THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

MISCELLANEOUS CAUSE No. 0003 OF 2016

ARUA KUBALA PARK OPERATORS AND MARKET VENDORS' COOPERATIVE SOCIETY LIMITED } …… APPLICANT

VERSUS

ARUA MUNICIPAL COUNCIL …… RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

It is incumbent on court to determine at the commencement of every proceedings whether or not it is seized with jurisdiction to grant the reliefs sought by the parties. Accordingly, having perused the pleadings filed, I noted that it was necessary for the court to determine whether or not the subject matter of the application is one that could be dealt with by way of judicial review.

The background to the application in brief as disclosed by the pleadings is that during the financial year 2014 / 2015, the respondent invited bids from potential service providers for the collection of revenue from Arua Main Market. The applicant was the successful bidder and eventually executed a contract with the respondent on 6th July, 2015. The applicants rendered their services under that contract until 27th November, 2015 when they received a letter from the respondent's Town Clerk terminating the contract for alleged breach by among other reasons, failing or defaulting to remit funds collected in the sums agreed upon under that contract. In terminating the contract for alleged default on remittances, the respondent cited clause 14 of the agreement. The respondent stipulated that the matter be referred to arbitration in accordance with clause 13 of the agreement.

In the instant application, the respondent seeks to have the decision to terminate that contract, and have the dispute referred to arbitration as stipulated by the applicant in their letter of termination instead subjected to judicial review and quashed and the contract re-instated on

grounds that the applicant was never afforded a hearing before termination of the contract, the applicant was never given the thirty days' prior notice of termination as stipulated in clause 14 of the agreement and the respondent has since unlawfully confiscated some of the applicants tools and equipment used in cleaning the market.

In their affidavits in reply, the respondent asserts facts relating to the circumstances leading to the termination of the contract for default on remittances, issuance of a series of false cheques by the applicant resulting in arrears of collections of over shs. 186,073,728/= justifying the respondent's termination of the contract for breach and taking over direct management of the market. They also refute the claim that the termination was done without notice or denial of the right to be heard but make averments instead as to the applicant's evasiveness in a bid to avoid submission to arbitration and service of the notice of termination of the contract. The respondents thus content that all steps it took were in accordance with the contract.

Submitting in support of the viability of the application based on those facts, counsel for the applicant Mr. Madira Jimmy argued that the respondent is supposed to be transparent in execution of its authority. Whatever the respondent does as a Council is in the area of public law. The decision to terminate the contract was reached without giving the applicant any hearing. The contract was terminated by the contracts committee, based on reports received from the Town Clerk which violated the principle of fair hearing. The importance of the transaction of revenue collection from markets to the public makes it a matter of public law. This was not a private contract. The applicant was offering public services. They were contracted to offer service for the sole benefit of the public. The manner in which the services were terminated is therefore of public interest.

In response, the learned State Attorney Mr. Onyango Fred Osende submitted on behalf of the respondent that although this was not a contract for supply of goods and services but rather for revenue collection, it falls under private law. It was signed between the two parties. There is no public wrong alleged to have been committed by the respondent. The applicant should have filed a formal suit to address the concerns raised. The subject matter of the application is not within the purview of the conditions for judicial review. The applicant should be given a chance to file a

suit which the court will address. In his brief reply, counsel for the applicant sated that here is no distinction between revenue collection and a contract for supply of goods and services. For as long as a contract is made with a public body, the public has an interest. He prayed that the application should therefore be heard on its merits.

Judicial review of administrative action is a procedure by which a person who has been affected by a particular administrative decision, action or failure to act by a public authority, may make an application to the High Court, which may provide a remedy if it decides that the authority has acted unlawfully. While it has been said that the grounds of judicial review "defy precise definition," most, if not all, are concerned either with the processes by which a decision was made or the scope of the power of the decision-maker. A key question that often arises at the commencement of judicial review challenges is whether the decision challenged is a public law decision and therefore amenable to judicial review or a private law decision and not. At the heart of the problem is that it is possible to act in both capacities at the same time. Just because the decision-making body is a public body it does not necessarily follow that its actions should be governed by public law principles.

The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. Judicial review is only available against a public body in a public law matter. In essence, two requirements need to be satisfied; first, the body under challenge must be a public body whose activities can be controlled by judicial review. Secondly, the subject matter of the challenge must involve claims based on public law principles and not the enforcement of private law rights (see Ssekaana Musa, *Public Law in East Africa*, p 37 (2009) LawAfrica Publishing, Nairobi).

