho Parish, Atiak Sub County, Amuru District. The land is said to measure 7,800 hectares (hereafter, the suit land). The 2nd to 6th Respondents applied for conversion of customary tenure of the suit land to freehold tenure from the 1st Respondent Land Board. The Application for conversion was initially rejected during the 6th Board Meeting of 24.08.2012 but on review during the 7th Board Meeting, it was granted by a vote of 4 to 1 under Minute ADLB/7(5) of 18. 10. 2012. The Board decision was communicated to the 2nd to 6th Respondents who appear to be family members under the head of the 2nd Respondent. The Board decision was communicated by the Secretary of the 1st Respondent. The Secretary advised the 2nd to 6th Respondents that they could survey the suit land and have their certificate of title processed. It is not known to court whether that advice was actioned.

The Applicants were aggrieved with the decision of the 1st Respondent. They contend that they and the 218 other persons, were excluded. They thus averred

that the 2nd to 6th Respondents were (as at the date of suing) already surveying the suit land and processing certificate of title to the exclusion of the Applicants and 218 others. They argued, the Applicants and 218 others would be deprived of the suit land which is their customary land from which they derive their livelihoods. Concluding their averments, the Applicants pleaded that the Application has been preferred under article 50 of the Constitution of Uganda, 1995 as well as a "representative suit" pursuant to order of the Deputy Registrar of this court. The Deputy Registrar is said to have issued a representative order in Misc. Cause No. 132 of 2012 for an on behalf of the Applicants and 218 others.

The 1st, 2nd, and 4th Applicants swore affidavits in support. They all deposed that they are elders from Atiak Pacilo who were brought up and raised from there (Atiak Pacilo). They learnt about how the 2nd to 6th Respondents applied to convert their customary land into freehold to the exclusion of the Applicants and others. They were aware a meeting was called by the 1st Respondent before considering the Application for conversion. In particular, the 2nd Applicant (Okot Balmoi) attended a meeting of the Board with the community in which he gave a detailed background to the suit land. He asserts that the suit land has been a communal hunting ground. It is located in Kaladima Village, Bibia Parish in the North, Akononguti/ Gunya Village in the South, River Taya in the East, and Abalokodi Village in the Far East. The suit land (Gem Area) falls under Kaladima Village. The 2nd Applicant further deposed that, the father of the 2nd Respondent and two others, moved to the area (the suit land) while fleeing from the regime

of Idi Amin Dada (the then President of the Republic of Uganda from 1971- April 1979) to graze cattle. He further deposed that, the then Rwot (Chief) of Atiak and the community used the area as a resting camp while on hunting expeditions in the near-by area. The 2nd Applicant asserted that, the 2nd Respondent and his family have never publicly made known their interests in the Gem area except perhaps, to a few people, mainly children and relatives, in order to deliberately sideline other genuine stakeholders interested in the Gem area. He further deposed that, the suit land is far in excess of the actual size of the Gem area which is located on hilly area not exceeding 150 areas. The area claimed by the 2nd to 6th Respondents is unrealistic and do not reflect the actual borders of Gem. He claims, the 2nd to 6th Respondents are trying to use the Gem area to acquire large chunks of empty community land in Pacilo, Kaladima, Gunya, Akononguti and part of Abalokodi Sub Parishes. The 2nd Applicant concludes, the grant of freehold interests in the suit land to the 2nd to 6th Respondents by the 1st Respondent, is unconstitutional, illegal, unlawful, biased, unjustified, and contrary to the principles of natural justice, and thus null and void. The 2nd Applicant attaches to his affidavit, a copy of the letter by the 1st Respondent in which the 2nd to 6th Respondents were being notified of the positive decision of the District Land Board.

