

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS CAUSE NO. 374 OF 2019
IN THE MATTER OF AN APPLICATION FOR PREROGATIVE REMEDIES
BY WAY OF JUDICIAL REVIEW

YASIN OMARI:.....APPLICANT

VERSUS

1. ELECTORAL COMMISSION
2. ATTORNEY GENERAL
3. HON. BETTY KAMYA TUROMWE :.....RESPONDENTS
MIN. FOR KAMPALA CAPITAL CITY AUTHORITY AND
METROPOLITAN AFFAIRS

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This application is brought under section 14 & 33 of the Judicature Act, Cap 13 (as amended) and Rules 3,6 and 7 of the Judicature (Judicial Review) Rules, S.I No 11 of 2009 and Section 98 of the Civil procedure Act, Cap 71 for an order of mandamus compelling the 3rd respondent to demarcate Bukasa Ward into three wards (administrative units) namely; *Muyenga ward, Namongo ward and Bukasa ward.*

An order of Mandamus issues compelling the 2nd and 3rd respondents to demarcate Bukasa Ward in to (three) Wards (Administrative Units) aligned to the Electoral areas as hereunder;

1. **Muyenga Ward** made of Muyenga Hill, Muyenga A, Muyenga B, Kyeyitabya, Ssekindi Zones.
2. **Namongo Ward** made of Namongo A, Namongo B, Yoka, Kanyogoga, Tibaleka, Kayongo and Project Zones.
3. **Bukasa Ward** made of Bukasa, Mugalu, Kijwa and Katongole

At the time of filing this application on the 4th September 2019, the 1st respondent had not undertaken the demarcation of electoral areas. subsequently, this was done and communicated to the applicant by letter dated 17th September 2019. The applicant faults the 3rd respondent in his supplementary affidavit for failing to make a decision on whether or not to demarcate Bukasa ward into 3 administrative units an act he alleges is irrational, illegal and arbitrary.

The grounds upon which this application are based and set out in the notice of Motion and the affidavit in support by the applicant and the supplementary affidavit as follows;

- i) That the delimitation of Bukasa ward/parish is not reflective of the reasonable representative needs of the populace compared to other parishes of Makindye Division.
- ii) That the current demarcation by the respondents does not take into account the density population in Bukasa Ward/parish when they increased more electoral areas in the other parishes of Kibuli, Kansanga, Ggaba, Makindye II, Kabalagala, Nsambya Railways among others.
- iii) That there is need for realignment of electoral areas with the proposed ward administrative boundaries of Muyenga, Bukasa and Namongo wards/parishes.
- iv) Demarcation of Bukasa would be necessary to ensure that there is relatively equal number of eligible voters and effective service delivery with more or less equal distribution of grants, government programs and manage security in these challenging moments of high crime rate, human and drug trafficking and terrorism.

- v) That there is need to adjust the number of representatives based on population changes and necessity to have reasonable administrative units that are manageable.
- vi) That the intended delimitation will take into account communities interest, which can be determined by natural or administrative divisions and cohesive factors such as common history, ethnicity, religion etc

The 2nd and 3rd respondent opposed the application through the affidavit in reply deponed by Mr. Obura Jimmy Odoi and sought court dismisses the application with costs in their favour.

The applicant was represented by *Mr. Milton Fred Ocen & Mr. Casper Tevin Okiru* whereas the 2nd and 3rd were represented by *Mr. Madette Geoffrey*.

Counsel for the applicant applied to court to withdraw the suit against the 1st respondent and the same was granted with no orders to costs since the 1st respondent had already demarcated the areas as polling stations due to the population of the area.

The following issues were proposed for determination by this court.

- 1) *Whether this application is properly before this court and whether it should be allowed.*
- 2) *What remedies are available to the parties?*

The parties were ordered to file written submissions and accordingly filed the same. All the parties' submissions were considered by this court.

