

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[CIVIL DIVISION]
MISCELLANEOUS CAUSE NO. 096 OF 2022

1. HOMS COMPANY LIMITED

2. DHIGLOOL LIMITED=====APPLICANTS

VERSUS

1. THE COMMISSIONER LAND REGISTRATION=====RESPONDENTS

**2. THE ADMINISTRATORS OF THE ESTATE OF LATE YOANA
MARIA KIGGUNDU**

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for judicial review by way of Notice of Motion under Articles 28(1), 42 & 44(c) of the Constitution and the Judicature Act Cap 13 & Rules 3, 4, 6 7 and 8 of the Judicature (Judicial Review) Rules, S.I. No.11 of 2009, seeking that;

1. An Order of Certiorari quashing the Respondent's decision cancelling the 1st applicants' certificates of title for land comprised and registered under
 - i) Kyadondo block 268 plot 978 land at Naziba
 - ii) Kyadondo block 268 plot 979 land at Naziba
 - iii) Kyadondo block 268 plot 980 land at Naziba
2. An Order compelling the 1st respondent to reinstate and or restore the applicants' certificates of title of land comprised and registered under:
 - i. Kyadondo block 268 plot 978 land at Naziba
 - ii. Kyadondo block 268 plot 979 land at Naziba
 - iii. Kyadondo block 268 plot 980 land at Naziba

3. An Order of certiorari quashing the respondent's decision cancelling the 2nd Applicants' certificate of Title for the land comprised and registered under Kyadondo Block 268 Plot 977 at Naziba.
4. An Order compelling the respondent to reinstate and or restore the 2nd Applicants certificates of Title for land comprised and registered under Kyadondo Block 268 Plot 977 at Naziba
5. A permanent injunction restraining the Respondents from illegally cancelling or otherwise interfering with the applicants' registration and or proprietorship of all the land comprised in Kyadondo Block 268 Plots 977,978,979 and 980 at Naziba.
6. The costs of the application be provided for.

The grounds upon which the application is set are laid out briefly in the Notice of Motion, and expounded upon in the affidavits of Santur Ismail and Ibrahim Osman Omar the Applicant. Those grounds being;

1. The 1st applicant company is the registered proprietor of the land comprised in Kyadondo Block 268 Plots 978, 979, and 980 while the 2nd applicant company is the registered proprietor of land comprised Kyadondo Blcok 268 Plot 977 at Naziba.
2. The 1st respondent purportedly issued a notice of intention to effect changes in the register dated the 7th day of March, 2019 to the applicant companies, Saulo Bamuchumika and Juliet Kawagule Kafiire.
3. That on the 6th day of February, 2020, the respondent illegally made a decision to the 1st and 2nd applicants' certificate of title comprised Block 268 plots 798, 799 and 980.
4. That the 1st Respondent stated that the reason for the cancellation of the applicants' certificates of Title is that the same was fraudulently transferred into the names of Saulo Bamuchumika and later in the names of Juliet Kawugule.
5. That the office of the Commissioner Land Registration acted ultra vires as it does not have powers to cancel a certificate of title on ground of Fraud.

6. That the said Notice of intention to effect changes in the register neither made reference to the applicant nor made reference to plot 195 to which she is the registered proprietor.
7. The 1st respondent's office acted illegally, unreasonably and unconscionably when it deliberately conducted a hearing in respect to the applicants' property yet the applicants were never invited for the said hearing.
8. That the applicants only learnt of the 1st respondent's decision when they tried to obtain credit facilities from the bank wherein they were informed that upon conducting a search it was discovered that the certificates of title had been cancelled.
9. That the impugned actions of the 1st respondent are unconstitutional, unreasonable and contrary to rules of natural justice, a brazen, well-rehearsed and targeted improper exercise of statutory powers granted to the office of the Commissioner Land Registration.

The 1st respondent filed an affidavit in reply through Assistant Commissioner Land Registration-Mr Mugaino Baker contending that;