The first Applicant (Odongping Paul) deposed that, he had noted from the Application of the 2nd to 6th Respondents that, the same was for a huge chunk of land and yet the Acholi people do not traditionally own such huge chunks of

land as a family. That, the District Land Board sought to meet the elders of the area where the suit land is, and verify the claims of customary ownership as asserted by the 2nd to 6th Respondents, but the Board found no people at the scheduled venue. Eventually, the Board met the 2nd to 6th Respondents at the home of the 2nd Respondent but there were no persons knowledgeable about the Acholi land Customs or ownership of the suit land. The District Land Board allegedly confirmed that the 2nd to 6th Respondents have never been in occupation of the suit land and thus could not claim customary ownership. It rejected the application at the time. However, the Board subsequently reviewed its decision and granted the Application by a vote of 4 to 1. The 1st Applicant attaches to his affidavit, an affidavit of the then Chairman of Nwoya District Land Board Okwonga Alex sworn in respect of a suit by the 2nd to 6th Respondents against the 1st Respondent (Miscellaneous Cause No. 100 of 2012 which apparently followed the initial Board decision). The 1st Applicant also attaches the Minutes of the Board Meetings.

The 4th Applicant (Odong Simon) deposed that, the people of Atiak learnt with shock that the 2nd to 6th Respondents were making attempts to convert their land to freehold to the exclusion of the Applicants and others. Therefore, several meetings were held. On the 3rd and 5th September, 2012, community meetings were held to discuss the issues regarding the suit land and it was confirmed that, the suit land was not owned by the 2nd to 6th Respondents. The 4th Applicant attaches copies of the Minutes of the community meetings. He concludes that, if

the 1st Respondent Board had met the communities who customarily own and use the suit land, it would not have approved the Application of the 2nd to 6th Respondents. This Court, however, notes that, the attached Minutes do not show that the Respondents attended the mentioned community meetings.

Furthermore, as earlier noted, there is no affidavit in Reply and in opposition filed on record of court. However, court sees no prejudice to the Respondents who raised the preliminary objections. In any case, the determination of the points of law will not require any affidavit evidence of the Respondents, as court is able to rely on the Applicants' pleadings which is sufficient in the circumstances.

The preliminary points of law

In his arguments, learned counsel for the Respondents objected to the Application on three grounds, namely;

i) The Applicants purport to represent other persons without obtaining a representative order from court, and without giving notice to the persons sought to be represented, contrary to the provision of Order 1 rule 8 of the Civil Procedure Rules (CPR).

ii) The Applicants have not demonstrated locus to bring the application to enable court exercise supervisory jurisdiction.

iii) The Application is an abuse of court process.

Relying on the provision of O. 1 rule 8 of the CPR, learned counsel for the Respondents argued that, permission from court was not sought by the Applicants. He also argued that, pursuant to rule 8 of O.1, the Applicants should have sought court permission and should have given notice to the persons sought to be represented, either by personal service or because of their large numbers, through public advertisement. Learned Counsel emphasized that it was the duty of court to give notice and to direct on how the notice ought to be served on represented persons. Learned Counsel cited the persuasive Tanzanian case of ***K.J Motors & 3 others Vs. Richard Kishamba & others, Civil Appeal No. 74 of 1999***, for the proposition that the requirement for leave in a representative suit is fundamental and is not a mere technicality. Counsel added that, the rationale for seeking leave is clear, for instance, it could turn out that the persons on whose behalf a representative suit is sought to be lodged, could be dead, non-existent, or fictitious, or the person seeking to represent others might purport to sue on behalf of persons who have not authorized him to do so. Thus, counsel pressed, if not checked, allowing the representatives to proceed when they have not notified the others, could lead to undesirable consequences. Learned counsel wound up on the first objection by claiming that the first Applicant (Odongping Paul) and the 3rd Applicant (Dwoka John Makambo) even deposed affidavits to the effect that they were never consulted and did not

instruct Okello- Oryem & Co. Advocates to institute the present suit. With respect, this court was unable to verify the claims as the affidavits alleged to have been sworn by the two Applicants are not on court record.

In his response, learned counsel for the Respondents contended that, leave was sought and was granted by the Deputy Registrar of this court. He attached a copy of the court Order. Regarding notice, counsel submitted that the same is not mandatory. Learned counsel also contended that, the learned Deputy Registrar exercised his discretion not to order for notification of the representative order on those sought to be represented and that explains why the order is silent about it. Learned Counsel invoked article 126 (2) (e) of the Constitution of Uganda, 1995 regarding the want of notification, contending, the lack of notice is a technicality that this court ought to ignore. He also argued that the requirement to give notice only becomes mandatory where court orders for it. Counsel distinguished the precedent in ***Ibrahim Buwembo & others Vs. UTODA Ltd, HCCS No. 664 of 2003*** (Kiryabwire, J, as he then was) from the instant case, reasoning that, in the case at hand, the Deputy Registrar of court did not direct for the notification of the persons sought to be represented.