DETERMINATION OF ISSUES

Issue 1

Whether the application is properly before this court and whether it should be allowed.

Counsel for the applicant submitted that the application is very relevant to the applicant and other stakeholders requesting for the creation of the administrative units. He stated that the 3rd respondent has not responded to the petition or made a decision on this subject over a period of six years as required under section 7 (10) of the Local Government Act, Cap 243 to the detriment of the applicant and the residents of Bukasa ward.

Counsel relied on the text from **Administrative Law** by *Jack M Beerman* at pg 51 that states that if an agency answers a request for action with a firm statement that it has decided not to act, that decision can be final agency action or decision subject to judicial review he stated that the 3rd respondent is required by statute to give reasons for withholding her approval to the request of the applicant and his ward committee members and has given no reason for her delayed response which makes her actions a subject of judicial review.

Counsel further submitted that the role of administrators such as the 3rd respondent is to implement the objects of Statute and not to act contrary to the same. He stated that to frustrate objects of the statute is to act in revulsion to it.

It was stated that the 2nd respondent submitted before this court that upon filing of this application, he communicated to the 3rd respondent seeking detailed information on the efforts taken by her office to remedy the situation but she adamantly refused to respond to date.

Counsel further stated that the powers to create new wards is vested in the 3rd respondent and therefore submitted that this court finds her inaction illegal and malevolent abuse of discretionary powers.

Counsel for the 2nd and 3rd respondents opposed the application contending that it is now trite that for an applicant to succeed in a judicial review application, a combination or any of these grounds i.e illegality, irrationality and procedural irregularity must be satisfied.

He submitted it is settled law that judicial review is concerned with prerogative orders which are basically remedies for control of exercise of power by public officers and not aimed at providing final determination of private rights which is done in a normal civil suit.

Counsel further submitted that the 3rd respondent is enjoined to work in consultation with Kampala Capital City Authority in arriving at the decision to establish within the Capital City Urban councils and Village urban council. He stated that the authority is not a party to the present suit and thus contended that the suit is misconceived in as far as it excluded the Authority a key stakeholder decision making process. He also stated that there has been no act by the 3rd respondent that meets the legal criteria of being either illegal or tainted with procedural impropriety or one capable of being adjudged as ultra vires in order for this court to exercise its judicial discretion.

He stated that this suit had abated and prayed that court find so since there was a demarcation of electoral areas for Bukasa ward and the application had been overtaken by events.

Determination

Judicial review is a fundamental mechanism for keeping public authorities within the due bounds and for upholding the rule of law. See *Wade & Forsyth Administrative Law 10th Edition*.

The learned authors *Ssekaana Musa and Salima Namusobya Ssekaana* in the book *Civil Procedure and Practice in Uganda* at page 287 1st Edition, define judicial review as the:

“nature of proceedings by which the High Court exercises its jurisdiction of supervising inferior courts, tribunals and other public bodies, commanding them to do what their duty requires in every case where there is no specific remedy and protecting the liberty of the subject by speedy and summary interposition.”

The principle is that judicial review involves the exercise of the Court's inherent supervisory jurisdiction in respect of activities of public authorities in the field of public law. As such judicial review is only available against a body exercising public functions in a public law matter.

In essence, a person seeking a remedy under judicial review must satisfy 2 requirements. First, that the body under challenge must be a public body or a body performing public functions. Secondly, the subject matter of the challenge must involve claims based on public law principles, not the enforcement of private rights. **See Judicial Remedies in Public Law 5th Edition, Sweet & Maxwell, 2015 (page 9).**

In the circumstances of this case, I agree with the submissions of counsel for the respondent in as far as the concern that judicial review if an agency answers a request for action with a firm statement that it has decided not to act, that decision can be final agency action or decision subject to judicial review. As discussed above, judicial review deals with the nature of proceedings by which the High Court exercises its jurisdiction of supervising inferior courts, tribunals and other public bodies, commanding them to do what their duty requires in every case where there is no specific remedy and protecting the liberty of the subject by speedy and summary interposition.