1. The suit land was initially comprised in Mailo Register Volume 704 Folio 11 registered in the names of Sepiriya Kawaganya vide instrument No. 32276 issued on the 23rd day of November 1935 who transferred the same in the names of Yoanna Maria Kiggundu on the 17th day of August, 1959.
2. The said land was brought on the new Block and Plot Register as Kyadondo Block 268 Plot 14 on the 22nd day of January 1968 and the 1st entry appears on the converted page is the registration of yoanna Maria Kiggundu vide Instrument No. KLA 227387 of the 17th day of August 1959 who transferred the same in the names of Saulo Bamuchumika on the 30th day of November 1968 vide instrument No. 52123.
3. Saulo Bamuchumika transferred the same into the names of Juliet Kawagule Kafire on the 9th day of August, 1969 vide instrument No. KLA 54611 who caused Plot 14 to be subdivided into plots 923 and 933 vide instrument No. 52123.
4. The office of Commissioner Land registration received a complaint from Hassan Luyimbazi who alleged to be a son of Musa Lukwago and

a grandson to Sepiriya Kawaganya Ssali to the effect that their family land was erroneously registered into the names of Saulo Bamuchumika without the consent of their grandfather the late Sepiriya Kawaganya or the late Yoana Maria Kiggundu for which reason all the enteries were cancelled from the register book and reinstated in the names of Yoanna Maria Kiggundu.

The 2nd respondents administrators to wit; Sempereza Rajab, Luyimbazi Hassan and Sentongo Ismail Kitooke opposed the application and Sempereza Rajab deposed an affidavit in reply briefly stating;

1. That Kyadondo Block 268 Plot 14 was converted from Mailo Register Volume 704 Folio 11 which was issued in the names of the Late Sepiriya Kawaganya on November 1935. On 17th August 1959, the abobe Mailo Register Volume was transferred into the names of the of the late Yoanna Maria Kiggundu.
2. That upon conversion of the land to private mailo, the 1st respondent erroneously and unlawfully registered Saulo Bamuchumika directly on the newly created title deed for Kyadondo Block 268 Plot 14 despite the earlier entry of the Late Yoanna Maria Kiggundu as the registered proprietor on the Mailo Register Volume.
3. That the late Yoanna Maria Kiggundu never sold the said suit property to the late Saulo Bamuchumika and as such Saulo's registration thereon was illegal and unlawful.
4. That it is this impugned and defective title that the 1st applicant purported to purchase/obtain from Juliet Kawugule Kafire, the successor in title of Saulo Bamuchumika. Since Saulo never owned the suit property, he could not purport to sell or transfer the suit property to Juliet Kawugule Kafire.
5. That upon discovery of the above illegalities and material irregularities surrounding the registration of Saulo Bamuchumika, Juliet Kafire Kawugule and the applicants on the suit property, one of the administrators-Luyimbazi Hassan lodged a complaint.
6. Following the applicants non-attendance and failure to attend to the notice issued on 6th February 2020, the 1st respondent rightly proceeded to cancel the sub-division of Kyadondo Block 268 Plot 14 into plots 932 and 933. Additionally, the 1st respondent lawfully cancelled the

applicants titles comprised in Kyadondo Block 268 Plots 977,978,979 and 980 and accordingly reinstated Kyadondo Block 268 Plot 14 in the names of Yoanna Maria Kiggundu.

ISSUES

The following issues were raised by the applicants counsel for determination.

- 1. Whether the decision of the respondent was irrational, ultra vires and was in contravention of the law?*
- 2. What remedies are available to the parties?*

The Applicant was represented by *Counsel Matovu Akram*, while the 1st respondent was represented by *Babu Hakim*-Registrar of Titles and 2nd respondent was represented by *Counsel Mac Dusman Kabega*.

DETERMINATION

Whether the decision of the respondent was irrational, ultra vires and was in contravention of the law?

The applicant's counsel submitted that the 1st respondent purported to cancel the applicants' title under section 91 of the Land Act and according to him, the 1st respondent did not have any powers and or jurisdiction to cancel the Certificates of title on allegations of fraud as these powers and jurisdiction are vested in the High Court. That the 1st respondent can only exercise powers of cancellation upon being presented with an order from the High Court sanctioning the cancellation. He cited the case of *Hilda Wilson Namusoke & 3 Others v Owalla's Home Investment Trust (EA) Limited SCCA No. 15 of 2017*.

The applicant stated in paragraph 10 of his affidavit that the commissioner land registration cancelled out the applicant's certificates of title giving reasons that the same was fraudulently transferred into the names of Saulo Bamuchumika and later into the names of Juliet Kawugule.

Section 91(2) (e) and (f) provide that the commissioner can only cancel a certificate of title if it is obtained illegally or wrongfully obtained or retained. The commissioner further relied on the section 177 of the Registration of Titles Act which affects a title procured by fraud.

It was counsel's submission that the 1st respondent acted illegally when they cancelled out the proprietorship of the applicants contending it was obtained fraudulently.

Secondly, the applicants' counsel submitted that the 1st respondent's office deliberately conducted a hearing in respect of the applicants' property without according them a hearing or inviting them for a hearing.