Resolution of the first point of law

On perusal of the duplicate file, this court noted that a copy of the representative order issued by the Deputy Registrar of court is on court record. The order was issued on 29 January, 2013. The order is of course silent on the need for service or notification on the persons sought to be represented by the Applicants. Thus it is my respectful opinion, that the omission by the learned Deputy Registrar to direct on the service of the represented persons, constitute an error of law. I am of that opinion because it is the duty of court to direct service at the cost of the Applicants. The duty is mandatory at all times. The mandatory nature of the court's duty have been stated in several decisions of courts both here and elsewhere, and in the writings of celebrated authors on the subject of Civil Procedure. See: ***Ibrahim Buwembo & others Vs. UTODA Ltd, HCCS No. 664 of 2003 (supra); Kasozi Joseph & 50,003 others Vs. UMEME (U) Ltd, HCCS No. 188 of 2010; Yusuf Ajij Shaikh Vs. Special Land Acquisition Officer AIR 1994 Bom 327; Mulla, Indian Code of Civil Procedure, 16th Ed.***

In the instant case, therefore, the representative order was sought to enable the Applicants pursue an action in judicial review. Whereas this appears strange, however, according to Mulla (supra) at p. 1520, the nature of the claim is not always very material in considering whether a suit could be filed in a simplified procedure of O.1 rule 8 of the CPR as what is material is the existence of a community of interest among the persons on whose behalf or against whom the suit is instituted. To the learned editors of Mulla, that is the governing factor for

the adoption of the procedure of representative action. What is material is thus that, the interests of the persons sought to be represented ought to be well taken care of in a bonafide manner. Any clash of interests between the representative and the persons concerned or where due to collusion or for any other reason, the representative neglects out of malintent to defend the case, he cannot be considered a representative. According to Mulla, it appears the power of courts under rule 8 of the CPR cannot be exercised in matters of public interest litigation. See: **SP Curaraja Vs. the Exeeutive Member, Karantaka Industrial Area Development Board, AIR 1998 Kant 223 (DB)**. In Uganda, this view seems to be supported by case law as public interest litigation is supported by article 50 (2) of the Constitution, 1995, where the requirements of O.1 rule 8 of the CPR, is not applicable, that is, the sameness of interests. See: ***The Environment Action Net Work Ltd Vs. the Attorney General & National Environment Management Authority, Misc. Application No. 39 of 2001 (per Ntabgoba, PJ) at pp. 11-12***. Thus, although the editors of Mulla appear to suggest that representative suits are not applicable in writ proceedings (In India, this encompasses proceedings that take forms similar to constitutional petitions, and judicial review proceedings), in my view, the Rules regulating Judicial Review proceedings appear not to bar the would be Applicants in judicial review from being represented by others, although it is not clear how 'represented persons' would be able to prove their direct or sufficient interests, without first being made parties. It thus seems to me that, in reality, judicial review proceedings may not be appropriate where majority of persons are sought to be represented without

being made parties. Their direct or sufficient interests may not be easily proved. I, however, do not suggest I can conclusively discuss the matter in this ruling. In closing on the matter of principles, I can authoritatively state that the provisions of O.1 rule 8 CPR apply only if the parties are numerous; if they have the same interest; if the necessary permission of court is obtained; and if notice is given to persons sought to be represented.