The 3rd respondent is mandated by statute to make a decision on the demarcation of new administrative units and urban councils in Kampala upon request and where the approval is withheld, shall in writing give reasons for its action. In this case, the 3rd respondent has withheld her approval without giving reason as to why. This therefore brings her within the purview of the law under judicial review to ensure that she exercises her duties in respect of the application before this court.

The submission by the respondent counsel that the suit abated is totally misplaced and devoid of any merit. The applicant petitioned the Minister responsible and under the law, the Minister is mandated to create the new

administrative units. The then Minister responsible has not done what the law mandates her to do. It is clear that the applicant is allowed to bring such an application for judicial review in order to force and compel her to do what the law mandates her to do.

Under the Kampala Capital City Authority Act, Section 4(4), the power to create Ward, Village Urban Councils and to alter their boundaries is vested in the Minister for Kampala and Metropolitan Affairs, in consultation with the Authority. The Minister has a duty under the law to act once petitioned by the majority in a given locality through division council meeting.

The issue at hand was forwarded by the different responsible offices in 2017; Office of the Mayor Makindye Division Urban Council. The Minister in reply to the same letter responded as follows;

RE; CREATION OF VILLAGES AND WARDS IN BUKASA

This is to acknowledge receipt of your letter to me Ref MDC/KCCA/006/02 dated 23rd June 2017 on the above subject.

I will conduct the due diligence necessary and come back to you with an answer, recommendation or action plan as the case may require.

Beti Kamyia Turwomwe

Minister for Kampala Capital City and Metropolitan Affairs.

Since that time the said Minister has not acted or responded as she promised. This is contrary to the law and it is an act of abuse of power.

Mandamus can be issued when the government or public servants denies itself a jurisdiction which it undoubtedly has under the law or where an authority vested with a power improperly refuses to exercise it.

All statutory requirements are prima facie mandatory. The person vested with such power is enjoined to act in accordance with the law and the failure to act may be compelled using the coercive remedy of mandamus.

The court may be involved in assessing the importance of the provision, particular regard should be given to its significance as a protection of individual rights or public good; relative value that is normally attached to the rights that may be adversely affected by the decision, and the importance of the procedural requirement in the overall administrative scheme established by statute.

The community of Bukasa Ward made a resolution to have more administrative units and the Minister for Kampala Capital City and Metropolitan Affairs is supposed to take a decision which she has failed or refused to do. This is a breach of the Act that empowers her to take rational decisions.

I therefore answer issue 1 in affirmative.

Issue 2

What remedies are available to the parties?

The applicant prayed that court allow this application and grant the following reliefs;

1. Declaration

This court issues a declaration that the 3rd respondent's inaction and non-responsiveness to the applicant's petition is illegal, malevolent abuse of office and contrary to statute.

2. Mandamus

Mandamus can be issued to any kind of authority in respect of any type of function-administrative, legislative, quasi judicial, judicial. *Mandamus* can be granted only when;

1. A legal duty is imposed on the authority in question and it does not perform the same; and

2. The applicant has a legal right to compel the performance of this duty

An order of mandamus compelling the 2nd and 3rd respondent to demarcate Bukasa ward into three wards/ administrative units namely;

1. **Muyenga ward** made up of Muyenga Hill, Muyenga A, Muyenga B, Kyetabya and Sekindi zones;
2. **Namongo ward** made up of Namongo A and B, Yoka, Kanyogoga, Kayongo, Tibaleka and Project zones;
3. **Bukasa ward** made up of Bukasa, Mugalu, Kijwa and Katongole zones.

This court issues an Order of Mandamus compelling the 3rd respondent to consider the applicant's petition for creation of the said administrative units as soon as possible since it has been unattended to since 2017.

Costs

This application is allowed with costs to the applicant.

I so order.

SSEKAANA MUSA

JUDGE

13th March 2020