IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Miscellaneous Civil Application No. 013 of 2018

In the matter between

THE REGISTERED TRUSTEES OF KER BWOBO LAND DEVELOPMENT TRUST } ..... APPLICANT

VERSUS

NWOYA DISTRICT LAND BOARD ..... RESPONDENT

Heard: 8 May, 2019.
Delivered: 30 May, 2019.

Administrative law *— Judicial review — hearing of an interested person not a party but opposed to the application — Whether reversal of a decision by a successor administrative agency is illegal— whether a District Land Board becomes functus officcio upon grant of an offer of a lease—whether judicial review is appropriate where the right asserted only incidentally involves the examination of a public law—whether all investigations require observance of the full range of rights under the audi alteram partem rule—whether a person who refuses to attend an inquiry or investigation without good reason, is deemed to have waived his or her right to be heard—Whether the application is barred by limitation.*

Contracts— *validity of a revocation of an offer before communication of its acceptance.*

Land Law— *revocation of offer of a lease over former public land—Autonomy of the District Land Board—The Public Trust doctrine is paramount in all decisions of the District Land Board.*

RULING

STEPHEN MUBIRU, J.

Introduction:

[1] This is an application for judicial review made under sections 36, 37, 38 of *The Judicature Act* and Rules 7, 8 and 10 of *The Judicature (Judicial Review) Rules, 2009; S.I No.11 of 2009*, seeking;- an order of certiorari quashing the

respondent's decision to revoke a lease offer given to the applicant in respect of 3,020 hectares of land situate at Nyamukino, Paibwo Parish, Alero sub-county, Nwoya District; a declaration that the procedure leading to the revocation of that offer violated the applicant's right to be heard; an injunction restraining the respondent from implementing its decision directing the applicant to re-apply for the land; and an order of mandamus compelling the respondent to issue instructions to the Commissioner Land Registration to issue the applicant a certificate of title to the land. The applicant seeks an ward of the costs of the application as well.

[2] The applicant's case as explained in the affidavit of Mr. Okot Ronald Julius, one of the trustees, is that on 28th January, 2013 the Development Trust applied to Amuru District Land Board for 3,020 hectares of land situate at Nyamukino, Paibwo Parish, Alero sub-county, Nwoya District, for commercial and plantation farming. The land was duly inspected by the Area Land Committee of Alero sub-county on 24th April, 2013 and a report issued recommending that the applicant be offered the land (as per annexure "IR"). Amuru District Land Board considered the recommendation and at its meeting under minute number ADLB (13) Min. 4(b) (19) of 29th October, 2013 decided to grant the application. The land was valued (as per annexure "VR") and a lease offer issued to the applicant on 15th May, 2014 (as per annexure "LO"). Instructions to survey were issued on 21st March, 2014, the land was surveyed and a deed print issued (as per annexure "DP").

[3] Following the creation of Nwoya District that was carved out of Amuru District with effect from 1st July, 2013, on 19th July, 2016 forwarded the file relating to the application for this land to Nwoya District Land Board (as per annexure "FL"), since Nyamukino, Paibwo Parish, Lungulu Sub-county, now formed part of Nwoya District. By a letter dated 19th July, 2016 (annexure "LPG"), the applicant was advised by the sub-county Chief of Lungulu Sub-county to pay the premium amounting to shs. 35,000,000/= into the sub-county collection account in Crane

Bank, Gulu Branch. There is no evidence though placed before court to show that the said amount was paid as advised.

[4] The applicant was then on 7th September, 2016 invited by the respondent to attend a meeting scheduled for 15th September, 2016 concerning the offer of a lease that had hitherto been processed by Amuru District Land Board. The meeting was attended by the applicant's advocates but in turned out to be an investigation into the procedure leading to the grant of that offer and the processes that took place thereafter. The applicant was not given prior notification that the meeting would be for consideration of the possible revocation of the offer, hence denying it the right to a fair hearing. The respondent thereafter in its communication dated 23rd September, 2016 (annexure "DCS"), indicated that the offer had been revoked and the respondent should apply for the land afresh. The applicant contends that the respondent did not have the power to revoke the offer considering the advanced stage reached in processing the title deed to the land.

[5] This application is opposed by way of the respondent's affidavit in reply sworn by Mr. Zeru Abukha, the respondent's former chairperson. The respondent contends that the offer was revoked after it discovered a number of anomalies, namely;- that the purported inspection of 24th April, 2013 following which a report was made recommending that the applicant be offered the land (as per annexure "IR" to the motion) never took place in fact; the respondent was constituted and became fully operational on 15th July, 2013 whereupon on 7th January, 2014 it called for the file relating to the land in issue from Amuru District Land Board (as per annexure "A"), yet the file was submitted more than two years later on 19th July, 2016; Amuru District Land Board had issued an instruction to survey that land on 21st March, 2014 yet the respondent had more than two months before on 7th January, 2014 called for the file relating to the land; it is on that account that the respondent became suspicious of the transaction and on 16th November, 2015 recalled the file from Entebbe (as per annexure "C"); it was thereafter

confirmed by the District Staff Surveyor that no actual physical survey of the land on the ground had ever taken place (as per annexure "D").

[6] The respondent further contends that although the application was submitted to Amuru District Land Board on 28th January, 2013 the applicant was only incorporated six months later on 6th June, 2013 and was thus non-existent at the time of the application; the applicants were invited to a meeting convened on 6th May, 2016 (as per annexure "F") intended to sort out all those anomalies but never showed up; the applicants were invited to another meeting convened on 15th September, 2016 for the same purpose but the person they delegated to attend did not present any official authorisation from the applicants; the Area Land Committee of Alero sub-county subsequently on 16th September, 2016 recanted its inspection report of 24th April, 2013 (annexure "IR" to the motion) and wrote instead that the applicant did not own the land applied for (as per annexure "E"); not having received any explanation of the anomalies from the applicant, the respondent decided to revoke the offer, and communicated that decision by letter dated 23rd September, 2016 (annexure "DCS" to the motion and "H" to the affidavit in reply). The application for judicial review having been filed two years later on 20th September, 2018 it is also time bared and ought to be dismissed with costs to the respondent.

Interested party granted audience in opposition to the application;

[7] At the hearing of the application, a one Mr. Odonga Joseph MacLean through his counsel, Mr. Mr. Dan Wegulo, applied to be heard in opposition to the application on ground that he is an offeree of the same land and is likely to be affected by the decision of court. Although under the rules of procedure of this court a necessary party is one against whom relief is claimed and persons whose presence is necessary to enable the court decide the dispute completely and effectively, such that those who are likely to be affected by the decision of the court do not automatically become necessary parties, according to rule 10 (1) of

The Judicature (Judicial Review) Rules, 2009; S.I No.11 of 2009, on the hearing of any motion for judicial review, any person who desires to be heard in opposition to the motion and appears to the court to be a proper person to be heard, shall be heard, notwithstanding that he or she has not been served with notice of the motion or the summons.

[8] Under this provision, all persons who are affected or are likely to be affected by the decision should be heard even if they are not joined as parties. In any event, all persons must necessarily be before the Court who are required to obey the directions of the court, or whose presence is necessary to make such directions effective. In proceedings for judicial review therefore, anybody whose interest is likely to be directly affected by the decision of the court is a necessary party. Such a person when attending the hearing, would be deemed to be a party and be entitled to be heard in opposition to the application. Mr. Odonga Joseph MacLean, being one of the occupants of the land in issue and indeed is an offeree of a lease over part of the same land claimed by the applicant, he was found to have had sufficient interest in the application. He is a person whose interest was likely to be directly affected by the decision of the court and was therefore an interested party. He was accordingly deemed to be party and was granted leave to be heard, notwithstanding that he had not been served with notice of the motion but had been granted leave to file an affidavit in reply.

