THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISC. CAUSE NO. 108 OF 2019

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

JULIET KABUGO :: APPLICANT

VERSUS

1. **THE COMMISSION OF INQUIRY**

   (Effectiveness of law, policies and processes

   Of land acquisition, land administration,

   Land management and land registration in Uganda

2. **ATTORNEY GENERAL ::: RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The applicant filed this application seeking the following judicial reliefs and orders that;

1) A declaration that the actions of the 1st respondent, of ordering and prohibiting the applicant from utilizing and enjoying land comprised in Ssese Block 134, Plot 2 Mumyuka, Bagala is illegal and ultra vires the mandate of the 1st respondent;

2) A declaration that the 1st respondent's process of determining the applicant's utilization of land comprised in Ssese Block 134, Plot 2 Mumyuka, Bugala without affording the applicant a hearing was in breach of principles of natural justice and her fundamental right enshrined in Article 28 of the Constitution of Uganda;

3) An Order of Certiorari quashing the order dated 11th September 2018, issued against the applicant by the respondent without affording the applicant notice of hearings from which such proceedings or orders arose, or affording her audience to be heard in such proceedings, or before such orders were issued.

4) The Costs of this application be provided for.

The applicant states that she is a registered proprietor of land comprised in Ssese Block 134, Plot 2 at Mumyuka, Bugala and had until the illegal interruption by the 1st respondent, variously utilized it with the beneficiaries of her late husband's estate. On 11th September 2018, the 1st respondent, without according the applicant a hearing, issued an order directing the applicant, a one Simeon Munywevu and all their agents to stop all and any activity on the land in question to accommodate what the 1st respondent suggested was, but unnamed or defined an ongoing investigation. The applicant being aggrieved by the impugned order filed this application for judicial review seeking remedies as set out in her motion.

The respondent filed an affidavit in reply where they denied the allegations and stated that the applicant was not entitled to any of the reliefs sought.

The applicant was represented by *Mr.Peter Allan Musoke* whereas the respondent was represented by *Ms. Suzan Apita Akello*(State Attorney).

The parties proposed the following issues for determination by this court.

ISSUES:

1) ***Whether the application raises any grounds for judicial review?***

2) ***What remedies are available to the parties?***

The parties were ordered to file written submissions; the parties accordingly filed the same. The same have been considered by this court.

Preliminary Considerations

The respondent filed an affidavit in reply by Cheptoris Sylivia (State Attorney) but the said affidavit does not contain any substance in reply to the application apart from raising legalese or points of law as if it where evidence.

The practice or habit of lawyers from the Attorney General Chambers swearing or deposing affidavits should and must stop. They do not have sufficient knowledge of the facts on the cases they defend especially in applications for judicial review. Under *Order 19 rule 3.*Affidavits shall be confined to such facts as the deponent is able of his or her knowledge to prove. Article 119(4)(c) of the Constitution enjoins *the Attorney General to represent Government in courts or any other legal proceedings to which Government is a party;*

The right to represent Government as lawyers should not include becoming star witnesses/deponents for all matters involving government. If the particular department of government cannot have witnesses, then the matter may not be opposed on the facts or evidence presented but the same can be opposed on the law.
The affidavit in reply of respondent is therefore struck off.

Secondly, the respondents counsel had raised an objection that the application is brought outside the mandatory 3 months period allowed for judicial review.

This court confirms that the application was brought outside the mandatory 3 months period but the applicant sought leave of this court. The court granted the leave to bring this application outside the stipulated time.

The objection is devoid of merit and is overruled.

DETERMINATION OF ISSUES

Whether the application raises any ground for judicial review.

Submissions

Counsel for the applicant submitted that judicial review is concerned with issuance or not of prerogative orders which are remedies for the control of excess in use of administration of persons. It is also trite to note that it is not concerned

with the decision in issue per se but with the decision making process and that involves the assessment of the manner in which the decision was made.

He further submitted in respect of procedural impropriety, the applicant states that prior to the making or passing of the order, by the 1st respondent, she was neither given notice of the ongoing investigation or accusations nor was she given an opportunity to confront and reply to my accusers. Counsel stated that save for general denials, the respondents in their affidavits in opposition to the motion did not show evidence that the applicant was ever accorded a hearing and that the applicant was neither let in on who her accusers were, what their case was nor was she accorded a hearing. The acts of the 1st respondent of determining the utilization of the applicant's land and issuing an order against the applicant without according her a hearing was contrary to the provisions Article 28, 42 and 44 of the Constitution and principles of nature justice.

