THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS CAUSE NO. 146 OF 2020

1. **GASTERVUS MUWANGA**
2. **NDAGIRE RITAH**
3. **MBIBO MARTIN**
4. **NUCIA INVESTMENTS LIMITED::APPLICANTS**

VERSUS

1. **REV FR. BLAISE S. ZZIMBE**
2. **THE COMMISSIONER FOR LAND REGISTRATION:::::::::::RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The applicant brought this application under Rules 3, 6, 7 & 8of the judicature (Judicial Review) Rules 2009, Section 36 of the Judicature Act Cap 13 seeking the following judicial reliefs and orders:

1. A declaration that the proceedings and the decision of then2nd respondent were unfair, marred by gross irregularities and contravened the Applicant's right to be heard.

2. A declaration that the actions and decision of the 2nd respondent in the proceedings held at the Kampala Land Office were irrational, ultra vires and were done in contravention of the ***sub judice rule.***

3. An order of Certiorari to quash the decision of the 2nd respondent contained in his Order dated 20th December 2018 cancelling the Applicants' certificate of title to the suit property.

4. A declaration that the 1st respondent acted ultra vires when he entertained and determined a complaint based on fraud.

5. A consequential order reinstating the applicants as the respective registered proprietors of the suit property.

6. Costs of the application.

The applicants are registered owners of the land comprised in Kyadondo Block 186 Plots 401, 406, 408, 409, 411, 412, 413, 414, 415, 416, 417, 418,419,420, 421 and 422 at Namavundu. The 1st respondent lodged a complaint to the 2nd respondent to investigate illegally amalgamated plots 46, 47, 63 and 64 Block 186 belonging to different persons, into plot 11 and the resultant subdivisions therefrom.

The 2nd respondent investigated the complaint, summoned the parties and on the 20th of December 2018 issued a cancellation order of the illegal amalgamations of 46, 47, 63 and 64 of Kyadondo Block 186 into plot 11, the survey and subdivided titles for plots 401-445 which are 12 of the 45 plots claimed by the applicants.

The applicants alleged that they were never invited to participate in the proceedings preceding the issuance of the impugned cancellation order which order purported to cancel plots 401-445 for allegedly having been procured through fraud despite the respondents being fully aware of the applicants interest in the land as proprietors and respondents in Civil Suit No. 497 of 2017 which is pending hearing before the High Court Land Division.

The applicants then filed this application for judicial review seeking for orders cancelling the Commissioner's cancellation order of their titles citing gross irregularities in the proceedings. The application was supported by the affidavits of Gastervus Muwanga and Ndagire Ritah.

The 1st respondent filed an affidavit opposing the application stating that the application lacked merit in so far as the applicants never attended the scheduled hearing before the 2nd respondent and that the cancellation was purely on ground of errors made on the register and not fraud as they seem to allege. The actions of the 2nd respondent were made in accordance with their powers as a public body.

The 2nd respondent filed an affidavit in reply through Wamala Ali a Senior Registrar of Titles who contended that;

1. The office received a complaint from Rev. Fr Blaise Zimbe the administrator of the Estate of the Late J Sejjano to the effect that the estate land comprised in Kyadondo Block 186 Plot 46 was illegally amalgamated with plots 46, 47, 63 and 64 to create plot 11 and thereafter subdivided to create plots 401-445.

2. That upon receipt of the complaint, the register was perused and it revealed that indeed plots 46,47,63 and 64 which were in the names of different registered owners were illegally amalgamated into plot 11 Block 186.

3. The said amalgamation and subsequent subdivision which created plots 401-445 was caused by a one Nvule Patrick the Administrator of the Estate of the Late Ssabwe Paulo Kabambwe vide Administration Cause No. 549 of 2011 issued by High Court of Uganda-Family Division. The said letters of Administration were found not to have been issued by said court.

4. The Lodgement book further indicated that the Instrument No. KLA581704 under which Nvule Patrick as the Administrator was issued with the certificate of title for Plot 11 Block 186 does not exist in the Lodgement book.

5. The discoveries from the perusal of the register made the root of certificate of Title comprised in Kyadondo Block 186 Plot 11 and all subdivisions arising therefrom null and void and therefore ought to be cancelled.

6. That the office of the Commissioner Land Registration in order to rectify the said irregularities on the register book, invoked its powers and issued a notice of intention to effect changes in the register dated the 11th day of July 2018 to Nvule Patrick, Nucia Investments and Muwanga Gastervus who were invited for a public hearing on the 17th day of August 2018 such that they can be heard before the 2nd respondent could make a decision.

7. The Notice to effect changes in the register was duly served on the said Nvule Patrick, Nucia Investments and Muwanga Gastervus by registered mail on

P.O.Box 33193 Kampala. The 2nd respondent heard the complaint on the stated date when the applicants did not appear.

8. The 2nd respondent invoked its statutory powers under the Land Act and by an Amendment order dated 20th day of December 2018 cancelled the illegal amalgamation of Plots 46,47,63 and 64 into Plot 11 and subsequent subdivision of Plot 11 into Plots 401-445.