I am thus of the considered opinion that the failure by the learned Deputy Registrar of this Court to direct by its order, on the service of the represented persons, did not stop the Applicants from effecting service on those persons. It was incumbent on the Applicants' counsel, as an officer of court who owes a duty to court, as well as to this clients, to ask the court to clarify on its order the moment the court went silent on the need for service. In my view, keeping quiet on an important matter of law and leaving the court to omit the same from its orders, with respect, cannot later be taken advantage of by the Applicants, to argue that, after all, the court did not require the Applicants to effect service of the representative order. Thus the claim that the omission was a mere technicality is devoid of legal basis and contrary to precedents. Of course the learned Deputy Registrar, with respect, ought to have been alive to the mandatory requirement of O.1 rule 8 of the CPR and the authorities on the matter. With respect, a court is presumed to be well versed with the basic law. The duty imposed on court to direct on the mode of service of the representative order, cannot be taken to have been an accidental slip on the part of the learned

Deputy Registrar. The purpose of notice is to safe guard the interests of the persons sought to be represented so that they do not suffer any prejudice. This is more especially since a decree passed by court in a representative suit is binding on all represented persons unless court otherwise orders. See: ***Dison Okumu & 7 Others Vs. Uganda Electricity Transmission Company Ltd & 6 others, Civil Appeal No. 18 of 2020 (SCU) (Per. Prof, Tibatemwa-Ekirikubinza, JSC).*** Therefore, the consequence of non-compliance with the mandatory provision of rule 8 of O.1 CPR is that the suit loses its representative character and cannot be allowed to be proceeded with as such. However, persons seeking to sue may be allowed to proceed with their action in their own right without asserting that it is a representative suit, and by excluding the persons they purport to represent. I am fortified in this view by the conclusion taken by this court in ***Ibrahim Buwembo & others Vs. UTODA Ltd, (supra)***; and ***Kasozi Joseph & 50,003 others Vs. UMEME (U) Ltd, (supra).*** In those cases, this court restricted the respective suits to the Plaintiffs. Court held that the persons sought to be represented would be excluded from the suits where they were not properly notified about its existence. I am in respectful agreement with the consistent approach of courts. I think the same is rooted in the nature of a representative action. A representative suit is lodged by a person or persons who first of all have right(s) to sue on their own without the others. The representative action only enables a party to represent many who have a common / same interest as his/hers. The representative is not forced to represent others so long as his/her action can still be launched without necessarily having to join other

persons. See: ***Surendra Kumar Vs. District Board, Nadiad AIR 1942 Cal. 360, 200 IC 314***. Thus, the provision of Order 1 rule 8 of the CPR presupposes that each one of the many persons, just as their representatives, may by himself/ herself, sue as of right. Therefore, since a representative is taken to have the right to sue in his or her own right, it means he/she can maintain the suit alone without the need to have the persons sought to be represented on board. The Principle of law, therefore, is that he who lacks a right to sue cannot be permitted to sue on behalf of others, and so, he who has a right to sue and has common/ same interest with others, may likewise with court's permission, sue on his own behalf and on behalf of the others. See: ***L Ramaseshiah Vs. M Ramayya, AIR 1957 AP 964;*** *and* ***Durge Dass Vs. Banaras Dev, AIR 1972 J & K 6***.

Given my analysis, I am, therefore, of the view that, since the Applicants did not serve the representative order on the 218 other persons they sought to represent in this suit, the 218 persons are not represented persons in the instant proceedings. The suit is thus not a representative one but the Applicants could proceed with it in their own right as the party suing. I, therefore, hold that the Applicants are the only parties to the proceedings. Accordingly, whatever order this court may make, shall not bind the 218 other persons in any way. Therefore, the suit cannot be dismissed simply because it has lost its representative character. The first preliminary point of law is accordingly resolved.

The second objection is that the Applicants have not demonstrated *locus standi* to bring the application in order for this court to exercise its supervisory jurisdiction. In addressing this objection, learned counsel for the Respondents relied on article 42 of the Constitution of Uganda, 1995 which requires that any person appearing before any administrative official or body has a right to be treated justly and fairly, and enjoys a right to appeal to a court of law in respect of any administrative decision taken against him/ her. Counsel paid deference to the persuasive decision in ***Chief Constable of North Wales Police Vs. Evans (1982) 3 All E.R 141 at 143 h to 144 a (Lord Hailsham L.C of St. Marylebone)*** for the proposition that the purpose of remedies (in judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected. Learned counsel argued that, having not appeared before the 1st Respondent Land Board, the Applicants cannot purport to challenge its decision by way of judicial review. Counsel contended, the Applicants thus lack *locus standi* for they cannot question a decision of a body before whom they never appeared.