Public Law has been described as the system which enforces the proper performance by public bodies of the duties which they owe the public while private law, on the other hand, is concerned with enforcement of personal rights of persons, human or juridical, such as those emanating under property, contract, duty of care under tort and mainly regulates relations between private persons. Not every act of a statutory body necessarily involves an exercise of statutory power. Some statutory duties imposed on public bodies may still create private rights in favour of

individuals; enforceable by way of ordinary claim only. In addition, public bodies perform private law acts all the time in respect of which they can sue and be sued in private law proceedings: breaches of contract and covenants in leases and tenancy agreements, nuisance and negligence, employment of staff, personal injury, etc are examples. It is therefore always necessary to analyse the nature of the decision or act to decide whether it is properly classified as existing in public or private law, given that for judicial review to be the appropriate form of challenge, it is necessary that the decision or act exists in public law.

The case of *R v. East Berkshire Health Authority ex parte Walsh [1984] 3 WLR 818* provides an illustration. That case involved an application for certiorari by an employee of a public body, namely a senior nursing office of the East Berkshire Health Authority, whose services were terminated by the District Nursing Officer, on the recommendation of a committee of inquiry. He then took two parallel steps. He first set in motion the appropriate industrial dispute procedure and then applied for certiorari to quash his dismissal and any subsequent appellate proceedings thereto. In relation to the preliminary point raised by the health authority that the judicial review proceedings were incompetent, as relating to a matter of private law, Sir John Donaldson MR said at page 824:

> The remedy of judicial review is only available where an issue of "public law" is involved but as Lord Wilberforce pointed out in *Davy v. Spelthorne Borough Council [1934] 3 All ER 278; [1934] AC 262*, the expressions "public law" and "private law" are recent immigrants and whilst convenient for descriptive purposes must be used with caution, since English Law traditionally fastens not so much upon principles as upon remedies. On the other hand, to concentrate on remedies would in the present context involve a degree of circuitry or levitation by traction applied to shoestrings, since the remedy of "certiorari" might well be available if the health authority is in breach of a "public law" obligation but would not be if it is only in breach of a "private law" obligation.

A similar decision is to be found in *Regina v. Civil Service Appeal Board Ex Parte Bruce [1988] ICR 649*, where May LJ, said: "I think that at the present time in at least the great majority of cases involving disputes about the dismissal of an employee by his employer, the most appropriate forum for their resolution is an industrial tribunal (now of course an employment tribunal). The Courts should not be astute to hold that any particular dispute is appropriate for consideration under the judicial review procedure."

It has been said that what must be identified to distinguish private matters from public matters (subject to judicial review) “is a feature or a combination of features which impose a public character or stamp on the act” (see *Poplar Housing and Regeneration Community Association Ltd v. Donoghue [2002] QB 48*, at para 65, per Lord Woolf CJ). What is needed, however, is some guidance as to what “public” might mean in this context. As Dyson LJ has explained:

> The question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law. It may be said with some justification that this criterion for amenability is very broad, not to say question-begging (*R (Beer t/a Hammer Trout Farm) v. Hampshire Farmers’ Markets Ltd [2004] 1 WLR 233*, at pp. 240-241).

Thus, notwithstanding that the complaint is against a public body, it is a prerequisite that the right sought to be enforced is a public law right rather than a private law right. In other words, that the decision infringed upon a right entitled to protection under public law. There must be a public dimension to justify having recourse to relief by way of judicial review and where a transaction is unrelated to the public interest an aggrieved party has a remedy in private law.

To bring an action for judicial review, it is a requirement that the right sought to be protected is not of a personal and individual nature but a public one enjoyed by the public at large. The "public" nature of the decision challenged is a condition precedent to the exercise of the courts' supervisory function. If the relationship is governed by private law (no matter how ineffective), then judicial review is unavailable. In disputes arising from the performance of contracts as in this case, it is then reasonable to look at the availability and effectiveness of contractual remedies. If these remedies were available and effective, the court would decline to exercise its judicial review discretion.

For example in *Dudley Muslim Association v. Dudley Metropolitan Borough Council, [2015] EWCA Civ 1123*, the parties disputed occupation of the land under which a mosque had been built. The respondent had offered the appellant a 99 year lease over land for construction of a mosque. One of the covenants required the development on the land to be completed "with all practicable speed and in any event within five years from the date hereof" and that if the

development had not been completed within five years the lease would become null and void. The appellant submitted an application for planning permission to the respondent and at the same time asked for removal of the covenant about the time scale for development, because it needed to raise funds for the development. The Council turned down that request. The appellant decided to commit themselves to the purchase of the freehold despite the lack of planning permission and despite the respondent's refusal to concede any meaningful extension of the development timetable; and in the knowledge that the respondent's position was that it could not relax the covenants. A transfer of the freehold was executed. The appellant resubmitted the application for outline planning permission but it was rejected on the ground that the proposed use was contrary to the development plan.

