

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA SITTING AT GULU  
MICELLANEOUS CIVIL CAUSE No. 0131 OF 2012**

5 **LAMWAKA ALICE VERONICA ..... APPLICANT**

**VERSUS**

1. **AMURU DISTRICT LAND BOARD }  
10 2. **GULU UNIVERSITY } ..... RESPONDENTS****

**Before: Hon Justice Stephen Mubiru.**

**RULING**

15

This is an application by way of notice of motion pursuant to articles 26, 28, 42 and 50 of *The Constitution of the Republic of Uganda, 1995*, sections 33 and 36 of *The Judicature Act*, Rules 3, 4, and 6 of *The Judicature (Judicial Review) Rules* and Order 46 rules 5, 6, and 7 of *The Civil procedure Rules*. The applicant seeks orders of certiorari, prohibition and a permanent injunction  
20 against the respondents jointly and severally, prompted by the first respondent's decision to grant part of her land measuring approximately 200 hectares, to the second respondent.

In her affidavit in support of the application, she states that she is an equitable lessee of land located at Pajengo village, Latoro Parish, Purongo sub-county in Nwoya District that was given  
25 to her by a one Paulino Okidi the 1990s, which land she had been occupying since then. During or around June, 2011 she applied for and received an offer of a lease from the first respondent in respect of that land. She has since been in effective and exclusive possession of that land and is in advanced stages of procuring a land title thereto only to learn that the first respondent had sometime in October, 2012 offered a part of the same piece of land to the second respondent.  
30 The second respondent has since caused a survey of the land and obtained a title deed to the land,

comprised in L.R.V 4422 Folio 6 Plot 68 Block 4 Nwoya County. She contends the offer of the land to the second respondent is unlawful, unfair, *ultra vires*, and irrational.

The application is opposed. By affidavit sworn by Mr. I. V. M. Okoth Ogola, the second respondent's University Secretary, the second respondent states that it is unaware of the applicant's occupation and equitable claims to the land in issue. The second respondent acquired interest in the land by purchase from a one Bongomin David Awany, which piece of land is different from the one claimed by the applicant. Granting the applicant her prayers will prejudice the second respondent. The other affidavit in reply is sworn by a one Mr. Oola Godfrey, the then Chairperson of Purongo Sub-county Area Land Committee, to the effect that the piece of land applied for and offered to the applicant, is different from that applied for and offered to the second respondent.

The uncontroverted factual background to the application is that on 10<sup>th</sup> April, 2010 the applicant submitted her application for a lease over the 200 acres of land she claims to have been given by Paulino Okidi. The land was inspected by the Purongo Sub-county Area Land Committee which compiled its report dated 28<sup>th</sup> June, 2010. By the first respondent's Minute ADLB (2) Min. 4(87) of 14<sup>th</sup> - 15<sup>th</sup> June, 2011 the applicant was offered a lease over that land. Subsequently, the second respondent on 9<sup>th</sup> August, 2012 applied for a leasehold title over land within the same locality. A notice of inspection of that land was issued on 24<sup>th</sup> August, 2012 and the Purongo Sub-county Area Land Committee on 12<sup>th</sup> September, 2012 duly inspected the land applied for. By the first respondent's Minute ADLB (2) Min. 6(c) (1) of 18<sup>th</sup> October, 2012. The second respondent eventually obtained a title deed comprised in LRV 4422 Folio 6 Plot 68 Nwoya Block 4. The title deed indicates the second respondent became registered proprietor thereof on 12<sup>th</sup> February, 2013 and the duplicate certificate of title was issued on 15<sup>th</sup> February, 2013 in respect of 208.131 hectares, for a term of 49 years with effect from 1<sup>st</sup> December, 2012.

Suspecting that the land she had been offered to lease had instead been given to the second respondent as a leasehold, the applicant sought to have that decision of the first respondent quashed. The application was filed on 28<sup>th</sup> February, 2013, thirteen days after the title deed to LRV 4422 Folio 6 Plot 68 Nwoya Block 4 had been issued. Unfortunately, on all occasions the

application came for hearing, it was adjourned by reason of absence of the trial judge. It is only on 4<sup>th</sup> September, 2018, over five years after the filing of the application, that it eventually was heard by way of written submissions of both counsel.