Submissions in support of the application;

[9] Submitting in support of the application, Counsel for the applicant argued that the manner in which the decision of the respondent was made, recalling the applicants' file from Entebbe, was erroneous. The applicant was entitled to a hearing before such a decision yet he had not been afforded one. The respondents alleged that they were investigating the process by which the applicant had applied for a lease. They suspected that the applicant was involved in fraud. They found that the process was fraudulent in so far as Amuru District

land Board subsequently issued an instruction to survey. That they acted without authority because they found Nwoya was the Board vested with authority. The decision that was made substantially affected the applicant's right who had received an offer of a lease. At the time of the application the authority to deal with the land lay with Amuru District Land Board. The application was made on 28th January, 2013 yet Nwoya District Land Board became operational in June, 2013 (as per annexure H).The offer of a lease was made on 15th May, 2014 (annexure "LO"). The minute approving the application was on 29th October, 2013. Annexure A to the respondent's affidavit in reply is a communication requesting for transfer of the process to itself.

[10] He argued further that the respondent received a complaint from a third party who claimed that when he undertook a survey after being offered the same land by the respondent, he found there was an initial survey. His complaint is that part of the land that was surveyed under the applicant's initial survey encroached on his land. The Board decided to invite the applicant and it was indicated that the purpose of the meeting was for giving additional information to that they submitted to Amuru District Land Board (annexure "G"). The applicant's Chairperson because of health challenges as per para 15 of the affidavit in support of the application, was unable to personally attend but instructed their lawyers, Nimungu Associated advocates, to represent them with instructions to ascertain the nature of information that the Board needed. To their surprise the meeting turned out to be a substantive hearing to answer allegations which had not been brought to the attention of the applicant. The inquiry turned out to be an investigation and they proceeded as if it was an investigation.

[11] In his view, there was unfairness manifested in the decision to recall the file. The surveyors were never heard in explanation of the processes of survey. The Area land Committee was never consulted. They took a decision without proper information. They avoided the proper sources of information and that shows they were not acting in good faith. A reasonable Board should have sought

information from the Area Land Committee. The respondent acted without authority. It should not review the decision of Amuru District Land Board in so far as it found Amuru District Land Board had acted fraudulently. It had no powers of review. The recall was at the stage when the respondent was *functus officio*. It becomes *functus officio* at the moment an offer is made and there is no more discretion henceforth to be exercised. The plotting during the survey was preceded by a valid offer. The proper forum for revocation should have been a court of law.

[12] There is unreasonableness in the decision since the respondent took into consideration irrelevant material such as the date of the applicant's incorporation. They began investigating the issue as a query against the survey processes yet they ended up recalling the offer made to the applicant. The decision affected the rights of the applicant. The consideration were unreasonable in as far as the respondent Land Board purported to reach a fair legal and equitable decision without inquiring from the Area land Committee and the surveyor who conducted the survey. There is no benefit in the decision since the entire process of the applicant's acquisition of title has stalled. In any event Judicial review is concerned with the decision making process and not the decision itself yet Counsel for the third party raises issues relating to the substance of the decision. He therefore prayed that the application be allowed and the reliefs sought be granted.

Submissions for opposing the application;

[13] In response, counsel for the respondent, State Attorney Mr. Amuru Shafiq submitted that the respondents consulted the surveyor who revealed that there had not been a survey at all. Para 12 of the affidavit in reply states that he never surveyed. The surveyor engaged in desk survey without going to the land physically. The Area Land committee wrote to the DLB (Annexure E). The surveyors and the Area Land committee therefore were consulted. Various

opportunities were given to the applicant to appear. Two opportunities were given as per Para 14 of the affidavit in reply. The respondent acted as a reasonable person; invited representations and obtained the necessary information to guide their decision. They had to consider the status of the applicant in public interest. They manage the land in public interest and they needed to know the composition of the applicant. It was a relevant consideration in light of pending applications.

[14] He submitted further that the offer was conditional. Annexure "LO" indicates under condition No. 7 that the offer was conditional on the land being available and free from disputes. The respondent was not *functus officio* at the time it revoked the offer. Since no survey was done it was still within their powers to revoke the process. It is not in doubt that on 28th January, 2013 when the applicant made the application for a lease to Amuru District land Board, Nwoya District Land Board was not in existence. But it came into existence in June, 2013. Nevertheless Amuru district land Board continued to make decisions and act over the same land yet it had no legal mandate to do so.

[15] Secondly, by that fact that the Area Land Committee did not visit the land and there was no survey, this was an illegality and maintaining the offer would lead to an absurdity. It was at the time of submitting the work for approval that the interested party discovered the overlap, not by physical monuments planted on the ground. The remedy sought will affect the offer of land made to the interested party. Annexure "A" shows that the interested party has accepted the offer made to him. The interested party's application is dated 23rd April, 2012 while that of the applicant is dated 28th January, 2013. To grant the order would affect his interest. Page 14 of that affidavit has the Board decision. It was a reasonable decision in light of the facts of the case. There is no injustice to the applicant since the applicant was advised to re-apply. He prayed that the application be dismissed with costs to the respondent.

Interested party's submissions for opposing the application;

[16] In support, counsel for the interested party, submitted that it is not in doubt that on 28th January, 2013 when the applicant submitted the application for a lease to Amuru District Land Board, Nwoya District Land Board was not in existence. It came into existence in June, 2013 yet Amuru district land Board continued to make decisions and act over the same land. It was an illegality and making the grant would lead to an absurdity.

[17] Secondly, by that fact that the Area Land Committed did not visit the land ad there was no survey. It was at the time of submitting the work for approval that he discovered the overlap. The remedy sought will affect the offer of land made to the third party. Annexure "A" shows that he has accepted the offer. His application is dated 23rd April, 2012 while that of the applicant is dated 28th January, 2013. To grant the order would affect his interest. Page 14 of that affidavit has the Board decision. It was a reasonable decision. It was a reasonable decision in light of the facts of the case. There is no injustice to the applicant. the application should be dismissed

General considerations;

[18] In applications for judicial review, it was stated in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1947] 2 ALL ER 680: [1948] 1 KB 223*, that the court is concerned with;- (i) illegality: which means the decision-maker must 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 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.

[19] The applicant has sought a number of orders. The order of Certiorari is a means of quashing decisions of 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*). Certiorari is concerned with decisions in the past.

[20] On the other hand a declaration is a formal statement by the court pronouncing upon the existence or non-existence of a legal state of affairs. It declares what the legal position is and what the rights of the parties are. A declaration pronounces upon the existence of a legal relationship but does not contain any order which can be enforced against the respondent (see *Webster v. Southwark LBC [1983] Q.B. 698*), although it could be contempt for respondent to act to the contrary after having had notice of the declaration. In many situations all that is required is for the legal position to be clearly set out in a declaration for a dispute of considerable public importance to be resolved.