The appellant lodged an administrative appeal and a public inquiry took place. By the time the proceedings were concluded the date for completion of the development had long since passed. The respondent recited the covenants in the transfer, stated that the development had not been completed and required the appellant to confirm that it would comply with its obligation to transfer the site. The appellant contended that the respondent was not entitled to enforce the covenant because the appellant had been prevented from complying with the said covenant by the respondent itself by refusing planning permission to the plaintiff. The plaintiffs argued they had an operative legitimate expectation that the permission would be granted and the respondent had breached that legitimate expectation. One of the issues was whether the appellant had a valid public law challenge to the respondent's claim to enforce its contractual rights. It was held that;

> It is true that in a technical sense the Council is operating under statutory powers; but that is only because the Council can do nothing unless it is authorised by statute..... However, this case is not about the unilateral exercise by the Council of a statutory power; it is about the implementation of a commercial bargain. In substance, what we are dealing with is the enforcement of a contract willingly made by both parties with the aid of legal advice.... In my judgment, in the circumstances of this case, there is no public law defence available to the DMA based on legitimate expectation or a general appeal to abuse of power. If the DMA cannot assert a variation of the contract or a promissory estoppel, which they do not attempt to do, the contract is enforceable according to its terms.

In that case the court observed that a claim in public law would allow a challenge on the ground that the decision was taken in bad faith or for an improper motive. But otherwise the case would be governed by private law. In order to attract public law remedies, it would be necessary for the applicant for judicial review to establish, at the very least, a relevant and sufficient nexus between the aspect of the contractual situation of which complaint is made and an alleged unlawful exercise of relevant public law powers.

Similarly in *Hampshire County Council v. Supportway Community Services Ltd [2006] EWCA Civ 1035, [2006] LGR 836*, the parties had entered into a contract for the supply of housing related support services. Under the terms of the contract the Council was required to carry out a review of the services. The review was to be carried out in accordance with directions given by the Deputy Prime Minister under section 93 of *The Local Government Act, 2000*. Having carried out the review the Council concluded that Supportway was too expensive and terminated the contract. Supportway sought to challenge the Council's decision on public law principles. The court held that Supportway's remedies were confined to private law remedies. Their complaint was that the Council had not complied with the terms of the contract; and they were seeking to enforce compliance. Neuberger LJ pointed out at [37] that virtually any contract entered into by a local authority would involve performance of public administrative functions; and said at [38]:

> Thus, the mere fact that the party alleged to be in breach of contract is a public body plainly cannot, on its own, transform what would otherwise be a private law claim into a public law claim. There are, of course, circumstances where, in a contractual context, a public body is susceptible to public law remedies. However, where the claim is fundamentally contractual in nature, and involves no allegation of fraud or improper motive or the like against the public body, it would, at least in the absence of very unusual circumstances, be right, as a matter of principle, to limit a claimant to private law remedies..... However, it cannot be right that a claimant suing a public body for breach of contract, who is dissatisfied with the remedy afforded him by private law, should be able to invoke public law simply because of his dissatisfaction, understandable though it may be. If he could do so, it would place a party who contracts with a public body in an unjustifiably more privileged position than a party who contracts with anyone else, and a public body in an unjustifiably less favourable position than any other contracting party. Equally importantly, it appears to me that it would be wrong in principle for a person who would otherwise be limited to a private law claim to be entitled to base his claim in public law merely because private law does not afford him a sufficiently attractive remedy. It is one

> thing to say that, because a contracting party is a public body, its actions are, in principle, susceptible to judicial review. It is quite another to say that, because a contracting party is a public body, the types of relief which may be available against it under a contract should include public law remedies, even where the basis of the claim is purely contractual in nature.

Traditionally judicial review is premised on allegations that a public body;- acted without powers (lack of jurisdiction); went beyond its powers (exceeded jurisdiction); failed to comply with applicable rules of natural justice; according to the record, proceeded on a mistaken view of the law (error of law on the face of the record); or arrived at a decision so unreasonable that no court, tribunal or public authority properly directing itself on the relevant law and acting reasonably could have reached it (*Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1948] 1 K.B 223*).

A public authority will be found to have acted unlawfully if it has made a decision or done something: without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of reasonableness); or without observing the rules of natural justice (unlawful on the grounds of procedural impropriety or fairness). Failure to observe natural justice includes: denial of the right to be heard, the rule against actual and apprehended bias; and the probative evidence rule (a decision may be held to be invalid on this ground on the basis that there is no evidence to support the decision or that no reasonable person could have reached the decision on the available facts i.e. there is insufficient evidence to justify the decision taken).