In his submissions, M/s. Abore, Adonga and Ogen Advocates, counsel for the applicant argued that in granting the second respondent a lease over the land comprised in LRV 4422 Folio 6 Plot 68 Nwoya Block 4, part of which covers the 200 acres offered earlier to the applicant, was unlawful, irrational and tainted with fraud. The grant was made without first affording the applicant a hearing. The title deed therefore can be impeached for flouting the applicant's equitable interest in the land.

In reply, M/s. Ladwar, Oneka and Company Advocates, counsel for the respondents argued that although both the applicant and the second respondent applied of land situated within Pajengo village, each was offered a distinct parcel. While the applicant is yet to obtain a title deed in respect of the land allocated to her, the second respondent was duly issued with a title deed in respect of the land it applied for. The applicant has no legitimate claim in respect of the land acquired by the second respondent. The nature of dispute now alleged by the applicant cannot be disposed of appropriately by way of judicial review.

It is trite that applications for Judicial review under rule 3 of *The Judicature (Judicial Review) Rules, 2009, S.I. 11 of 2009*, made under section 38 (2) of *The Judicature Act*, for orders of mandamus, prohibition, certiorari or an injunction are directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by public decision makers, i.e. the lawfulness of the decision-making process, and not the decisions themselves.

Certiorari is a means of quashing decisions of inferior courts, tribunals and public authorities where there has been an excess of jurisdiction, an *ultra vires* decision, a breach of natural justice or an error of law on the face of the record. The order will issue to control administrative decisions only to statutory authorities or where the administrative authority has acted in excess of its statutory power. It will also issue to ensure that a statutory tribunal or body applies the law correctly. Simply put the order is available to ensure the proper functioning of the machinery of Government. See *In Re: Application by Bukoba Gymkhana Club [1963] EA 478*. The writ of

certiorari is discretionary and issues only in fitting circumstances. See *Re- An Application by Gideon Waweru Gathunguri [1962] EA 520* and *Masaka District Growers Co-operative Union v. Mumpiwakoma Growers Co-operative Society Ltd and Four others [1968] EA 258*.

5 On the other hand, an order of Prohibition is directed to an inferior court, tribunal, or other public authority which forbids that court, tribunal or authority to act in excess of its jurisdiction or contrary to the law. Whereas certiorari is concerned with decisions in the past, prohibition is concerned with those in the future. While Certiorari looks at the past as a corrective remedy, prohibition looks at the future as a prohibitive remedy. Certiorari is sought to quash the decision and prohibition to restrain its execution (see *Wheeler v. Leicester City Council [1985] 2 ALL.ER*  
10 *1106*).

The limits within which courts may review the exercise of administrative discretion were stated in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1947] 2 ALL ER 680: [1948] 1 KB 223*, which are;- (i) illegality: which means the decision-maker must  
15 understand correctly the law that regulates his decision making power and must give effect to it. (ii) Irrationality: which means particularly extreme behaviour, such as acting in bad faith, or a decision which is “perverse” or “absurd” that implies the decision-maker has taken leave of his senses. Taking a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could  
20 have arrived at it and (iii) Procedural impropriety: which encompasses four basic concepts; (1) the need to comply with the adopted (and usually statutory) rules for the decision making process; (2) the common law requirement of fair hearing; (3) the common law requirement that the decision is made without an appearance of bias; (4) the requirement to comply with any procedural legitimate expectations created by the decision maker.

25

Where an administrative decision is a matter of discretion it will not be disturbed on judicial review except on a clear showing of abuse of discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Some of the general principles relevant to the exercise of discretion are: acting in good faith and for a proper purpose, complying with  
30 legislative procedures, considering only relevant considerations and ignoring irrelevant ones, acting reasonably and on reasonable grounds, making decisions based on supporting evidence,

giving adequate weight to a matter of great importance but not giving excessive weight to a matter of no great importance, giving proper consideration to the merits of the case, providing the person affected by the decision with procedural fairness, and exercising the discretion independently and not under the dictation of a third person or body. What fairness requires will vary from case to case and manifestly the gravity and complexity of the charges and of the defence will impact on what fairness requires.

