

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

MISC. CAUSE NO. 021 OF 2014

5

1. NSWALI JOSEPH

2. YONA MWALYE

3. MPINDI FAISAL

4. BOGERE PAUL

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5. WAISWA

RICHARD:.....APPLICANTS

VERSUS

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**1. DEPARTED ASIANS PROPERTY
CUSTODIAN BOARD**

2. JAFFER ABDALLAH (Suing through his
lawful Attorney

SHARIF

MOHAMMED):.....RESPONDENTS

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BEFORE: THE HON. JUSTICE GODFREY NAMUNDI

RULING

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This Application was brought under the provisions of the
Judicature Act and of the Judicature (Judicial Review) Rules – SI.
11/2009 and enabling laws.

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It seeks Prerogative Orders of Certiorari, Prohibition, declarations
and also seeks costs.

The background to this is that the Applicants have been tenants in the suit premises since the 1970s.

5 According to the affidavit of Nswali Joseph one of the Applicants, rent was being paid to S.N. Gandesha & Co. Ltd up to 2013. Gandesha without notice closed office and abandoned the property. The said property was then taken over by the Respondent No. 1 to whom the Applicants then started paying
10 rent. The Applicants then applied for and got a Temporally Allocation of the said premises.

In June 2014, the 1st Respondent cancelled the said allocation purportedly on the directives of the Minister of State for Finance
15 (General duties) based on a claim by one Ali Abdalla Hassan that he had bought the property from the former owners.

It is this decision that is now being challenged on grounds that the Applicants were not given a right to be heard and that the
20 decision is a violation of the Rules of Natural justice and the inviolable rights to a fair hearing.

The 1st Respondent did not file an affidavit in reply neither did they attend court. The second Respondent on application was
25 allowed to participate in the proceedings under the provisions of Rule 10 (2) of the Judicature (Judicial Review) Rules being a

person directly affected by the decisions being challenged and the outcome of these proceedings.

5 He filed an Affidavit in reply through his Attorney Sharif Mohamed. Therein he claims he is the registered proprietor of the suit property, having purchased the same from the former owners, Mohamed Mitha & Sons who had a lease of 49 years up to November 1998 which was upon repossession extended for another 49 years from 1/11/1998.

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That upon the 1st Respondent's unjustified allocation of the premises to the Applicants by the 1st Respondent, the 2nd Respondent raised the issue with the Minister of Finance and the allocation to the Applicants was recalled/cancelled.

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He further avers that the Applicants are not entitled to the prerogative reliefs they are seeking.

20 The applicants through Yona Mwalye - the 2nd Applicant filed an affidavit in Rejoinder. Therein it is averred that the 2nd Respondent is not the registered proprietor as the property is still registered in the names of Mohamed Mitha & sons.

25 That the Certificate of Title the 2nd Respondent is relying upon was procured fraudulently and that there was no valid sale or transfer of the said property between Mohamed Mitha & Sons

and the 2nd Respondent. That the Certificate of Repossession is suspect and a forgery since it was granted to persons who were not in Uganda by then. That there is no record of return of the Directors of Mohamed Mitha and Sons Ltd for whatever reason
5 between 1972 and 1974.

A complaint was made to the police who investigated the 2nd Respondent's claims and a report was made showing that the 2nd Respondent's claims were fraudulent.

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At the hearing of this application, it was submitted by counsel for the applicants that since the 1st Respondent did not file an affidavit in reply, the applicant's claim should be considered unchallenged and should therefore be allowed. That the 1st
15 Respondent's actions contravened Articles 28 and 42 of the Constitution by denying the applicants a fair hearing, but only relied on allegations by the 2nd Respondent.

Reference was made to the cases of **Rev. Bakaluba Vrs. Betty Namboze and National Council for Higher Education Vrs. Hanifa Kawoya.** That the decision of the 1st Respondent should accordingly be quashed.
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It was also extensively submitted in respect of the 2nd Respondent. The import of the said submission is that the 2nd
25 Respondent has no locus in this matter, having obtained Title

through fraudulent means and that the property is till registered in the names of the former owners - Mohamed Mitha & Sons.

From the 2nd Respondent it was submitted that the Applicants' claims are based on contract as they were tenants and hence they can only sue for breach of contract. That they should have sued the Minister who directed cancellation of the Applicants' allocation.

It is also submitted that the Applicants are just tenants and cannot challenge the 2nd Respondents' ownership of the property.

Thirdly that allegations of fraud cannot be adjudicated upon through Judicial Review, they should be raised in an ordinary suit.

Resolution of case:

It is trite law that Judicial Review is power exercised by the courts to supervise the actions of those charged with exercise of public power or authority.

It is not concerned with the decision itself but with the decision making process. It is not an appeal but jurisdiction exercised in a supervisory manner, to ensure that public authority is exercised in accordance with the principles of legality, fairness

and rationality. **Ref: Council of Civil Service Unions Vrs. Minister for the Civil Service (1985) AC 34.**

Further, Judicial Review does not involve going into the merits of
5 the decision but rather the decision making process. **Ref: Municipal Council of Mombasa Vrs. Republic & another CA 185/2001.** The above position has been consistently been upheld by our courts right up to the Supreme Court.

10 The import of this application is that there was a landlord-tenant relationship between the applicants and the 1st Respondent.

The first Respondent terminated the tenancy when the 2nd Respondent made claims that he is the right landlord.

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At that point, this matter called for remedies arising out of breach of contract rather than prerogative reliefs.

If this matter was handled the way the applicants think it should
20 have, would it have reversed the 2nd Respondent's Title? Did the allocation by the 1st Respondent of the suit property grant Title to the Applicants?

I also observe that the applicants' claim that the 2nd
25 Respondent's title is suspicious, fraudulent and therefore his ownership is questionable.

Under the Registration of Titles Act, Section 59 a Certificate of Title is conclusive proof of ownership. Such Title can only be cancelled by the courts of law through the duly established
5 procedure or by the Commissioner for land Registration if it is proved it was issued in error under the Land Act Section 91 (1) Cap. 227 special powers of Registrar. None of the above procedures are provided for under Judicial Review. **Ref:**
Simon Tendo Kabenge Vrs. Uganda Law Society & Ruth
10 **Sebalindira.**

Further, allegations of fraud, for impeachment of a Title must be specifically pleaded and proved by way of an ordinary suit. Judicial Review procedure is not an ordinary suit. In **Law Vrs.**
15 **National Greyhound Racing Club Ltd**, the court held that contractual rights can only be enforced under private rather than public law.

Further, the claims against the 2nd Respondent about fraudulent
20 acquisition of Title can only be resolved by ordinary suit, requiring strict proof and adducing of evidence to support the allegations.

In **Simon Tendo Kabenge Vrs. Uganda Law Society and**
25 **another**, it was held that it is trite law that a court exercising judicial powers of Review is not entitled to go to the

merit.....doing so places the case outside the application of the Judicature (Judicial Review) Rules. Matters contesting the merits of something done have to be proved by extensive evidence at trial.

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This cannot be adequately accomplished through Judicial Review which was intended to be a summary procedure.

10 The authority above clearly addresses the circumstances of the instant case. It is the decision of this court that the applicants have failed to support their claims for prerogative reliefs. They are before the wrong forum. The application is accordingly dismissed.

15 The applicants will meet the costs of the 2nd Respondent.

Godfrey Namundi

20 **JUDGE**

13/11/2015

13/11/2015:

Benard Mugeni on brief for Ojambo Robert for 2nd Respondent
Applicants and counsel are absent

5 Court: Ruling delivered.

Godfrey Namundi

JUDGE

10 **13/11/2015**