[21] An injunction is an order of a court addressed to a party requiring that party to do or to refrain from doing a particular act. Hence an injunction may be prohibitory or mandatory. A final injunction granted on a claim for judicial review is normally indistinguishable in its effect from a prohibiting or mandatory order (see *M v. Home Office [1994] 1 A.C. 377 at 415E*). Injunctions may be granted to prevent *ultra vires* acts by public bodies (see *R. v. North Yorkshire CC Ex p. M [1989] Q.B. 411*) and to enforce public law duties (see *R. v. Kensington and Chelsea RLBC Ex p. Hammell [1989] 1 Q.B. 518*). In general, a mandatory injunction will not issue to compel the performance of a continuing series of acts which the court is incapable of superintending (see *Attorney General v. Staffordshire C.C. [1905] 1 Ch. 336 at 342*).

[22] Finally, mandamus is directed at ordering the public body to properly fulfil its official duties or correct an abuse of discretion. The order of mandamus is the classical means of compelling the performance by a public body of a duty imposed on it by law. While the duty must be a public one, it may be either of common law or statutory origin. Mandamus will also lie to review the exercise of discretion by administrative bodies. If, in arriving at a decision, the authority takes irrelevant factors into account, it can be ordered to hear and determine according to law. It is an extraordinary remedy designed to compel official performance of a ministerial act or mandatory duty where there exists a clear legal right in the applicant and a corresponding duty in the respondent and where there is no other adequate remedy at law (see *R. v. Barnstaple Justices Ex p. Carder [1938] 1 K.B. 385*).

First issue; Whether the respondent's revocation of the offer of a lease to the applicant is illegal.

[23] It is trite that decisions made without the legal power (*ultra vires*) include; decisions which are not authorised, decisions taken with no substantive power or 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 is not exercised for the 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 the 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 relevant considerations into account.

[24] The illegality alluded to by the applicant in the instant application is that the respondent acted without authority. The applicant argues that the decision to revoke the offer of 3,020 hectares of land situate at Nyamukino, Paibwo Parish, Alero sub-county, Nwoya District made by Amuru District Land Board under minute number ADLB (13) Min. 4(b) (19) of 29th October, 2013, was illegal. It is argued that the respondent has no powers of review and could not review the decision of Amuru District Land Board in so far as it found Amuru District Land Board had acted fraudulently. Secondly, that revocation of the offer was made at a stage when the respondent was *functus officio*. That a District Land Board becomes *functus officio* at the moment an offer is made and there is no more discretion henceforth to be exercised. That therefore the proper forum for revocation should have been a court of law.

[25] In the first place, 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.

[26] 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 the law of 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.

[27] The functions of the respondent fall into two wholly distinct categories. On the one hand, it is charged with decision-making functions. It is for the 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. These are essentially public law functions. The power of decision being committed by statute exclusively to the respondent, its exercise of power can only be challenged before the courts on the 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*; 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*.

[28] On the other hand, the respondent is charged with executive functions. Once an offer is made, rights and obligations are immediately created in the field of private law once it is accepted, capable of being enforced by injunction and the breach of which will give rise to a liability in damages. But it is inherent in the scheme of the statute that an appropriate public law decision of the respondent is a condition precedent to the establishment of the private law duty. While accepting therefore that the duty which the 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 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.

[29] It follows that it cannot be contended that the decision of a District Land Board offering and revoking the offer of a lease, infringes or threatens 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 this application for judicial review, the applicant wishes to overturn a decision that is not 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 rights springing from exercise of the statutory power of the 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.

Revocation of the offer is valid when made before communication of its acceptance;

[30] From the perspective of the private law of contract, an offer may be revoked at any time before the communication of its acceptance is complete as against the offeror, but not afterwards. The communication of a revocation is complete (a) as against the person who makes it, when it is put into a course of transmission to

the person to whom it is made, so as to be out of the power of the person who makes it and (b) as against the person to whom it is made, when it comes to his or her knowledge.

[31] For example in *Routledge v. Grant [1828] 4 Bing 653; 130 ER 920*, the defendant contacted the claimant in writing, offering to purchase the lease of the claimant's home. The offer stated that it would remain open to the claimant for a period of six weeks. However, during this period, before the claimant had accepted, the defendant changed his mind about the purchase and wrote to the claimant once again purporting to withdraw the offer. After receiving this second letter, still within six weeks from the first, the claimant accepted the defendant's offer. The issue was whether the defendant was contractually bound by his original letter to keep the offer open for six weeks, and by extension whether he was therefore bound by the claimant's acceptance within that period. The court held that the original letter did not bind the defendant to keep the offer open for a full six weeks, and as such it had been validly withdrawn by the defendant, and the claimant's purported acceptance was ineffective. In the words of Best CJ:

> "… If a party make an offer and fix a period within which it is to be accepted or rejected by the person to whom it is made, though the latter may at any time within the stipulated period accept the offer, still the former may also at any time before it is accepted retract it; for to be valid, the contract must be mutual: both or neither of the parties must be bound by it…"

[32] The underlying reason for this is that it is a fundamental principle of the law of contract that one party cannot be bound whilst the other is not. In the instant case, according to the Amuru District Land Board minute number ADLB (13) Min. 4(b) (19) of 29th October, 2013 (marked as annexure "VR" to the motion and as communicated in the offer dated 5th May, 2014), the offer had to be accepted within 45 days in writing and payment of specified fees. This was communicated in the formal Offer of 15th May, 2014 as condition No. 5 (see annexure "LO" to the motion). The applicant has not presented evidence of having accepted the offer "in writing" and payment of the specified fees within the specified 45 days.

Although the applicant the applicant has presented evidence to show that it was advised by the sub-county Chief of Lungulu Sub-county to pay the premium amounting to shs. 35,000,000/= into the sub-county collection account in Crane Bank, Gulu Branch, there is no evidence though placed before court to show that the said amount was paid as advised. The applicant has only produced evidence indicating an intention to pay the sum required as premium, albeit to the wrong entity.

[33] At common law, an offer will lapse if it is open for a specific length of time and that time limit expires (see *Ramsgate Victoria Hotel v. Montefiore, (1866) LR 1 Ex 109*). In the instant case, the offer was specifically stated to be open for 45 days. In the circumstances, the respondent was under no obligation to keep the offer open for any further period. Since the offer was not kept open upon expiry of the 45 days, its purported acceptance by way of the applicant's letter of inquiry as to where payment of the premium should be made (letter dated 19th July, 2016; annexure "LB" to the motion addressed to the Chairman of Lungulu sub-county) and the letter in reply dated 19th July, 2016 (annexure "LPG") from the Chairman of Lungulu sub-county, did not give rise to a binding contract. There is no evidence to show that the Chairman of Lungulu sub-county had authority to act on behalf of the respondent in matters relating to this offer. On both accounts therefore, when the respondent decided to revoke the offer, and communicated that decision by letter dated 23rd September, 2016 (annexure "DCS" to the motion and "H" to the affidavit in reply) it was entitled to do so since there had not been any acceptance of the offer by that date. An offer may be revoked at any time before the communication of its acceptance is complete as against the offeror.

[34] On that account, 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.

Autonomy of the District Land Board;

[35] As regards the argument that the respondent has no powers of review and could not review the decision of Amuru District Land Board, according to section 60 (1) of *The Land Act*, in the performance of its functions, a District Land Board is not subject to the direction or control of any person or authority. It is only required to take into account the national and district council policy on land and the particular circumstances of different systems of customary land tenure within the district.