An application for judicial review should on the face of it demonstrate that the applicant seeks to establish that a decision of a public authority infringed rights whose protection the applicant was entitled to under public law. There may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the applicant arising under private law, such as situations where the action impugns the authority's performance of its statutory duties as a pre-condition to enforcing private law rights (see for example *Cocks v. Thanet District Council*, [1983] 2 AC 286, [1982] 3 WLR 1121, [1982] 3 All ER 1135). Otherwise, where a relationship is regulated by private law, administrative law remedies should generally not be available. A party should not take advantage of public law simply because it contracted with a public body, and thereby obtain an advantage that would otherwise not be available against a non-public body or private person.

It is appropriate that an issue which depends exclusively on the existence of a purely public law right should be determined in judicial review proceedings and not otherwise (see *Roy v. Kensington & Chelsea and Westminster Family Practitioner Committee HL*, [1992] 1 AC 624, [1992] 2 WLR 239, [1992] 1 All ER 705). This should be the case where the rights and obligations sought to be enforced are conferred by statute rather than by private law such as contract. But where a litigant asserts his or her entitlement to a subsisting right in private law, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue should not entitle the litigant to establish his or her right by way of judicial review.

In the instant application, the functions of the first respondent fall into two wholly distinct categories. On the one hand, it is charged with decision-making functions of a discretionary

nature, relating to land administration. In that regard, it is for the first respondent to make the appropriate inquiries and to decide whether it is satisfied, or not satisfied as the case may be, of the matters which will give rise to making an offer of a lease of land. This is essentially a public law function because the public has a compelling interest in maintaining the system of land administration. It is a function that affects, or is likely to affect, the public or a section of the public. The nature of the interests affected by the body's decisions at that stage are thus of a public nature.

The power of decision regarding the allocation of land within its jurisdiction being committed by statute exclusively to the first respondent, its exercise of power can only be challenged before the courts on strictly limited grounds;- (i) that its decision was vitiated by bias or procedural unfairness; (ii) that it reached a conclusion of fact which can be impugned on the principles set out in the speech of Lord Radcliffe in *Edwards v. Bairstow* [1956] AC 14 (i.e. anything *ex facie* which is bad law and which bears upon the determination, that the determination was erroneous in point of law in that no person acting judicially and properly instructed as to the relevant law could have come to the determination, or that the body acted without any evidence or upon a view of the facts which could not reasonably be entertained such as where the evidence is inconsistent with and contradictory of the determination); or (iii) that, in so far as it exercised a discretion, the exercise can be impugned on the principles set out in the judgment of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223 (i.e. that it falls outside the bounds of reasonable judgment).

On the other hand, the respondent is also charged with executive duties which may generate private rather than public rights. One of the fundamental policies behind the laws creating District Land Boards is freedom of contract, but under governmental supervision of the process. While the parties' freedom of contract is not absolute, private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract, does not necessarily result in public law rights. For example once a decision has been reached to make an offer of land, rights and obligations are immediately created in the field of private law, capable of being enforced by injunction and the breach of which will give rise to a liability in damages. At that stage the Board is entrusted with functions to perform for the benefit

of the individual applicant rather than the public. The nature of the interests affected by the body's decisions at that stage are of a private nature. When public bodies make contracts, commit torts or have property disputes, such matters fall within ordinary private law rules.

In that regard, the offerree of a lease enters into private contractual relations with an offeror who happens to be a public body. This is because it is inherent in the scheme of the laws regulating land administration of this category that an appropriate public law decision of the first respondent is a condition precedent to the establishment of the private law obligations under the law of contract with applicants found to be deserving. While accepting therefore that the duty which the first respondent discharges, when deciding whether or not to offer a tract of land to a deserving offeree, is a public law duty or a function in public law, however once the offer is made then the executive functions of the first respondent create contractual relations. Where purely private law rights flow from statutory provisions, the proper remedy is by ordinary suit against the public body and not by judicial review of its action. Where a relationship is regulated by the law of contract, administrative law remedies should generally not be available. It is important that parties are held to their contractual obligations through ordinary suits and not by invoking public law remedies. A party should not take advantage of public law simply because it contracted with a public body, and thereby obtain an advantage in the enforcement of that contract, that would otherwise not be available against a non-public body or private person.