On the point of illegality, counsel stated that the 1st respondent is governed by the Commissions of Inquiry Act, Cap 166 where the Act stipulates the duty of the commissioners. Counsel stated that under section 6 of the Act, the 1st respondent's statutory authority is restricted to among others, making a full, faithful and impartial inquiry into the matter specified in the commission and report to the minister/appointing authority.

The 1st respondent's statutory mandate thereby does not extend to passing and or issuing orders. He stated that by issuing an order against the applicant stopping her from utilizing her land, the 1st respondent acted beyond its statutory authority and thus, its acts were ultra vires its mandate and amounted to the 1st respondent committing an error of law.

Counsel submitted therefore that the applicant has made out and proved the grounds of procedural impropriety and illegality in the application and satisfies grounds for judicial review.

On whether the application raises any grounds for judicial review, the respondents submitted that the applicant had not proved the ground of illegality to warrant issuance of the orders sought.

Counsel further relied on section 6 and 9 of the Commission of Inquiry Act where she submitted that the applicant had not brought any evidence to prove any illegality and prayed that the application fails.

Counsel stated that the burden of proof under section 6 of the evidence Act lies on the person who has knowledge of any fact and this is on a balance of probabilities. She stated that in this case, the burden lies with the applicant and therefore submitted that the applicant had not produced any evidence whatsoever to show that the 1st respondent completed the inquiry in respect of the suit land, made a conclusive written report about the result of the inquiry and commenced proceedings against the applicant without the following procedure of doing so hence the unfair decisions arrived at contrary to sections 6 and 9 of the Commissions of Inquiry Act.

She therefore submitted that the actions of the 1st respondent were not ultra vires neither was the order issued and served on the applicant by the 1st respondent tainted with illegality or procedural impropriety.

Determination:

According to the ***Black's Law Dictionary at page 1013 Black's Law Dictionary 11th Edition Thomson Reuters, 2019*** Judicial review is defined as a court's power to review the actions of other branches or levels of government; especially the court's power to invalidate legislative and executive actions as being unconstitutional. Secondly, a court's review of a lower court's or administrative body's factual or legal findings.

The power of judicial review may be defined as the jurisdiction of superior courts to review laws, decisions and omissions of public authorities in order to ensure that they act within their given powers.

Judicial review per the Judicature (Judicial Review) (Amendment) Rules, 2019 means; ***the process by which the High Court exercises its supervisory jurisdiction over proceedings and decisions of subordinate courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties***.

Broadly speaking, it is the power of courts to keep public authorities within proper bounds and legality. The court has power in a judicial review application, to declare as unconstitutional or illegal, law or governmental action which in inconsistent with the Constitution and other laws of the land. This involves reviewing governmental action in form of laws or acts of Executive or Parliament for consistency with Constitution and other laws.

Judicial review also establishes a clear nexus with the supremacy of the Constitution, in addition to placing a grave duty and responsibility on the judiciary. Therefore, judicial review is both a power and duty given to the courts to ensure supremacy of the Constitution and rule of law. Judicial review is an incident of supremacy, and the supremacy is affirmed by judicial review.

It may be appreciated that to promote rule of law in the country, it is of utmost importance that there should function an effective control and redressal mechanism over the Administration. This is the only way to instil responsibility and accountability in the administration and make it law abiding. Judicial review as an arm of administrative law ensures that there is a control mechanism over, and the remedies and reliefs which a person can secure against, the administration when a person's legal right or interest is infringed by any of its actions.

The courts have moved in the direction of bringing as many bodies under their control as possible and they have realized that if the bodies participating in the administrative process are kept out of their control and the discipline of the law, then there may be arbitrariness in administration. Judicial control of public power is essential to ensure that that it does not go berserk. The primary purpose of judicial review is to restrict the powers of Government within their legal limits or bounds so as to protect the citizens against any abuse or misuse of power by government machineries.

In the present case, the applicant is challenging the action and resultant order made by the Commission of Inquiry (1st Respondent) when they ordered the applicant to cease and desist all activities on the disputed land. The said ORDER is reproduced herein;

11th September 2018
The Resident District Commissioner,
Kalangala District

ORDER

On 8th December 2016 His Excellency, The President of the Republic of Uganda set up a Commission of Inquiry into the Effectiveness of Law, Policies and Processes of Land Acquisition, Administration, Management and Registration in Uganda Legal Notice 2 of 2017 as amended.