[36] According to the respondent's affidavit in reply, the respondent District land Board was constituted and became fully operational in September, 2013. It therefore became an autonomous body distinct and independent from Amuru District Land Board. *The Land Act* is silent though as to whether decisions of a predecessor District Land Board are binding on a successor one, upon the creation of a new District. However, it is a cardinal principle of administrative law that administrative bodies are not bound by their previous decisions. As long as the decision in any given case is reasonable, then it should not be struck down just because the administrative body previously reached a different decision (see *Construction Workers Union (CLAC), Local No. 63 v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488, 2012 ABQB 540; [2012] A.R. TBEd. SE.036*). Administrative decision-makers have significant flexibility in responding to changes in regulatory context and may change policies to better suit changed circumstances.

[37] It is this court's view that for a District Land Board to be in a position to act independently and in full knowledge of the facts, it must be provided with all the

information it needs. Permitting decisions of a predecessor District Land Board to foreclose and be binding upon a successor one, would allow the decisions of the predecessor District Land Board to override those of the new one and fetter its discretion in information gathering, thereby contravening the autonomy guaranteed by section 60 (1) of *The Land Act*. Given the fact-intensive and policy-laden nature of the work of District Land Boards, while theirs and their predecessors' earlier decisions may be relevant and even persuasive, they ought not to be binding.

[38] While consistency is doubtlessly a good thing in administrative decision-making, focusing on the facts at hand rather than on technical legal rules and synthesising a new case with previous decisions may make it easier for individuals to interact with administrative decision-makers. While in some cases there may be need to reference earlier decisions for purposes of consistency or to support a particular decision, District Land Boards should not have their discretion fettered by their own and their predecessors' earlier decisions. An administrative agency is not bound by its previous decisions and is free to adopt any reasonable interpretation of the matter before it. Previous interpretations will only have some bearing on the determination of the reasonableness of the agency's interpretation in a current matter. administrative agencies are, therefore, free, like courts, to correct a prior erroneous interpretation of the law, modify or overrule a past decision.

[39] Where an individual decision of an administrative agency does not create rights, provided that the principle of good faith is respected, it may be reversed at any time. On the other hand, a decision becomes binding on an administrative agency only when it is notified to the person concerned in the prescribed manner or in some other manner that gives rise to an inference that it was intended to notify the person concerned, of the decision.

[40] Although an individual decision affecting a person becomes binding on the administrative agency which has taken it and may thus create rights for the person concerned as soon the person has been notified of the decision, as a general rule, such a decision may be reversed if two conditions are satisfied: where the decision is unlawful or where it has not yet become final. In the instant case, the offer of 3,020 hectares of land situate at Nyamukino, Paibwo Parish, Alero sub-county, Nwoya District made by Amuru District Land Board was conditional and had not become final since it had not been accepted yet. Therefore, when the respondent sought to examine the circumstances surrounding that offer, it was not exercising a power of review, but rather its statutory mandate under section 60 (1) of *The Land Act,* over land within its geographical jurisdiction in respect of which a final decision had not been made yet.

A District Land Board does not become *functus officio* upon issuing a lease offer;

[41] As regards the argument that the respondent became *functus officio* upon grant of the offer to the applicant, the *functus officio* doctrine holds that once a decision-maker renders a decision regarding the issues submitted, the decision-maker lacks any power to re-examine that decision or to re-determine those issues. The implication of the argument in this context is that when a District Land Board has completed the business with which it is entrusted, it is *functus officio* in the sense that it has no further authority or legal competence because its duties and functions have been fully accomplished. It is trite that an administrator will be *functus officio* once a final decision has been made and will not be entitled to revoke the decision in the absence of statutory authority to do so (See for example, *Thompson, trading as Maharaj and Sons v. Chief Constable, Durban 1965 (4) SA 662 (D) at 667C-D*). The question then is whether the business of a District Land Board in dealing with a specific application for a lease over land under its jurisdiction and mandate, ends and is fully accomplished with the grant of an offer.

[42] According to section 59 (1) (d) of *The Land Act*, the functions of a District Land Board include causing surveys, plans, maps, drawings and estimates to be made; and under section 59 (1) (b) thereof, the facilitation of the registration and transfer of interests in land. It follows therefore that with each application, the functions of a District Land Board continue until the registration of the interest, since it not only has to cause the preparation of the deed plan but it also has to facilitate the registration of the interest so created. It is thereupon that the business with which it was entrusted becomes *functus officio* in the sense that it has no further authority or legal competence because its duties and functions have been fully accomplished. Issuing an offer of a lease is only a step in that process and not its final decision. Because it was not a final decision, it was subject to change without offending the *functus officio* principle. Subject to the law of contract, the respondent Board was entitled to revoke that offer for just cause at any time before registration of the interest created by the offer.

The Public Trust doctrine is paramount in all decisions of the District Land Board;

[43] This is mainly because according to article 241 (1) (a) of *The Constitution of the Republic of Uganda*, *1995* (reproduced in section 59 (1) (a) of *The Land Act*), one of the cardinal functions of District Land Board is "to hold and allocate land in the district which is not owned by any person or authority." The District Land Board is required that in the performance of its functions, it should take into account "national and district council policy on land" (see article 214 (2) of *The Constitution*), and "the particular circumstances of different systems of customary land tenure within the district" (see section 60 (1) of *The Land Act*).

[44] A District Land Board is thus entrusted with powers of Land administration only which include; - management, allocation and disposing of former public land or land in the district which is not owned by any person or authority, as well as leasing and effecting change of user in respect of such land. A District Land Board is thus mandated with the determination, recording and dissemination of

information about ownership, value and use of such land and its associated resources. In exercise of those powers, section 59 (8) of *The Land Act* provides that;

> The board shall hold in trust for the citizens the reversion on any lease to which subsection (1) (c) relates and may exercise in relation to the lease and the reversion the powers of a controlling authority under *The Public Lands Act, 1969*, as if that Act has not been repealed; but subject to the foregoing, that Act shall, in respect of any such lease or reversion, have effect with such modifications as may be necessary to give effect to this Act and shall be subject to the provisions of the Constitution (emphasis added).

[45] The fact that the Board holds the reversion "in trust" for the citizens implies that it is the duty of a District Land Board to manage land entrusted to it, for the public good, in the sense that it is land in which the public has an interest, or some interest by which their legal rights or liabilities are affected (see *Black's Law Dictionary*, 6th Edition, St. Paul, Minn. West Publishing Co. (1990). The law thus creates a special trust that imposes fiduciary duties upon the Board, such as the duty of good faith, fair dealing, full disclosure and loyalty, which require it to exercise its discretion or expertise in the best interests of the citizens.

[46] The decisions of a district Land Board should therefore be founded on the principles underlying good governance in the management of such land which are; legitimacy, accountability, fairness and participation. The Board should be a reliable and trusted institution in land management and delivery of security of tenure, equity in land distribution, and the promotion of sensible and attractive development such that public benefits are maximised. Ultimately, the Board should aim to use its powers of land administration as a means of achieving sustainable development.

[47] Public land management focuses on establishing and sustaining an optimum balance of use, conservation and development of resources, in harmony with the values and needs of society. The Board should in all its decisions primarily aim

to promote public welfare as opposed to decisions that benefit one or a few individuals. As aptly stated by the Private Sector Foundation, Uganda in its *Review of the Legal Framework for Land Administration: Final draft issues Paper,* (August, 2010) at p. 19*;*

> With increasing populations, demands for industrialisation and development, and for environmental conservation, public land management practices and policies must address a wider range of competing demands. These include access to land for the land-poor and other pro-poor agendas, agricultural uses, industrial uses, commercial uses, recreation, and conservation of selected public land locations. Underlying these competing and sometimes irreconcilable demands is a requirement to balance development and conservation of the land with long-term sustainability.