The applicants were represented by *Musinge Faisal* while the 1st respondent was represented by *Edwin Busuulwa* for the 1st respondent and *Babu Hakim* represented the 2nd respondent.

The parties filed written submissions that were considered by this court.

Issues for determination.

1. ***Whether the respondent acted ultravires, arbitrary and in contravention of the law when he entertained and issued a cancellation order in respect of the subject property.***
2. ***What remedies are available to the parties***

Both parties in their submissions raised the issue of whether the application had merit. Counsel for the respondent submitted that the application lacked merit from its onset. Counsel submitted that the applicant had by law to first pursue the statutory remedy of appeal under **Section 91 (10) of the Land Act Cap 227** otherwise the application for judicial review is premature and undesirable. Counsel further submitted that the application was time barred for being brought an entire two years after the date when the grounds of the application first arose, that the application in so far as it relates to the 1st respondent who is neither a public body nor administrative public office is misconceived and that the 2nd respondent's decision was based on the errors and mistakes detected on the register book not the alleged fraud as alluded to by the applicants.

Counsel for the applicants submitted that the application had merit in as far as a court seized of an application for judicial review at present doesn't have to look behind its back or peruse through statutes or other laws to ascertain the existence or otherwise an alternative remedy. On the application being time barred, counsel for the applicants

invited the court to act in the interest of justice without due regard to technicalities and determine the application on its merits. Counsel further submitted that on the submission by the 1st respondent that they are not a public body, the 1st respondent is a necessary party to the suit as he is to be affected by the orders sought and it would be unjust to condemn him unheard.

Analysis

It is clear from the evidence on record that the 2nd respondent made a decision on 20th December 2018. The applicant filed this application on 29 June 2020. This means that it was after a period of about 1 year and 6 months.

Under Rule 5 (1) of the Judicature (Judicial Review) Rules 2009 provides that;

> *(1) An application for judicial review shall be made promptly and in any event* ***<u>within three months from the date when the grounds of the application FIRST arose,</u>*** *unless the court considers that there is good reason for extending the period within which the application shall be made. (Emphasis is ours)*

The applicants either inadvertently or ignorantly did not seek leave of court to extend the time within which such an application can be brought.

In the case of **<u>IP MUGUMYA vs ATTORNEY GENERAL HCMC NO. 116 OF 2015</u>**. The Applicant challenged an interdiction which occurred on 6th July 2011 by an application for judicial review filed on 11th August 2015. **Hon Justice Steven Musota** (as he then was) dismissing the application for being filed out of time contrary to Rule 5(1) of the Judicature (Judicial Review) Rules 2009 had this to state;

> *It is clear from the above that an application for judicial review has to be filed within three months from the date when the grounds of the application first arose unless an application is made for extension of time…the time limits stipulated in the Rules apply and are still good law.*

The court ought not to consider stale claims by persons who have slept on their rights. Any application brought under the Constitution or by way of judicial review could not be entertained if presented after lapse of a period fixed by limitation legislation.

If the applicants wanted to invoke the jurisdiction of this court they should have come at the earliest reasonably possible opportunity or sought leave of the court to file their application out of time but not to file the same as of right after such a long time of almost 18 months. The court could have exercised its discretion to extend the time depending on the circumstances and facts to determine whether to extend the time to file for judicial review depending on the reasons on how the delay arose.

Inordinate delay in making an application for judicial review will always be a good ground for refusing to exercise such discretionary jurisdiction of this court to entertain the application. The court refuses relief to an applicant on ground of laches because of several consideration e.g it is not desirable to allow stale claims to be canvassed before the court; there should be finality to litigation.

Excessive interference by the judiciary in the functions of the Executive is not proper. The machinery of government would not work if it were not allowed some free play in its joints.

This application is incompetent for being filed out of the statutory period of 3 months. But for completeness this court shall proceed to determine the application on merit.

Whether the respondent acted ultravires, arbitrary and in contravention of the law when he entertained and issued a cancellation order in respect of the subject property.

The 2nd respondent received a complaint from the 1st respondent to the effect that their land was illegally amalgamated, subdivided and separate titles subsequently issued to the applicants.

The 2nd respondent perused the Register Book and found that Nvule Patrick who caused the subdivision of Plot 11 into Plots 401 to 445 under instrument No. WAK00128481 and subsequently transferred some of the plots to the applicants was registered on the land as an administrator of the estate of the late Ssabwe Paulo Kabambwe vide Letters of Administration Cause No. 549 of 2011 issued by the High Court of Uganda. The High Court Family Division by a letter dated 30th October 2017 disowned the Letters of Administration rendering the same to be a forgery.

This led the 2nd respondent to conclude that those discoveries made the root of the applicants' certificates of title and subsequent transactions null and void hence cancelling the certificates of title issued.

The subsequent cancellation of the applicants' titles was on the following grounds;

1. The issuing of a certificate or registration of any document shall not cure any defect in a land transaction nor confer any certificate or other document any validity which it would otherwise not have (Reg.56 of the Land Regulations).