The Commission received a complaint vide LI/1081/2017 and continues to investigate complaints from Kalangala District for land comprised in **Ssese Block 134, Plot 2,6, Mumyuka Bugala, and Ssese Block 132 Mumyuka Buunda, Kirungu Masaka against Mr. Simeon Munywevu, Crane Engravers, Kampala (Tel:0701 790 621) and Julient Kabugo, Kampala, (Tel: 0772 690 998)**. Despite the ongoing investigations, the Commission has received information that Mr. Simeon Munywevu and Juliet Kabugo have gone on to carry out activities on disputed land.

This is therefore to direct your office as the Chairperson District Security Committee to ensure that Mr. Simeon Munywevu and Juliet Kabugo and all their agents to **cease and desist all activities** on the disputed land immediately, and ensure that the commission's directives are hence forth complied with.

This Order shall be in effect until the Commission directs otherwise on the matter.
Given under my hand this 11th day of September 2018

Dr. Singiza K Douglas
Secretary to the Commission

The body under challenge is the Commission of Inquiry **(Effectiveness of law, policies and processes Of land acquisition, land administration, Land management and land registration in Uganda).**

The law governing the proceedings before the Commission is well stated in ***Section 6 of the Commission of Inquiry Act Cap 166*.** The section mandates the Commissioners inter alia to make a full, faithful and impartial inquiry into the matters specified in the Commission. The said section is to be read in conjunction

with ***Article 21 the Constitution*** which provides entitlement to equality and equal protection of the law in favour of all persons. See ***High Court Misc. Cause No. 137 of 2016 Dott Services & Anor v. AG Misc. Cause No.137 of 2016***.

Section 6 of the Commissions of Inquiry Act provides;

The Commissioners shall, after taking oath or making affirmation as provided, make a full, faithful and impartial inquiry into the matter specified in the commission; conduct the inquiry in accordance with the direction, if any, in the commission; in due course report to the President in writing, the result of the inquiry; and also when required, furnish to the President a full statement of the Proceedings of the commission and of the reasons leading to the conclusions arrived at or reported.

The underlying purpose in appointing this Commission of Inquiry is to ascertain facts for the information of the government as well as public so that if any problems are disclosed as a result of the inquiry, corrective legislative or administrative measures may be undertaken by the government. The government is under no legal or statutory obligation to appoint a commission to inquire into any definite matter of public importance.

It is also important to note that, a commission of inquiry may be appointed to inquire into a matter pending before the court, or a criminal court. The commission commits no contempt of court by enquiring into a matter pending before a court. Nor does it amount to usurping judicial functions because the commission's report is not enforceable *proprio vigore*; in making the, enquiry, the commission performs only a statutory duty. See *Shammbhu Nath Jha v Kedar Prasad [1972] AIR SC 1515*. But a government cannot appoint a commission for a matter in respect of which legal proceedings have already been taken and disposed of as such a matter remains no longer a matter of public importance.

The Commissions may either be Advisory and Investigative. Advisory commissions are appointed purely to gather information, study a problem and advise the government on questions of public policy question. The 1st respondent is one such Advisory commission of inquiry intended to inform the mind of government on land policy and possible changes to the current land systems and management.
The Commissions of Inquiry Act confers on the commission several powers which such a commission may need to perform its functions effectively and adequately.

Under Section 9, the commission has powers of High Court to summon witnesses, to call for the production of books, plans and documents and to examine witnesses and parties concerned on oath. The commission has compulsive powers to require the attendance of witnesses from any part in Uganda.

Under Section 9(4), the Commission is deemed to be a civil court for purposes of sections 94 and 99 of the Penal Code.

It can be deduced from the above provisions, that Commission envisaged by the Act is merely a fact-finding body; it does not decide any dispute. It is neither a civil court, nor are its proceedings judicial, nor do the provisions of the Criminal Procedure Code Act or the Evidence Act apply to its proceedings.

The commission has no power of adjudication; it does not produce any document of a judicial nature. Enquiry by a commission is not an inquiry by a civil or a criminal court; its proceedings are not equivalent to the proceedings of a court of law. Its procedure is inquisitorial rather than accusatorial as is followed in a criminal court.