[48] The challenge of the District Land Board as the resource manager is to "read" when and where different rights regimes, as between the private, the commons and the collective, may be appropriate to support poverty alleviation and sustainable rural livelihoods more generally. Whereas, article 241 (1) (a) of *The Constitution of the Republic of Uganda, 1995* charges a District Land Board with the management of land by holding and allocating land in the district which is not owned by any person or authority, the Board ought to be mindful of the fact that administrators of land have an impact on land tenure systems in their area of jurisdiction. They have a special responsibility to society.

[49] They cannot perpetuate a system of allocation, appropriation, disposal or use of such land that is devoid of accountability or methodology. Holding such land in trust for the citizens of Uganda imposes upon the Board an obligation to manage it in an equitable and efficient manner that guarantees sustainable productivity. It exists for the good of all, not the profit of a few, hence the Board should be keen on ensuring that individuals or corporations who own large tracts of land put it to sustainable productive use.

[50] Weak governance in the system of allocation, appropriation, disposal or use of such land has direct and indirect implications for citizens, and broader effects on

economic development, political legitimacy, peace and security and development cooperation (see Willi Zimmermann, *Effective and Transparent Management of Public Land Experiences; Guiding Principles and Tools for Implementation*, a paper presented at the FIG/FAO/CNG International Seminar on State and Public Land Management in Verona, Italy, 9-10 September, 2008). This is further echoed in *The Uganda National Land Policy* (February, 2013 at p 4) thus;

> One of the major concerns in the land sector at present is the allocation of government land, public land, and natural resources held by the State in trust for the citizens for private investment. Such land allocations have taken place amidst an environment of incoherent and / or non-existent and / or non-transparent processes and procedures. This in effect, has weakened institutions governing the use and management of these lands and natural resources. Some of the allocations have not considered ecological, environmental, economic and social impacts; and as such have displaced vulnerable land and natural-resource-dependent communities whose rights to land access, food security and livelihoods are lost. Whereas private sector investment in land and natural resources is necessary and should be promoted, safeguards ought to be put in place to ensure a transparent process with due diligence so that the land rights of vulnerable sections of society and the environment are not compromised.

[51] The basic reason that societies manage land is to satisfy human needs. Having a secure home, or even a secure place to sleep or work, satisfies fundamental necessities of life, just as guaranteeing a harvest to the sower of grain delivers food security (see Ian Williamson et.al.; *Land Administration for Sustainable Development,* Esri Press, 380 New York Street, Redlands, California 92373-8100 (2010) at p 15).

[52] A sustainable system of land administration requires that the institutions that interact with the citizens who are its intended beneficiaries do so in ways that build their confidence, particularly by negating disputes and managing points of tension relating to landownership, use, and availability. For example providing gender inclusiveness in access to land can benefit families, communities, and the nation through;- increased economic opportunities, increased investment in land and food production, improved family security during economic and social

transitions, and better housing and land stewardship. Land is also required for:- (i) direct developmental benefits for the country through improved food security; (ii) infrastructural developments which benefit the public; or (iii) activities with strong linkages to other industries in the country that generate substantial foreign exchange. Such benefits, however, can only be fully realised if the Board is sensitive to all these dimensions.

[53] Under article 421 (1) (b) of *The Constitution of the Republic of Uganda, 1995* and section 59 (1) (b) and (c) of *The Land Act,* the Board has the power to facilitate the registration and transfer of interests in land and take over the role and exercise the powers of the lessor in the case of a lease granted by a former controlling authority. It may be inferred from those provisions that it has the power of alienation of such land.

[54] With the responsibility of protecting and overseeing the public's rights and interests in such transactions, it is therefore the duty of the Board to develop guidelines on the procedure to be followed, and factors to be considered in the extension and renewal of leases. These roles are the preparatory steps towards the registration of a title. Land Registration (the process of determining, recording, updating and disseminating information about the ownership, value and use of land), is outside the Board's scope of duties but affects the legitimacy of the title. In general, the *functus officio* doctrine applies only to final decisions, so that a decision is revocable before it becomes final. Finality is a point arrived at when the decision to offer a lease culminates in the registration of the interest created by the offer.

<u>The respondent's decision is justified by the anomalies in the transaction</u>;

[55] In the instant case, the respondent in exercise of its mandate discovered a number of anomalies with the offer at hand, before it culminated in the registration of the interest created by the offer, to wit;- the purported inspection of

24th April, 2013 never took place in fact; the respondent was constituted and became fully operational in September, 2013 whereupon on 7th January, 2014 it called for the file relating to the land in issue from Amuru District Land Board yet the file was submitted more than two years later on 19th July, 2016 with no explanation for the delay; in the meantime, Amuru District Land Board had issued an instruction to survey that land on 21st March, 2014 yet it no longer had the legal mandate to do so at the time; it was thereafter confirmed by the District Staff Surveyor that no actual physical survey of the land on the ground had ever taken place; and lastly although the application was submitted to Amuru District Land Board on 28th January, 2013 the applicant was only incorporated six months later on 6th June, 2013 and was thus non-existent at the time of the application.

[56] The Public Trust Doctrine stipulated under article 421 (1) (b) of *The Constitution of the Republic of Uganda, 1995* and section 59 (1) (b) and (c) of *The Land Act,* involves a balance of public rights, private rights, and sovereign authority. In reviewing the decision of the respondent District Land Board in this context, the court would determine whether or not the decision of the respondent was undertaken to serve the primary public purpose of intergenerational use and access to land, or to serve another standard of proper public purpose, such as public health, safety, morals, or general welfare. The court would also determine if the means chosen rationally relate to that proper purpose. In dealing with land under the administration of a District Land Board, meeting this rationality requirement would require the impugned decision either to promote or not substantially impair public interests in the resource.

[57] When a District land Board, alienates trust property to private holders, the offer does not squelch the public interest. Instead, the public interest persists in the form of a condition subsequent (see *Boston Waterfront Development Corp. v. Commonwealth, 393 N.E.2d 356 (Mass. 1979*). According to condition No. 7 of the offer (annexure "LO" to the motion), the offer was conditional on the land

"being available and free from disputes at the time of survey." In the instant case, it was confirmed by the District Staff Surveyor that no actual physical survey of the land took place on the ground (as per the letter dated 2nd August, 2016; annexure "D" to the affidavit in reply). The person purported to have conducted the survey wrote as follows;

> In response to the subject matter: I don't know about Ker Bwobo, what they do, where their offices are and their officials. This proves that no survey took place because for the exercise to happen it requires us to meet physically for introduction followed by payment of survey fees, field work and finally document processing..... I am so disappointed because my name is appearing on the survey file but I would like to point out clearly that I did not carry out any survey field work on the subject land (the community around the area of complaint can testify on my behalf), instead I was only given the document to sign by the Supervisor because it is not recommended for a surveyor to supervise himself.....