2. Any certificate of title, entry or cancellation in the Register book procured or made by fraud shall be void against all parties or privies to the fraud (S.77 of the RTA)

Counsel for the applicants submitted that the Commissioner cancelled the applicants' titles on the grounds of fraud which authority he did not possess. This court agrees with this submission of counsel to the extent that the commissioner cannot cancel a land title for fraud and has reiterated the same in the case of ***Francis Louis Kibuuka & Another v Commissioner Land Registration & Kigongo Justine High Court Miscellanous Cause No. 60 of 2019***.

On the other hand counsel for the 1st respondent submitted that the 2nd Respondent's decision was based on the errors and mistakes detected on the register book and are listed 1 to 6 in its decision. The alleged fraud is not alluded to anywhere in the cancellation order. The Commissioner merely studied and corrected mistakes on its register and it is there statutory duty of keeping the sanctity of the land register which duty they cannot abdicate. Counsel further submitted that unlike in the *Francis Louis Kibuuka & Another vs Commissioner Land Registration & another (supra),* the instant case concerned illegal amalgamations to form plot 11 which was then registered into names of Nvule Patrick, the Administrator of estate of Paulo Kabambwe vide instrument KLA581704, which was found not to exist in the register book, leave alone the instrument No. KLA573708 for the preceding registration which was found to belong to a substitution in respect of a totally different title in Busiro Block 512 Plot 60.

According to the Cancellation order, the commissioner by perused the Register Book made discoveries upon which he based to order cancellation of the applicants titles. The Commissioner found that the instrument KLA581704 that registered Nvule Patrick as the Administrator of the estate of Paulo Kabambwe, did not to exist in the Register book. It was also found that the Letters of Administration of Nvule Patrick were rendered or found to be a forgery or non-existing by the High Court Family Division. These factors informed the Commissioner's decision to cancel the titles due to the illegality of the amalgamations and subsequent divisions.

This court cannot delve in the question raised by the applicants when the same was not and has not been alluded to by the respondents. No particulars of fraud were stated anywhere in the Cancellation Order. The 1st respondent's suit against the 2nd respondent

and other persons accusing them of fraud did not inform the Commissioner's decision as we see it is not mentioned anywhere in the cancellation order.

Therefore it suffices to note that the Commissioner acted well within his mandate cancelling the applicants' certificates of title due to the illegalities discovered and not fraud as alluded to by the applicants. The office of the Commissioner Land registration is charged with a statutory duty of keeping the sanctity of the Land Register pursuant of which it has special powers to cancel certificates of title which were issued illegally, irregularly or erroneously. Whatever the commissioner did was authorised by law.

The applicants stated and submitted that the 2nd respondent contravened Section 91(8) of the Land Act by failing to properly notify them. Counsel submitted that the respondents were well aware of the alternative addresses of the applicants and other owners but deliberately locked them out of the impugned ex-parte proceedings. On the other hand counsel for the 1st respondent submitted that the Commissioner was not obliged to look for an alternative address and ignore the ones on their certificates of title. Counsel cited **Hezekiah Mukiibi & Anor vs Commissioner Land Registration Misc. Application No. 98 of 2019** where this court held that this would be placing an extra burden unto the Commissioner Land Registration. Counsel further submitted that service on the registered mail was in the circumstances sufficient and that it was after all conceded by the applicants in their submissions that there was service in the manner described in paragraphs 11 & 12 of the 2nd Respondent's affidavit, despite the earlier denial in their affidavit evidence on record.

As held by this court in the Hezekiah case (supra); *If the registered mail is not returned the service is deemed effective.*

Section 35 of the Interpretation Act provides that;

Where any Act authorises or requires any document to be served by post, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post.

The submission of counsel on effective receiving fails and is unsustainable. The respondent should not be burdened with establishing whether the letter has effectively been received unless it is returned by post.

I similarly find that the applicants were properly notified of the proceedings leading to the cancellation of their land titles irregularly and illegally created.

Counsel for the applicants submitted that the respondents contravened the **sub judice rule** by holding/participating in a parallel tribunal to investigate fraud in respect of the subject land which same issue was before the High Court vide Civil Suit No. 497 of 2017.

This court already pronounced itself on this issue in the Hezekiah case (supra); ***Sub-judice rule*** *is not one of the grounds for judicial review. The decision maker cannot be restrained merely because there are pending matters in court. If a party is likely to be prejudiced by the decision of Commissioner Land Registration, it would be prudent to seek a temporary injunction.*

Otherwise, the office the Commissioner Land Registration would not execute their functions mandated under the Land Act or the Registration of Titles Act. All fraudsters would file any hopeless case and plead ***sub-judice*** *in order to maintain the status quo or curtail the powers of Commissioner Land Registration.*

On that note therefore, the applicants cannot plead contravention of the *sub judice rule* as a ground to grant the orders sought under judicial review.

From the foregoing, the applicants have not satisfied this court to warrant the orders sought for judicial review. This application was filed out of time and is devoid of any merit.

The application is dismissed with costs.

I so order.

Ssekaana Musa
Judge
21st June 2021