In reply, it was submitted for the Respondents that, the objection regarding the lack of *locus standi* is misconceived. Learned counsel contended that article 42 of the Constitution of Uganda, 1995, and the quoted decision of Lord Hailsham LC, on the contrary, support the Applicants' *locus standi.* Learned counsel argued, the entire legal regime of judicial review is built around articles 28 (right

to a fair hearing) and 42 of the Constitution of Uganda, 1995. Thus, want of a fair hearing is one of the major grounds for judicial review, he asserted. Counsel further pressed that, the first Respondent (Amuru District Land Board) did not accord the Applicants a fair hearing before depriving them of the suit land, and before approving the 2nd to 6th Respondents application for freehold interest. Learned counsel asserted, ground two of the Notice of Motion sets out the point where the Applicants aver that the decision of the 1st Respondent was taken in violation of the principles of natural justice. Counsel cited the authority of ***Hon. Ocula Michael & 4 others Vs. Amuru District Land Board and 3 others, HCT- 02- CV- MA- 022 of 2009*** (Kasule, J, as he then was), to argue that, each of the Applicants has a *locus standi* under article 50 of the Constitution, 1995, to institute the suit. He also cited another similar decision of ***Hon. Ocula Michael & 4 others Vs. Amuru District Land Board and 3 others***, Misc. Application No. 126 of 2008 (Masalu Musene, J (RIP).) and submitted that, there, the court held that, the Applicants had properly moved court by way of judicial review when the Applicants averred that they had been deprived of customary land which was allocated to other persons by the District Land Board. Learned Counsel stretched his argument, claiming that, even in Misc. Application No. 126 of 2008 (*supra*), the learned Judge held that a suit can even be commenced by a letter.

To resolve the second point of law, first, I should point out that the Applicants learned counsel, with respect, was quite off the mark by his submission in

response. The authorities cited are clearly distinguishable from the instant matter. The decision by Kasule, J, (as he then was) was rendered in respect of a case brought purely under Article 50 (2) of the Constitution, 1995, for enforcement of human rights. There, Court noted that, pursuant to article 50 (2), the Applicant need not have the same interest with others whom they seek to represent. It thus found that, each of the applicants had *locus standi.* By its order, the court converted the proceedings by allowing the Applicants to pursue the case in a representative capacity although it had not been commenced as such. It also allowed the Applicants there, to serve the represented persons and the Respondents afresh. The authority is, therefore, different and I shall not comment on the propriety or otherwise of the court's approach to convert the nature of the action as hitherto commenced. While in the matter decided by Masalu Musene J, the court noted that, the issue of *locus standi* had already been dealt with by Kasule, J, and saw no point in deciding it again. So, the purported objection was not decided by the second court. Therefore, in the instant case, I note that, no counsel properly addressed the issue of standing of the Applicants in judicial review. I should point out that in judicial review, to have a standing, an applicant must have a <u>direct</u> or <u>sufficient interest</u> in a matter. Whereas the above requirement is now rooted in rule 3A of the Judicature (Judicial Review) (Amendment) Rules, 2019, which was not yet in place in 2013 when the present action commenced, I must say the principle was founded in common law and continue to be applied by our courts, hence case law. It is thus the jurisprudence that have largely informed the amendment of

the Judicial Review Rules in 2019. Subsequent court decisions have thus posited that, in assessing the interest of an applicant in judicial review, the interest should not be a subjective one but an objectively defined interest. Thus, strong feelings of the Applicant will not suffice. An Applicant for judicial review must, therefore, be able to point to something beyond mere concern with legality but to either a right or factual interest. See: ***Muhumuza Ben Vs. The AG & 2 Others, High Court Misc. Cause No. 212 of 2020 (Ssekaana, J.)***; ***Obol James Henry & 2 others Vs. Gulu University & another, High Court Misc. Cause No. 16 of 2022***.

The above decisions are of equal force because, the principles enunciated therein are old and were well established even as at the time the present action was being launched. Although founded on common law principles, the principles have since received codification, hence the Judicial Review Rules, as amended in 2019.