There is no averment in the application of abuse of any of statutory powers of the first respondent or any other administrative law principles, save for the allegation of denial of a hearing. So far as public law is concerned, all that the applicant arguably had once she received the offer was a legitimate expectation, based upon her knowledge of what is the general practice, that she would be granted a lease upon fulfilment of the terms of the offer. Within that context, an expectant may be entitled to an opportunity to show cause before his or her expectation is dashed or an explanation as to the cause for denial. Although the applicant has cited this as the basis of her application for judicial review, judicial review only checks arbitrariness of public or state authority and does not create enforceable rights. Beside this, there is no statutory duty or protection which makes implicit revocation of an offer of a lease a matter of public law. There is no statutory power or procedure of decision making cited as having been involved in the revocation of that offer, if it was ever revoked implicitly. A body can be public and yet exercise a

private power that is not susceptible to public law judicial oversight. The fact that one of the parties to the dispute happens to be a public authority, is only incidental to the nature of the dispute in this case. In fact this is a matter purely in the realm of private law.

5 It cannot be contended that the decision of the first respondent extending or revoking the applicant's offer infringed or threatened to infringe any right of the applicant derived from public law, whether a common law right or one created by a statute. Offers of this nature are not a matter of right but of indulgence. By the application for judicial review, the decision the applicant wishes to overturn is not one alleged to have infringed any existing right under public law but a decision which, being adverse to the applicant, may at most establish a private law  
10 right springing from exercise of the statutory power of the first respondent. It would as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he or she was entitled to protection under private law, to proceed by way of judicial review and by this means, to evade the limitations imposed on such action under private law.

15

That aside, public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision (see *O'Reilly v. Mackman*, [1983] 2 AC 237, [1982] 3 WLR 1096, [1982] 3 All ER 1124). Rule 5 (1) of *The Judicature (Judicial Review) Rules, 2009* requires applications for judicial review to be made within three months from the date when the grounds of the application first arose, unless the Court considers that there is good reason for extending the period within which the application is to be made. The purpose of this requirement is to protect public administration against false, frivolous or tardy challenges to  
20 official action. A delay will only be condoned if the explanation for it is acceptable.

In the instant application, the decision to grant the second respondent the impugned lease was taken on 18<sup>th</sup> October, 2012 yet the application to quash the decision was filed on 28<sup>th</sup> February, 2013 (four months after the decision, without first seeking extension), and it is now sought to be  
30 quashed, nearly six years after the fact. In light of these facts, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a



person seeking to establish that a decision of a public authority infringed rights to which he or she was entitled to protection under public law, to challenge the decision so long after it was made. Public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any  
5 longer period than is absolutely necessary in fairness to the person affected by the decision.

Underlying that rationale for the time limit is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to  
10 the respondent is not a precondition for refusing to entertain judicial review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight. There is a public interest element in the finality of administrative decisions and the exercise of administrative functions. The extreme tardiness of the instant challenge is prejudicial to the  
15 public interest in efficient decision-making in land administration. If the court will allow legal challenges over five years late, it will be hard for third parties to feel assured that any title granted by a District Land Board is entirely free of risk.

In addition, the parties have laid claim to tracts of land which one party described as one and the  
20 same while the other maintains the two parcels are distinct. Prima facie evidence of distinctive tracts has been attached to the affidavit in reply. As a result of the position the parties have taken, issues of fact have arisen not capable of being disposed of by affidavit evidence, i.e. whether the land offered to the applicant is the same piece of land in respect of which the second respondent subsequently obtained a certificate of title.

25

Similarly, the applicant has made allegations of fraud in acquisition of the second respondent's title deed. The applicant consequently caveated the second respondent's title on 26<sup>th</sup> March, 2013. A determination of whether a party acquired land by fraud or in good faith and for value involves factual issues beyond the ambit of an application for judicial review for orders of  
30 certiorari. While malice intent, knowledge or other condition of the mind of a person may be averred generally, where fraud or mistake are alleged, the circumstances constituting fraud or

mistake must be stated with particularity and require a standard of proof not easily attainable by affidavit evidence only.

In conclusion, there is nothing in the circumstances of this application, to give it any sufficient  
5 flavour of a "public" nature that would justify this Court's interference by way of judicial review.  
For all the foregoing reasons, this application is accordingly dismissed. However, because part of  
the delay in disposal of the application is attributable to the court, each party is to bear their costs  
of the application.

10 Dated at Gulu this 11<sup>th</sup> day of October, 2018.

.....

Stephen Mubiru

Judge

11<sup>th</sup> October, 2018.