THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISC. CAUSE NO. 35 OF 2012

YUSTUS TINKASIMIRE & 18 OTHERS :::::::::::::::: APPLICANT

VERSUS

1. ATTORNEY GENERAL

2. DR. MALINGA STEPHEN :::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON JUSTICE ELDAD MWANGUSYA

RULING

This is an application for Judicial Review brought under Section 33, 36, 37 and 38 of the Judicature Act (Cap 13); the Judicature (Judicial Review) Rules S. I. 11 of 2009 and sections 64 &98 of the Civil Procedure Act Cap 71 for the grant of prerogative orders of certiorari and prohibition calling for and quashing the decision of the 2nd respondent made on 6/03/2012 which sought to chase the applicants and other residents from their land and/ or forcefully displacing them with refugees and prohibiting its implementation.

The application is supported by 2 affidavits and the grounds enumerated in the Notice of Motion are as follows;

a. The applicants and thousand other residents and inhabitants of an area commonly known as Rwamwanja in Nkoma subcounty, Kibaale county Kamwenge district are threatened with eviction by the respondent 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 respondent forcefully surveyed their land alleging that it was a refugee 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 right to property.

Dr. Malinga Stephen, the 1st respondent and the Minister in charge of disaster preparedness, relief and refugees filed an affidavit in reply wherein he deponed that the application was incompetently commenced against him in his personal capacity yet the allegations relate to acts done in official capacity as a Minister; that the crux of the application is a land ownership dispute between the applicants and the government which cannot be resolved in applications of this nature and above all the applicants do not have locus standi to institute and prosecute this application on behalf of several thousands of residents/ inhabitants who are not party to the suit.

Mr. Medard Lubega Seggona & Mr. Gabriel Byamugisha appeared for the applicants while Mr. Gerald Batanda & Mr. Joseph Kyazze appeared for the 1st and 2nd respondent respectively.

At the hearing of the motion, Counsel for the 2nd Respondent raised three preliminary points of law i.e. whether the 2nd respondent was a proper party to the application; whether this was a proper case for judicial review and whether the applicants had locus to represent the other residents.

It is the case for the 2nd Respondent that he was sued in his personal capacity for acts/omissions alleged to have been committed by the servants of Government or attributed to him in his official capacity as the Minister for Disaster Preparedness, Relief and Refugees.

Mr.Kyazze contended that since the applicants chose to sue the 2nd respondent in his personal capacity, then they ought to have complied with the rules relating to service of pleadings in such circumstances. He referred this court to O.5 r. 10 of the CPR and the authority of **Dr. Kasirivu Atwooki & 4 others v Grace Bamurangye (2009)1 HCB 42** where it was held that personal service means leaving a copy of the document with the persons served and showing him/ her the original if he desires it.

He maintained that there was no proof of personal service as to the 2nd respondent although there is an allegation that service was effected on the personal secretary of the 2nd respondent, there is no detail of the alleged secretary's identity/particulars. Counsel thus invited court to strike out the application as against the 2nd respondent. He further contended that the application is incompetently commenced against the 2nd respondent in his personal capacity. The applicants did

not allege any acts or omissions done in personal capacity. He relied on **Charles Harry Twagira vs AG, DPP and another SCCA No.4 of 2007,** where it was held that:-

"Where a person is on official government duty; such person is protected against personal law suits arising from his official functions by the law. He can only be sued in his personal capacity if there was a possibility that he deliberately and maliciously acted beyond the scope of his duties, which is not pleaded in this application."

In reply, counsel for the applicant contended that the 2nd respondent as an individual used ministerial powers to make and execute unlawful and illegal decisions, to this end he was duty bound to explain his decisions. He referred to the authority of **Ochieng S. Peter & 5 others v. The president General Democratic Party & 3 others Misc. Cause No. 217 of 2008** where Bamwine J (as he then was) held:-

"That persons whether natural or artificial, bound to explain and defend in any forum the decisions they take in performance of their duties are amenable in judicial review, as long as it is established that they acted without or in excess of jurisdiction; or where there is an error of law on the face of the record; or failure to comply with rules of natural justice. If it were otherwise, the law maker would have stated so."

He contended further that the 2nd respondent in performance of his duties acted without jurisdiction; failed to comply with the rules of natural justice and an error of law was apparent on the record. The respondent in his capacity as a minister made a decision to settle the refugees and also evict the applicants/inhabitants to which he even made a public pronouncement resulting into detrimental effects to the applicants. Counsel contended that the decisions were made in bad faith and offended Article 26 of the Constitution; Sections 31 and 32A of the Land Act as amended by the Land Amendment Act of 2010. He therefore became amenable to judicial review in the circumstances.