Therefore, from my perusal of the Motion, I have noted that the Applicants seek a declaration, among others, that they are customary owners of the suit land measuring 7,800 acres. They assert that, they customarily own the suit land. They further depose that, they are elders who were brought up and raised in Atiak Pacilo. The Applicants unfortunately make no clear deposition about how they come to claim customary interests in the suit land. Mere assertions in an affidavit evidence is not enough to prove a contested claim of customary land ownership. Proof of land ownership requires oral evidence which can only be

tested under the weight of cross examination, the greatest legal engine ever invented for testing the truth. Thus, whereas the Applicants claim that the 2nd to 6th Respondents are using their Application for Gem Area to claim more land beyond the Gem Area, that claim is not supported by cogent evidence at least for the moment. The Applicants make strong claims to the customary land in the Gem Area which have already been granted to the 2nd to 6th Respondents, after a community hearing. Thus to assail the affirmative decision of the Board which was made in favour of the 2nd to 6th Respondents, the Applicants ought to adduce cogent proof in a proper proceeding for determination of the ownership question. This requires rights' determination on merit by an ordinary suit. The present mode cannot achieve the desired result. Given my analysis, I would hold that, sufficient or direct interest of the Applicants, on the affidavit evidence alone, have not been well demonstrated for purposes of judicial review. I would accordingly uphold the objection although slightly for different reasons as canvassed. I would accordingly strike out the suit on this ground alone. It has been held that the object of the summary power to strike out a suit is to prevent parties from being harassed and put to expense by frivolous, vexatious or hopeless litigation. See: ***Murri Vs. Murri & another [1999]1 EA 212 (CAK)***.

The third and the final objection is that, the Application is an abuse of the court process. The Respondents' arguments are predicated on the view that, the Applicants purport to premise their case under article 50 of the Constitution of Uganda, 1995, which provide for enforcement of fundamental human rights. The

Applicants purport to enforce their right to property under article 26 and right to fair hearing before an administrative tribunal; under articles 28 and 42 of the Constitution. They also premise their Motion on the Judicial Review Rules, 2009, and at the same time, under Order 46 of the CPR for review of Decree or Orders of this Court. Learned Counsel contended, the procedure adopted being omnibus in nature, constitute an abuse of court process. Learned counsel cited authorities which, respectfully, I found not quite on point. Similarly, the Respondents' counsel argued and cited authorities which again, with respect, are not directly relevant.

In my opinion, a matter is said to be in abuse of court process where a party to litigation uses the judicial process for improper purpose. This view was well expressed by Stephen Musota, J (as he then was) in the case of ***Hon. Gerald K. Karuhanga & Kiiza Eron Vs. the AG & 2 others, Misc. Cause No. 060 of 2015***. Similar postulations are found in the decision of the apex court in ***Attorney General Vs. James Mark Kamoga & another, Civil Appeal No. 8 of 2004 (SCU) (per Mulenga, JSC (RIP);*** and in the High Court decision of ***Obol James Henry & 2 Others Vs. Gulu University & another, Misc. Cause No. 16 of 2022.***

In the case at hand, the procedures adopted by the Applicants are incompatible. The Applicants purport that their action is for enforcement of their rights under article 50 of the Constitution (and the rights of others) especially rights under

article 26, 28 and 42. At the same time, they coin the action as being judicial review suit under s.36 of the Judicature Act Cap 13 and Rules 3, 4, and 6 of the Judicature (Judicial Review) Rules, S.I 11 of 2009. They also purport that the suit is proceeding under the present Order 46 rules 5, 6 and 7 of the CPR (at the time O.46A rr. 5, 6 and 7 CPR) which concerns review of orders or decrees of the High Court. With the greatest respect to learned counsel for the Applicants, I find the course adopted to be mutually exclusive. First, pursuing a review under O.46 CPR is misconceived because there is no decree or order of this court that was passed against the Applicants with which they are aggrieved and which they now seek to be reviewed. Second, the enforcement of rights to property under article 26 of the Constitution by moving court within the purview of article 50 of the Constitution, is a private right enforcement, not tenable under judicial review which is purely a public law remedy and is concerned not with the merits of the decision but with the decision making process. In this case, it is clear that ownership is at issue and yet the Applicants wish to be declared owners of the suit land which has already been granted to the Respondents by a statutory body in the exercise of its constitutional and statutory powers accorded by article 241 of the Constitution, 1995, and section 59 of the Land Act Cap 227. Therefore, the present case cannot be appropriately adjudicated given the comingled proceedings. I, therefore, find that, by bringing the omnibus application, the Applicants have abused the court process. The kind of the abuse is very similar to that with which this court was faced with in the case of ***Seguya Hillary Innocent (acting through his recognized agent Male H. Mabirizi K.***