[58] In the interested party's affidavit in reply, it is stated that he and his family have since the year 2007 been resident on part of the land purportedly surveyed in the above circumstances. He and his wife on 23rd April, 2012 applied for a lease over their holding and received an offer from the respondent on 5th November, 2018. It is upon causing a survey and submitting the drawings to the drawing office that it was discovered that there had been an earlier survey. The implication then is that this was only a "desk-survey," hence his complaint of 12th August, 2015 to the respondent. It was in the public interest that this investigation be conducted. Since the complaint was brought to the attention of the respondent before the point of finality had been reached, which would have occurred when the decision to offer the lease culminated in the registration of the interest created by the offer, it was subject to change without offending the *functus officio* principle. The revocation of an offer will be deemed effective if it is communicated to the offeree before a valid acceptance on his or her part.

[59] Subject to the law of contract, the respondent Board was entitled to revoke that offer since there was just cause. The applicant had proceeded to cause

purported drawings to be submitted for processing a title yet no physical survey had been undertaken on the ground. Had the respondent turned a blind eye to that and the other anomalies identified in the process of reviewing the transaction, it would have failed in its duty of promoting the public interest in its management of such land. Revocation of the offer was not only in the public interest, but also a proper exercise of the respondent's statutory mandate and in a manner consistent with the private law of contract. Consequently the first issue is answered in the negative; the respondent's revocation of the offer of a lease to the applicant was not illegal.

Second issue; Whether there is any procedural impropriety in the process leading to the respondent's decision to revoke the offer of a lease that had been given to the applicant.

[60] A decision may be illegal where there has been a failure to comply with procedural requirements. Procedural fairness requires the decision maker to demonstrably use a fair decision making procedure that is free from the appearance of bias. The decision maker needs to come to a decision in a procedurally "fair" way otherwise, the decision may still be unlawful. Procedural impropriety may arise from one of three possible sources; either from (i) failure to adhere to procedural rules laid out by statute, or (ii) failure to observe the principles of natural justice; or (ii) failure to act fairly. Following the correct and fair procedure is important because it is not just the substance of a decision that matters. If procedural requirements in a decision making process are followed, they are likely to secure a just outcome and demonstrate compliance with the rule of law.

[61] It was argued by counsel for the applicant that the respondent's decision substantially affected the applicant's rights as a person who had received an offer of a lease and therefore the applicant was entitled to be heard before the decision was made. The applicant was notified only of the applicant's need to

clarify the offer, only to be surprised when the meeting turned out to be a substantive hearing to answer allegations which had not been brought to the attention of the applicant. The applicant's Chairperson because of health challenges was unable to personally attend but instructed their lawyers, Nimungu Associated advocates, to represent them with instructions to ascertain the nature of information that the Board needed.

[62] The Principles of natural justice apply equally to an administrative enquiry which entails civil consequences as much as they apply to quasi-judicial processes. The principles should be observed when administrative decisions likely to affect rights or the status of an individual are to be taken. The application of the principles of natural justice varies from case to case depending upon the factual aspect of the matter. Unfairness may occur in the non-observance of the rules of natural justice or the duty to act with procedural fairness towards persons affected by the decision. It may also involve failure 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 (see See *Council of Civil Unions v. Minister for the Civil Service [1985] AC 2*; *An Application by Bukoba Gymkhana Club [1963] EA 478 at 479* and *Pastoli v. Kabale District Local Government Council and Others [2008] 2 EA 300*).

[63] On the other hand, according to article 24 of *The Constitution of the Republic of Uganda, 1995* persons appearing before any administrative official or body have a right to be treated justly and fairly. The essence of fairness is good conscience in a given situation (see *Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others, 1978 AIR 851, 1978 SCR (3) 272*). Fairness has also been described as "openness, or transparency in the making of administrative decisions" (see *Doody v. Secretary of State for the Home Department [1993] 3 All E.R. 92*). It is usually unfair for an administrator to make a decision that adversely affects someone without giving reasons**.** Even where there is no statutory requirement, the decision maker must still give reasons

where the decision appears to be inconsistent with previous policy, or with other decisions in similar cases. In such cases, some explanation for the difference is needed.

[64] Giving reasons helps demonstrate that all relevant matters have been considered and that no irrelevant ones have been taken into account. The concepts of fairness, justice and reasons are interchangeable and one cannot be achieved without the other. Reasons are the link between the decision and the mind of the decision maker.

[65] Literally translated *audi alteram partem means* “hear the other party.” It is an elementary notion of fairness and justice that a decision should not be made against a person without allowing the person concerned to give his side of the story. Put in the context of administrative decision making, the *audi alteram partem* principle requires that a decision affecting a person’s rights or his or her legitimate expectations of receiving a benefit, advantage or privilege should only be made after hearing first from that person and taking into account what he or she has said. The main purpose of the *audi alteram partem* rule is to ensure accurate, informed and fair decision-making that inspires public confidence in administrative action. An administrative agency which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person must act in a fair manner.

[66] It is the contention of the respondent that this being an inquiry, it was not subject to the *audi alteram partem* rule. Inquiry is defined as “the systematic search for information, knowledge and truth about certain things and matters of public interest.” It is the process of solving a problem through researching and probing. It involves questioning and interrogation. It is aimed not only at searching for and acquiring knowledge and information about something, but it is also meant to settle any doubt that individuals may have on the subject. While an inquiry is a process, usually by a committee, agency, a public body, authority, or

government, brought in motion for the purpose of clearing a doubt, enhancing knowledge or finding a solution to a problem, an investigation is a formal process to get to facts and the truth by way of observing, measuring, testing and asking questions.

[67] Whereas the main object of an investigation is the collection of evidence, making findings of facts would entail an inquiry. Therefore an inquiry involves investigation and an investigation involves inquiry and although they have some very subtle differences, both words can be used in lieu of each other since they are synonyms and mean more or less the same thing.

[68] The the *audi alteram partem* rule is not of fixed content, but varies with the circumstances. It has been held to include everything from the right to reasons and formal notice, to the right to an oral hearing. In its fullest extent, it may include the right to be appraised of the information and reasons underlying the impending decision; to disclosure of material documents; to a public hearing and, at that hearing, to appear with legal representation and to examine and cross-examine witnesses, etc.

[69] An administrative decision that has serious or drastic consequences for the subject's rights, privileges and freedoms, very often goes through a process of investigation, but not all investigations require observance of the full range of rights under the *audi alteram partem* rule. Where the proceedings are of a quasi judicial nature, involving hearing or investigation into disputed claims and alleged infractions of rules and regulations, the administrative agency must; give adequate notice of the nature and purpose of the proposed action; give a reasonable opportunity to make adequate representations; and give adequate notice of any right of review or appeal, where applicable. If the decision-maker is holding prejudicial information against the person concerned, that prejudicial information must be disclosed to the person and he or she must be given a chance to refute that information.

[70] However, a fact-finding investigation of the nature undertaken by the respondent, which was not a quasi judicial process, does not demand for full observance of the *audi alteram partem* rule, including; prior notification of charges or accusations, notification of the evidence in possession of the respondent prior to the applicant's appearance as a witness, nor would the applicant be entitled to demand to be allowed to present a "case," lead evidence, have legal representation, cross-examine other witnesses, and address the respondent. The criterion is one of fundamental fairness and for that reason the principles of natural justice are always flexible. What fairness requires will vary from case to case and manifestly the gravity and complexity of the matter under investigation will impact on what fairness requires. What is a breach of procedural fairness in one context may be a fair and acceptable practice in another.