Mr. Ssegona concurred with Mr. Kyazze's submission that the 2nd respondent was sued in his personal capacity so service must have been personal. He thus maintained that the service was personal on the person of the 2nd respondent who preferred to receive in the capacity of the Minister and went ahead to receive in the capacity to direct his subordinates to receive on his behalf and stamp the copies. He further contended that even if service of the process had not been personal, the 2nd respondent was not in any way prejudiced as he indeed filed a response. He conclusively invited court to find this issue in the negative.

While I agree with Mr. Kyazze's submission that the 2nd respondent is protected against personal lawsuits arising from his official functions if there was evidence that such a person acted beyond the scope of his duties, maliciously or exhibited a certain degree of bad faith, then such

protection ceases. In his written submission counsel for the applicants contended that the 2nd respondent's decisions were made in bad faith and offended Article 26 of the Constitution; Sections 31 and 32A of the Land Act as amended by the Land Amendment Act of 2010. He however did not lead any evidence to prove the alleged bad faith on the side of the 2nd respondent nor was the same pleaded in the motion.

It is trite law that bad faith must be pleaded with sufficient particularity; this the applicants have not done. The authority of **Robert Mwesigwa & Anor Vs. Bank of Uganda HCCS No. 588 of 2003** is instructive.

But more importantly if the 2nd Respondent was implementing a decision that was not his own but one reached by Government the question that the decision was taken in bad faith would not arise as far as the 2nd Respondent is concerned. He is merely an implementer and since the decision maker was made party it was not necessary to include the 2nd Respondent. Once the decision is clearly identified it is still quashable without involving the implementers who act on behalf of Government.

The second objection is whether the case as presented by the applicants is a proper case for judicial review. Mr. Kyazze contended that the crux of the application is a land dispute with questions relating to ownership/proprietorship, lawful occupation, overlapping titles and validity of the said titles. To entertain these issues the court would be exceeding the scope of its jurisdiction provided for by statute in applications for judicial review. It was his contention that the controversy between the parties and the government relates to ownership/proprietorship of the suit land. The appropriate action in the circumstance would be to file an ordinary suit by way of plaint so that the issues of proprietorship and validity of title can be resolved after hearing the evidence of the parties.

Although there is a report on the record regarding the proprietorship and validity of the titles of the land in issue, the same is not binding on the court and cannot be fully relied on to determine the parties' rights without hearing the evidence. Judicial review should not be resorted to in the clearest cases where alternative procedures are more convenient. He contended that the applicants have not demonstrated that filing an ordinary suit is inconvenient, less beneficial, less effective or totally ineffective. He referred to the authorities; **UTODA v KCCA & Anor MA No.137 of 2011, Micro Care Ltd V Uganda Insurance Commission MA No.31/2009** and **Galleria in Africa Ltd v UEDCL & Anor MC No.20/2007.**

In reply to this issue, counsel for the applicants contended that the crux of the dispute is the unlawful/illegal decision made by the 2nd respondent to evict the applicants from their lands and settle refugees, which decision was subsequently executed by the 2nd respondent. He maintained that since the matter involved land, this court had to exercise its discretion under Section 33 of the Judicature Act by calling for any kind of evidence/information to help in resolving the dispute between the parties. It is on this premise that a committee whose report is on record was formed with the consent and participation of the parties.

Counsel further sought to distinguish the case of **Charles Sensonga Mwanga Magoya v Budesian Kyabangi Bamera MC No.131 of 2010** from the instant case. He contended that in the instant case the right to life which includes the right to livelihood was at stake as the applicants were continually being evicted from their homes, land and gardens in favour of the refugees; an ordinary suit requiring service of 45 days notice would be no remedy to the applicants. Additionally, the respondents ignored the Interim Court Order which had been issued and the negotiations that had been suggested by the court with the consent of the parties turned out to be fruitless.

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.

If court was to find that anyone holding a public office acted either illegally, unfairly and irrationally it would intervene to put things right so to say. In exercise of its jurisdiction, this court is not required to vindicate anybody's rights but merely to examine the circumstances under which an act is done and determine as to whether the standards set out above have been met and if not prescribe the remedies in form of prerogative orders set out in the Rules.

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. The production of the titles to the land by the disputants only demonstrates the high handed manner one party to the dispute in this regard the Government treated the other party to this dispute in

this regard the occupants of the disputed land some of whom posses titles without recourse to the law and after eviction now turns around to say that the matter is beyond the scope of Judicial Review because the rights of the parties can only be determined in an ordinary suit as is being submitted by the Attorney General. The question for this court to decide is as to whether the decision by the Government to evict the applicants herein raises any ground for this court to quash the decision

The grounds for Judicial Review have been discussed in numerous decisions of our Courts and in one of these **Fr. Francis Bahikirwe Muntu Vs Kyambogo University** reported in the East Africa Law Reports at page ..... Justice Remmy Kasule (as he then was) and relying on the decision of **Council of Civil Service Unions Vs Minister of Civil Service [1985] AC 2** held as under:-

"The grounds, a combination or any one of them, that an applicant must satisfy in order to succeed in Judicial Review application are illegality, irrationality and procedural impropriety ....."