Kiwanuka) Vs. Attorney General, Misc. Cause No. 261 of 2019 in which Bashaija K. Andrew, J., in his usual captivating eloquence, expressed himself, thus:

"The Application is brought in an omnibus manner seeking for prerogative orders under judicial review, pursuant to section 36 of the Judicature Act Cap 13; at the same time as an application for enforcement of human rights pursuant to Article 50 of the Constitution as operationalized by the Human Rights Enforcement Act No. 18 of 2019. From the outset, it is clear that the convoluted manner of the application is such that the Applicant is pursuing judicial review and enforcement of his private rights at the same time, but seeks remedies in the alternative, just in the event that he does not succeed on one. To my mind, the above is akin to a fishing and game hunting expeditions, undertaken at the same time by one fisherman-cum hunter. Logic ought to inform him that he can only be in one place at a time; either in the lake fishing or in the forest hunting. Similar logic ought to inform him that he need not carry fishing gear when on hunting expedition or a hunting gear when on a fishing expedition. To insist on being in both places at the same time, would be ridiculous and rather futile. The analogy is pertinent to this application as the ruling will show."

I cannot agree more with the above wisdom. In the instant matter, the situation seems worse. The Applicants seek to move court using three different modes under one application which are legally incompatible and incapable of proper

adjudication. This court can not countenance such a practice which itself would be embarrassing. The Applicants cannot be allowed to sue in a manner they wish more so when their options flout the law. Whereas the Applicants assert lack of procedural hearing by Nwoya District Land Board, I have noted that, they volunteered relevant information in their affidavits that, they attended meetings convened by the first Respondent. The Applicants further agree that, a community meeting was held by the 1st Respondent Land Board. Thus, although this court can not purport to determine the merit of the Applicant's land ownership claim, because of the improper procedure they adopted, I am compelled to agree with the submission that the Application constitute an abuse of the court process. I would also strike out the Application on this ground. The Application is accordingly struck out on grounds of lack of locus standi and for constituting an abuse of the court process. Regarding costs, given that the 2nd to 6th Respondents, and the Applicants, ought to be encouraged to reconcile as it is this court's duty while adjudicating disputes before it, as required under the provision of article 126 (2) (d) of the Constitution of Uganda, 1995, and given the general conduct of the case as highlighted in my prefatory observations, I would order that each side to the litigation meets their own costs of the Application.

Before I close this matter, I should point out that, a fourth preliminary point of law was raised in the rejoinder submissions for the 2nd to 6th Respondents to the effect that, the judicial review application was lodged outside time. Whereas *prima facie* the objection appears to be sound, I completely declined to address

it because, it was raised at so late a time that the Applicants appear to have not responded to it, as their submission on the point, if at all, is not on court record. What I should state for the benefit of all legal practitioners is that, I do not encourage piecemeal taking of preliminary objections, otherwise, it turns the whole adjudicatory process into an uncontrolled game of ping- pong if not to encourage surprises in litigation with attendant unpalatable consequences. Counsel cannot sleep on a point of law or keep it close to his/her chest only to remember at the dearth of the litigation duel and pop it out. Raising late objections, however arguable, denies the opposite party a fair hearing which is sacrosanct under our Constitution, thus objections placed before court in installments may be ignored wholesale unless court in its discretion decides that parties address the court on it, and thus calls on the other party to respond to the new point of law.

Delivered, dated and signed in court this 29th February, 2024.

29/2/2024

George Okello

JUDGE

09:30am

29th February, 2024

Attendance

Ms. Nandutu Dinah Jesca, holding brief for Mr. Alfred Okello-Oryem, Counsel for the Applicants.

The parties are absent.

Counsel for the Respondents absent.

Mr. Stephen Ochan, Court Clerk.

29/2/2024

George Okello

JUDGE