[71] Although there is need to afford a hearing to a person before making a finding which may have an impact on rights or interests, such as findings that attribute misconduct, this investigation never began as an adjudicative process involving an accusation against the applicant. The respondent had taken a preliminary view of the situation but needed to investigate further. It was only co-incidental that a fact-finding investigation, which was not initiated as a hearing or as an investigation into disputed claims and alleged infractions of rules and regulations, yielded facts whose determination and the conclusion reached, directly affected the legal rights of identifiable persons. At this very preliminary stage there was no duty to have given the applicant a hearing. At the very initial stage, when the respondent's attention was drawn to possible anomalies in the transaction, it was not in principle or legally required of the respondent to have given the applicant an opportunity to answer what were suspicions, which could have been confirmed or alternatively proved groundless in further investigations.

[72] In a situation like that, to prove unfair treatment under article 24 of *The Constitution of the Republic of Uganda, 1995*, an applicant must show that the measures or decisions taken by the administrative agency in the process of

investigation are not reflective of good conscience, or were taken for improper purposes, or were misguided by extraneous or irrelevant considerations, or were not aimed at promoting public interest and that they adversely affected the applicant or that the applicant's dignity has been significantly adversely affected or demeaned by those measures or decisions.

[73] What is required for the respondent to meet the duty to treat the applicant justly and fairly in a process of investigation**, is** to have done its best to act justly, and to reach just ends by just means, i.e. acting honestly and by honest means. The nature of this standard was explained in *De Verteuil v. Knaggs and Another [1918] A.C. 557*, as “a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice."

[74] Decisions are seen as "fair" when they are perceived to be morally right, e.g. ethical, dictated by conscience, honest, uncorrupted and free from prejudice, favouritism or self-interest, balanced, etc. (the focus is primarily internal and subjective). Conduct is seen as "fair" if it is perceived to be administratively just, e.g. lawful, in accordance with accepted standards of conduct, in good faith and for legitimate reasons, unbiased, rational, consistent, what is appropriate for a particular situation, etc. Some of the criteria that can be used to assess fairness is honesty, legality, regularity, provision of an opportunity to be heard, etc.

[75] In many cases natural justice is satisfied if the affected person is afforded the opportunity to make a written submission. Oral hearings are more likely to be called for if there are disputed questions of fact to be determined, there is a need to assess whether a person is telling the truth, or an affected person cannot adequately put their case in written submissions. For example in *H v. St John’s College 2013 (2) ZLR 621 (H)* the applicant had been disciplined by the school authorities for breach of the school rules by barring him from attending the school

leavers' dance. Before doing so, the school authorities had called for an explanation in writing, which the applicant had ignored. The school authorities then went ahead and withheld the applicant's entitlement to attend the leavers' dance, which the only event of significance still remaining for the applicant at the school. In court, he complained that he had not been charged with any offence, but was being punished. He claimed that the respondent had violated the rules of natural justice. The school was meting out the most severe punishment without having charged him with any offence, let alone affording him the chance to be heard.

[76] It was held in that case that the "right to be heard" in appropriate circumstances may be confined to the submission of written representations. It is not the equivalent of a "hearing" as that term is ordinarily understood. The school had taken that measure in an effort to get a response. There was no fault in the measures taken by the respondent, which had been what the exigencies of the situation had demanded. The applicant had spurned the opportunity that he had been afforded to explain his absenteeism. The school authorities had not breached the *audi alteram partem* rule. Thus, in some cases, conduct can be dealt with perfectly fairly by allowing the parties to make their submissions in writing.

[77] That aside, a person that was given an opportunity to be heard who claims to have been unable to attend the hearing, is obliged to provide convincing proof of this. A person who refuses to attend the inquiry or investigation without good reason, is deemed to have waived his or her right to be heard. For example in the South African Case of *Old Mutual Life Assurance Co. (Pty) Ltd v. Gumbi (2007) 8 BLLR 699; [2007] ZASCA 52*, an employer dismissed the employee for misconduct. The employee took the employer to the High Court on grounds that the disciplinary hearing had taken place in his absence. The Court found that the employee had wilfully excluded himself from the disciplinary hearing and dismissed the case. The employee took the matter to a higher court, the Transkei

Regional Court which reversed the High Court's decision on the grounds that the employee had a valid reason for his absence from the hearing. That is, he was ill and produced a medical certificate.

[78] The employer then took the matter to the Supreme Court of Appeal, which found that when the disciplinary hearing had first been convened the employee had proffered a medical certificate. The employer then withdrew the charges and, after the employee had returned to work, issued him with a new hearing notice. However, the employee's representative raised some spurious reasons for trying to halt the hearing. After a brief adjournment the employee's representative submitted another doctor's certificate and made it clear that he and his client would not be attending the hearing. The second medical certificate had been offered under questionable circumstances and had little value. The employee had thus used unacceptable means of trying to abort the disciplinary hearing. Had he truly been ill he should have applied in advance for a postponement. The employer therefore had the right to proceed with the hearing in the employee's absence and the dismissal was not unfair.

[79] In the instant case, the applicants were first invited at a meeting convened on 6th May, 2016 (as per annexure "F") intended to sort out all those anomalies but never showed up. The applicants were invited to another meeting convened on 15th September, 2016 for the same purpose but the person they delegated to attend did not present any official authorisation from the applicants. While an affected person's right to attend an inquiry or investigation should not be dispensed with too hastily, and fairness demands that if an affected person fails to attend a first meeting it will usually be good practice for the public agency to re-arrange the meeting to an alternative day in order to give the affected person a further chance to attend, in the event that the affected person persistently seeks to postpone the meeting or simply fails to attend without good reason, a decision may need to be taken in the affected person's absence.

[80] Public agencies cannot be expected to put off an investigation indefinitely. The applicant was given an opportunity to comment, criticise, explain or rebut the material brought to the respondent's attention, hence the opportunity to be heard which it did not take. The respondent then went ahead and made a decision based on the facts it had established ad gave reasons for the decision. The respondent has clearly and unequivocally proved that the decision was reached with proper motivation but not any ulterior motives. I therefore have not found any procedural impropriety in the process leading to the respondent's decision to revoke the offer of a lease that had been given to the applicant.

Third issue; Whether the respondent's decision to revoke the offer made to the applicant was irrational.

[81] In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Decision-makers remain free to take whatever decision they deemed right in their conscience and understanding of the facts and the law, and not be compelled to adopt the views expressed by other members of the administrative agency. “Reasonable” means here that the reasons do in fact or in principle support the conclusion reached. The court will intervene when the reasons for decision are non-existent, opaque or otherwise indiscernible. The decision should be so unreasonable that no reasonable authority could ever have come to it. Failure to take into account a relevant consideration is a badge of unreasonableness.

[82] When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum; the result is to be looked at in the context of the evidence, the parties’ submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. That is, even if the reasons in fact given do not seem

wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference is the appointment of the agency and not the court as the front line adjudicator, the agency's proximity to the dispute, its expertise, etc. the concept of "deference as respect" requires of the court's respectful attention to the reasons offered or which could be offered in support of a decision and not submission. The fact that there may be an alternative decision to that reached by the agency does not inevitably lead to the conclusion that the agency's decision should be set aside if the decision itself is in the realm of reasonable outcomes. On judicial review, a judge should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

[83] To justify interference by court without delving in the merits, the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it.

[84] Judicial review of the decision's reasonableness is limited to the questions of whether the challenged determination was arbitrary and capricious, irrational, made in bad faith, or contrary to a Constitutional provision or a statute. Such reviews were only limited to an exceptional class of case in which public agency stepped outside the range of reasonable decision making. A reasoning or decision is unreasonable (or irrational) if it is so unreasonable that no reasonable person acting reasonably could have made it (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223*). The test is stricter than merely showing that the decision was unreasonable.