Though section 9 clothes the commission with certain powers of a civil court, it does not generally confer the status of a court on it. Section 9(4) imparts to its proceedings the character of a judicial proceeding, for certain purposes. These provisions only create a legal fiction for certain purposes which cannot be extended beyond the purposes for which they are created.

In the proceedings before the commission, there is no *lis;* there are no accused, no accusers, no specific charges for trial, nor is the government, under the law, required to pronounce one way or (the other on the commission's findings. The report of the commission is merely of a recommendatory nature. Under See Rule 8(2) it is provided that *the Commission shall submit a final report of its findings and recommendation to the President*. It is not in any way binding on the government. It is not enforceable *proprio vigore*. The report of a commission of inquiry has no evidentiary value in the trial of a criminal case. See ***Kehar Singh v Delhi Administration, AIR [1988] SC 1883: [1988] 3 SCC 609***

Basically, an inquiry under the Commissions of Inquiry Act is usually mounted by the government for the information of its own mind. The findings of a commission

of inquiry are binding on court and the court has to arrive at its own conclusions after an independent assessment of the evidence tendered before it. See ***Shamkant v State of Maharashtra [1992] AIR SC 1879***

The Commissions of Inquiry Act makes no provision for giving effect to the commission's findings. The commission is merely a fact-finding body having no power to pronounce a binding or definitive judgment or orders. It collects facts through the evidence laid before it, and after considering the same, it submits its report which the appointing authority may or may not accept. The Commission of inquiry is not a court but it is merely clothed with certain powers of a civil court but it does not have the status of court. See ***Frances Namara & 61 Others v Attorney General HCMisc.Cause No. 86 of 2019; Attorney General v Walugembe Daniel CACiv Misc. App No. 290 of 2018***

The Commission is required to collect facts fairly to all concerned and in the best manner possible and advise the government with its findings. It will be ultimately for the appointing authority (President or government) to accept the commission's findings and take appropriate measures as advised or even otherwise.

The 1st respondent acted illegally in issuing the ORDER against the applicant and the said order was issued outside both the enabling law Commission of Inquiry Act and the terms of reference in the appointment instrument. It would be irrelevant to determine whether the applicant was given a hearing before the said illegal order was issued.

Even if the applicant had been given a hearing, the 1st respondent had no mandate to issue such orders and is not clothed with court powers to issue such orders. Acting outside the four corners of the law is to act illegally and/or in abuse of the authority conferred.

The Order given by the 1st respondent was tainted with illegality and procedural impropriety.

Issue 2:

What remedies are available to the parties?

The ever-widening scope given to judicial review by the courts has caused a shift in the traditional understanding of what the prerogative writs were designed for. For example, whereas certiorari was designed to quash a decision founded on excess of power, the courts may now refuse a remedy if to grant one would be detrimental to good administration, thus recognising greater or wider discretion than before or would affect innocent third parties.

The grant of judicial review remedies remains discretionary and it does not automatically follow that if there are grounds of review to question any decision or action or omission, then the court should issue any remedies available. The court may not grant any such remedies even where the applicant may have a strong case on the merits, so the courts would weigh various factors to determine whether they should lie in any particular case. See ***R vs Aston University Senate ex p Roffey [1969] 2 QB 558, R vs Secretary of State for Health ex p Furneaux [1994] 2 All ER 652.***

The primary purpose of certiorari is to quash an ultra-vires decision. By quashing the decision, *certiorari* confirms that the decision is a nullity and is to be deprived of all effect. See ***Cocks vs Thanet District council [1983] 2 AC 286***

In simple terms, certiorari is the means of controlling unlawful exercises of power by setting aside decisions reached in excess or abuse of power. See ***John Jet Tumwebaze vs Makerere University Council and Another HCMC No. 353 of 2005***.

The effect of certiorari is to make it clear that the statutory or other public law powers have been exercised unlawfully, and consequently, to deprive the public body's act of any legal basis.

The further effect of granting an order of certiorari is to establish that a decision is ultra vires, and set the decision aside. The decision is retrospectively invalidated and deprived of legal effect since its inception.

This court issues an Order of *Certiorari* quashing the ORDER dated 11th September 2018 against the applicant by the 1st respondent for illegality and procedural impropriety.

This application is allowed with costs.

I so order.
Dated, signed and delivered be email at Kampala this 23rd day of April 2020

SSEKAANA MUSA
JUDGE