Decisions made without the legal power (*ultra vires* which may be narrow or extended. The first form is that a public authority may not act beyond its statutory power: the second covers abuse of power and defects in its exercise) include; decisions which are not authorised, decisions taken with no substantive power ore where there has been a failure to comply with procedure; decisions taken in abuse of power including, bad faith (where the power has been exercised for an ulterior purpose, that is, for a purpose other than a purpose for which the power was conferred), where power not exercised for purpose given (the purpose of the discretion may be

determined from the terms and subject matter of the legislation or the scope of the instrument conferring it), where the decision is tainted with unreasonableness including duty to inquire (no reasonable person could ever have arrived at it) and taking into account irrelevant considerations in the exercise of a discretion or failing to take account of relevant considerations. It may also be as a result of failure to exercise discretion, including acting under dictation (where an official exercises a discretionary power on direction or at the behest of some other person or body. An official may have regard to government policy but must apply their mind to the question and the decision must be their decision).

The proper sphere of the court in proceedings of this nature is illegality, irrationality or unreasonableness (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation (1948) 1 KB 223*). Although it has been held that the court will be called upon to intervene in situations where public authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations or take into account irrelevant considerations in their decision making, or act contrary to legitimate expectations of applicants, even where such conduct is not strictly within the purview of the "three I's" (see *Kuria and three others v. Attorney General [2002] 2 KLR 69; Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya),[2006] 1 EA 47,* and *Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43*), it is impermissible for parties to private law contracts made with public bodies to proceed by way of judicial review in order to improve their contractual claim. It is trite that the exploitation and extension of remedies such as judicial review beyond their proper sphere should not be encouraged (see *Mercury Energy Ltd v. Electricity Corp of New Zealand Ltd [1994] 1 WLR 521*), especially in cases such as this where the impugned administrative decision was made within the context of the enforcement of a private law contract made with a public body.

There is a dichotomy between the "decision-making" and "executive" functions of a public authority. The former involves the exercise of discretionary powers invested in the authority by Parliament and which are for the authority to exercise rather than for the court. Those functions can only exist in public law. The latter functions are no more than the implementation of the public law decision and should be enforced by private action (see *Cocks v. Thanet DC [1983] 2 AC 86,* HL, per Lord Bridge at 292D–293B; *Mohram Ali v. Tower Hamlets LBC [1993] QB 407,*

CA, per Nolan LJ at 413G–414B). Therefore judicial review applies only to a public authority's capacity to contract and not the terms of the contract itself.

There may well be cases in which a true public law claim vitiates a contractual claim, for example if a public authority takes a decision to terminate a contract where such decision is made in bad faith. In the exercise of its supervisory jurisdiction, the court may well quash the decision. But all that means is that the public authority is free to take the decision again; and if it reaches the same decision in good faith, the contract will be terminated.

I have considered the nature of the dispute in the instant case. The contract in issue comprehensively set out the terms. It also provides for arbitration as a remedy in the event of a dispute between the parties. It is not pleaded that the relationship, or key aspects thereof, were founded in statute. The disputed termination of the contract required no exercise of discretionary or statutory power by the respondent. It does not involve exercise by a local government official of a power under legislation. There is no allegation of abuse of any of statutory powers of the respondent or any other administrative law principles, save for the thinly veiled allegation of denial of a hearing. In the absence of any pleaded unlawful action on the part of the respondent as a public authority, the claim made against it is essentially one of breach of contract. In fact it is merely a matter of a private law nature, the right of one party to a contract to terminate it. There is no statutory duty or protection which makes this a matter one of public law. There is no statutory power of decision involved in the decision to terminate the contract. This is purely a matter of the relationship between parties to a contract. The termination was simply a consequence of the terms of the contract that the parties had agreed upon. Each of the parties cites some of the clauses and seeks to have them enforced in its favour.

Ultimately, the decision to maintain or terminate the contract in issue it is not regulated by any Act of Parliament or exercise of a statutorily regulated power, but rather by the terms of the contract between the parties. The private law of contract provides for remedies in case that termination was effected in breach of contract. A body can be public and yet exercise a private power that is not susceptible to 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. This is therefore, in my judgment, a purely contractual dispute.

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 nothing in the circumstances of this case, to give it any sufficient flavour of a "public" nature to justify this Court's interference by way of judicial review. The thinly veiled allegation of denial of a hearing, considered against the backdrop of the facts as pleaded by both parties, is clearly intended to avoid the dispute resolution mechanism stipulated in clause 13 of the Consent Agreement (annexure "D" to the affidavit in support of the application). Therefore in the instant case, it is only fair that the applicant should be confined to its contractual (private law) remedies, whatever they may be. If it cannot show any breach of contract by the respondent in such proceedings, that should be the end of the matter. The application is therefore struck out with costs for being incompetent.

Dated at Arua this 9th day of January, 2018 ……..

Stephen Mubiru
Judge,
9th January, 2018.