[85] 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 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.

[86] The decision and the reasons behind it are contained in the respondent's letter addressed to the applicant dated 23rd September, 2016 (annexure "DCS" to the motion), which indicated that the offer had been revoked and the respondent should apply for the land afresh. The respondent wrote as follows;

> .....your application for a leasehold title....[has] raised a lot of questions (not to say controversy)... The Board would like to apologise in advance if the time taken before our decision has been too long, but the intention was to get fair and proper information to guide the Boars on its decision.....Nwoya District Land Board has always respected the work done by our predecessor Board in Nwoya County, only until 12th August, 2015 when a "red flag" was raised for our attention by a one Mr. Odonga Joseph McLean (see annex1). Immediately NDLB embarked on investigating this circumstance. You may also appreciate the fact that on several occasions the Chairman NDLB and the Nwoya District Staff Surveyor had been in contact with you over the issue. I am now happy to say that it took us exactly one year to come up with this decision.
>
> .....The question why Amuru still went ahead to approve this file despite the fact that they already knew Nwoya District Land Board was already operational is beyond our comprehension. Nwoya District

> Staff Surveyor was recruited in March, 2013, did her induction in Gulu District Land office at the same premise where Amuru Land office was housed and every staff of Gulu and Amuru knew of her existence. Our Board now wonders why really, on the 21st March, 2014 Gulu District Staff Surveyor (after request for Amuru Land Office) went ahead to issue instructions to survey that piece of land you are applying for in total disregard of the presence of the substantive Staff Surveyor of Nwoya. The answer to this question is still lacking and both Amuru District Land Office together with Gulu District Staff Surveyor owe Nwoya District Land Board a thorough answer.
>
> ....Gulu District Staff surveyor issued the instruction to survey to M/s MHE Technical Services....it turned out that it was instead Jerusalem International Ltd that "surveyed" the land. Our investigation informs us that that Jerusalem International Ltd is a private surveys and mapping consultancy firm belonging to the Gulu District Staff Surveyor. In essence, the District Staff Surveyor instructed himself and supervised himself and came out with a survey report.....he categorically states that he did not carry out the survey field work on the subject land.....[at] a public meeting on 13th February, 2016 held at Arana, Nyamukini village...the then Chairperson of the Area Land Committee of Alero sub-county....said publicly that no inspection of the land took place.....In the same meeting almost everybody present testified that there was no inspection, nor any survey took place.....
>
> In consideration of the above eleven issues.....the Board would like to communicate to you thus;
>
> 1. Nwoya District Land Board considers your application to have been fraudulently done and processed.
> 2. Nwoya District Land Board is going ahead to cancel your application, instruction to survey, deed plan and lease offer.
> 3. Nwoya District Land Board advises Ker Bwobo to re-apply. The new application shall, however this time, be inspected and surveyed with the close supervision from the District Land Board.

[87] It is argued by counsel for the applicant that the decision is rational in so far as the respondent did not obtain the necessary information from the relevant Area Land Committee and surveyor. To the contrary, I have found that the respondent consulted with both sources, and the relevant documentary evidence in proof

thereof was attached to both its communication to the applicant dated 23rd September, 2016 (annexure "DCS" to the motion) and the affidavits in reply.

[88] While the information made available to those making decisions must be underpinned by clear and accurate data and thorough analysis, I find that to the extent the respondent derived the required evidence from the best available sources, the consultations made are within the acceptable range of sources of information for a decision of this kind and that the information obtained was reliable and, above all, relevant to the needs of the situation at hand.

[89] The respondent was confronted by the outcome of process shrouded in controversy and mystery, yet it is the duty of District Land Boards to act visibly, predictably and understandably, guided by the principle of transparency. Transparency is a principle that entitles those affected by administrative decisions to know not only the basic facts and figures behind the decision but also the mechanisms and processes leading to it.

[90] Certain questions that come before administrative agencies do not lend themselves to one specific particular result. Therefore, the reasonableness standard implies that administrative agencies have a margin of appreciation within the range of acceptable and rational solutions. It is not enough for decision to be unreasonable, it must be so unreasonable that no reasonable authority could come to such a conclusion. This is an objective test and the court cannot invalidate the decision because it disagrees with it or because it would have reached a different conclusion. The Court cannot substitute its own view of a preferable outcome, but rather has to determine if the outcome falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[91] Only a very extreme degree of unreasonableness can bring an administrative decision within the legitimate scope of judicial invalidation. The court will

intervene only when the decision is found to be "irrational" or "bizarre" i.e. where the decision is so absurd that administrative agency must have taken leave of its senses.

[92] I have considered the decision and the reasons behind it and found that it is not so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. It is not a decision which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt. This issue too is decided in the negative.

Fourth issue; Whether the application is barred by limitation.

[93] It is argued by the respondent that this application is barred by limitation. Rule 5 (1) of *The Judicature (Judicial Review) Rules, 2009* provides that an application for judicial review should be made promptly and in any event 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 shall be made. "Grounds of the application" in this context is in essence the cause of action. It is that aggregate of operative facts which give rise to one or more legal relations of right-duty enforceable in the courts. Three elements must accrue before "grounds of the application" may be said to exist; (i) a primary right; (ii) a corresponding duty; and (iii) a wrong. Combined they constitute the cause of action in the legal sense of the term.

[94] The court, in determining when the grounds of the application first arose, is concerned with the existence of the facts giving rise to the entitlement to commence proceedings. Neither the knowledge nor the belief of the applicant as to an entitlement to bring proceedings is relevant to the question of when the grounds of the application first arose.

[95] The grounds of the application usually first arise on the date that the injury to the applicant is sustained. The clock of the limitation period is intended to tick solely from the time of the wrongful act, not from the time harm is realised. The grounds of the application accrue when the infringement first occurs, regardless of whether the damage is then discovered or discoverable. Where the operative facts instrumental in bringing into being and shape the legal controversy are a series of acts or events, grounds of the application may not arise until the last one of the bundle of acts occurs, or a new ground for the application may arise with each new occurrence of each act, whereupon the grounds of the application may be held to arise up until the last occasion of a violation.

[96] Rule 5 (1) of *The Judicature (Judicial Review) Rules, 2009* provides that an application for judicial review should be made promptly and in any event 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 shall be made. An order for enlargement of time should ordinarily be granted unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the Court, has not presented a reasonable explanation of his or her failure to file the application within the time prescribed by the Rules, or where the extension will be prejudicial to the respondent or the Court is otherwise satisfied that the intended application is not an arguable one.

[97] 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*). The purpose of this requirement is to protect public administration against false, frivolous or tardy challenges to official action.

[98] In the instant case, the applicant's cause of action concretised with the respondent's issuance of its decision in the letter dated 23rd September, 2016 (annexure "DCS" to the motion). The applicant did not seek to challenge it until 20th September, 2018. The applicant therefore filed the application nearly two years from the date the grounds of the application first arose. There is no explanation for the inordinate delay and neither did the applicant seek an enlargement of time. An application filed out of time without an order for enlargement of time is bad in law.

Order :

[99] For all the foregoing reasons, the application lacks merit and is hereby dismissed with costs to the respondent.

_____

Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the applicant : Mr. Kinyera Rodney Jordan.

For the respondent : Mr. Amuru Shafiq, State Attorney.

For interested party : Mr. Dan Wegulo.