From the definition of the three grounds drawn from the case of **Council of Civil Service Unions Vs Minister of Civil Service** cited above the decision of the Government to evict the occupants of the disputed land is an embodiment of all the three grounds. I will illustrate this point by stating the definitions of the three grounds as defined in the case of Muntu.

Illegality is when the decision making authority commits an error of law in the process of taking a decision. An exercise of power that is not vested in the decision making authority is such instance. Acting without jurisdiction or ultra vires are instances of illegality. A decision maker who incorrectly informs himself/herself as to the law or who acts contrary to the principles of the law is guilty of an illegality.....

Irrationality is when the decision making authority acts so unreasonably that in the eyes of the court, no reasonable authority addressing itself to the facts and the law before it would have made such a decision. Such a decision must be so outrageous in its defence of logic or acceptable moral standards that no sensible person applying his/her mind to the question to be decided could have arrived at such a decision.....

Procedural impropriety is when the decision making authority fails to act fairly in the process of its decision making. It includes failure to observe the basic rules of natural justice or to act with

procedural uniform towards one to be affected by the decision. It also involves failure by an administrative authority or tribunal to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.....

The essence of procedural impropriety is the violation of the cardinal rule of natural justice: "AUDI ALTERAM PARTEM" the right of a party to a cause not to be condemned unheard ....."

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 and quash and court is satisfied that the applicants have established the sufficient grounds for quashing it.

On the order of prohibition the applicants stated that they had been evicted from the land on 6th March 2012 which ordinarily would mean that the prerogative order of prohibition is no longer applicable. But the process of eviction did not end on 06.03.2012 and there was an interim order of prohibition issued by this court on 2nd April, 2012 restraining the Respondents from evicting the applicants and or in any way interfering with the Applicant's occupation of the suit land till the main application came up for hearing. This interim order was ignored by the Respondents to further the illegality with which they were acting. If the Respondents were prohibited from evicting the applicants way back on 02.04.2012 and the order was ignored, this court cannot fold its hands and condone the illegalities perpetuated by the Respondents who by issue of a prerogative order of prohibition should stop the illegalities. In the circumstances of this case the prerogative order of prohibition will also issue to save the Respondents from any further evictions.

As to whether the applicants have locus to represent other residents/inhabitants of Rwamwanja allegedly affected by the order. Mr Kyazze had this to say;

The applicants have in the course of their pleadings and submissions turned this action into a representative suit. They make several references to the residents/inhabitants of Rwamwanja i.e. paragraph (a), 1 (b), (c) of the applications. In essence this court is being invited to adjudicate over a dispute between the applicants and thousands of occupants of Rwamwanja on one hand

and the respondents on the other hand. The applicants purport to pursue both their interests and those of the other unnamed thousands residents of Rwamwanja. There is no evidence of a representative action as required in O1 r 8 of the CPR. He cited the authority of **Dr. James Rwanyarare v AG Constitutional petition No.11/1997** cited with approval in **Kasozi Joseph & Ors v UMEME Ltd HCCS No.188/2010** for the preposition that court cannot accept any argument that any spirited person can represent any group of persons without their knowledge or consent. That would be undemocratic and could have far reaching consequences.

Mr Kyazze submitted thus that in absence of any court order permitting the applicants to represent the interests of the other un named Ugandans at Rwamwanja, the application would be incompetent.

Mr. Seggona did not agree with the respondent's contention that court was being invited to adjudicate over a dispute between the applicants and several thousands of residents in Rwamwanja; instead the applicants were seeking a declaratory order which if granted would resolve the issues between the parties and the other residents of Rwamwanja. He invited court to disregard the preliminary objections and determine the application on its merits.

For the 1st respondent, Mr. Batanda associated himself with Mr. Kyazze's submission on the 2nd and 3rd preliminary issues.

This court's view in the issue of locus standi is that once a decision has been identified by this court and it is found to be illegal as has been in this case the manner in which it has been brought to the court is immaterial. The order sought can be granted or denied on merit depending on the circumstances since the determination is in a supervisory manner and not on the rights of parties.

In conclusion both prerogative orders of certiorari and prohibition sought by the applicants are granted and this court expects compliance and not defiance as was exhibited when an interim order of prohibition was issued.

The 1st respondent will meet the costs of this application.

Eldad Mwangusya

J U D G E

05.04.2013

Delivered by the Deputy Registrar this ...**5th**... day of...**April**... 2013

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Asiimwe Tadeo

DEPUTY REGISTRAR

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