The 1st respondent submitted that it was an oversight on the office of the Commissioner Land registration to cancel the applicants' certificates of title on ground of Fraud which was never attributed to the applicants.

The 1st respondent's counsel further submitted that the concern raised by the 2nd respondent about Assistant Commissioner Land Registration swearing an affidavit while the Ag Commissioner Land Registration was still in office was baseless since Commissioner Land Registration is an office and not a person and it is defined to include the Commissioner Land Registration, The Assistant Commissioner Land Registration, Principal Registrar of Titles, Senior Registrar of Titles and Registrar of Titles. Therefore, any of the officers mentioned therefore any of the above officers can swear an affidavit for and on behalf of the office of the Commissioner Land Registration.

The 2nd respondent's counsel submitted that the application is not competent since it was not filed in time after the mandatory specified time of 3 months and that the applicant ought to have obtained leave of court prior to filing the application out of time.

Counsel further submitted that the 2nd respondent's adduced evidence of the mail posting receipts which clearly showed that the 1st respondent had on two occasions, sent notices by registered mail to Saulo Bamuchumika, Juliet Kawugule Kafire and the applicants known addresses. They never attended nor filed any responses to the said notices.

It was further contended that the cancellation of titles was premised on illegality and not fraud. No particulars of fraud have been stated anywhere in the Amendment Order. The 1st respondent is charged with a statutory duty of upholding the sanctity of the land Register and in its performance of that duty, the 1st respondent is vested with special powers to cancel certificates of title which were issued illegally, irregularly or erroneously such as those of the applicants. Therefore, the 1st respondent's actions in respect of the suit property are legal and well-founded in law.

Analysis

It is true that the application was filed out of the stipulated time period of 3 months but the rules allow the court to exercise its discretion in entertaining any matter which would have been filed out of time. The court is at liberty to exercise the discretion judiciously and in the best interests of justice.

The applicants' certificates of title were cancelled in 2020 during which period there was a Covid 19 outbreak and lockdowns which restricted the movements. This was an abnormal situation which court should take judicial notice of in the circumstances of the present case.

Secondly, the 1st respondent was also duty bound to notify the parties about the decision to effect changes in the register. It is not enough to merely contend that the party was notified about the hearing but rather a further responsibility is created to notify the affected person about the changes to be effected. This would trigger the time running from the date the decision was made known to the affected parties. The present application has peculiar circumstances and this court would exercise its discretion to allow the extension of time on its own motion in order to serve the interests of justice.

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, law or governmental action which is inconsistent with the Constitution. This involves reviewing governmental action in form of laws or acts of executive for consistency with constitution.

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. Judicial review is

an incident of supremacy, and the supremacy is affirmed by judicial review.

It is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law-to the extent at least that it expresses this principle of legality-it is generally understood to be a fundamental principle of constitutional law.

Lawfulness thus stands at the core of the general constitutional law principle of legality and applies to all public actions. An analysis of lawfulness in administrative law thus always involves comparing the administrative action to the authorisation for that action in the relevant empowering provision. Therefore lawfulness or lack of mandate provides public decision makers with the tools to identify specifically what they are entitled to do.

In determining whether the grounds of this application warrant the grant of judicial review, this court is guided by the position of the law as variously upheld in different court decisions and precedents. Therefore, Judicial review can be granted on three grounds, namely; *Illegality; irrationality and procedural impropriety*. See *Council of Civil Service Unions vs Minister for the Civil Service [1985] 1 A.C 374*

An applicant who wishes to succeed in an application for judicial review must therefore as a matter of law, plead and prove that the decision complained of was arrived at either illegally, irrationally or there was procedural impropriety implying, flouting of well-known procedure in that regard.

The 1st respondent's decision to cancel the applicants' title is challenged for illegality since they do not possess such power to cancel certificates of title for fraud. This is buttressed by the case of *Hilda Wilson Namusoke & Others vs Owalla Home Investment Trust Limited & Commissioner Land Registration SCCA No. 15 of 2017* the Supreme court noted that " save for fraud, all the other grounds on which the commissioner could base a decision to cancel a certificate of title under section 69 of the Registration of Titles Act were

imported into section 91 of the Land Act to wit; certificates of title issued in error, endorsements made in error, endorsements obtained or retained wrongfully and certificates bearing misdescription of land and boundaries.

Justice Lillian Tibatemwa Ekirikubinza specifically stated as follows;

“I am inclined to believe that the absence of fraud in the new provision of section 91 is deliberate. It therefore follows that the enactors of the Land Amendment Act of 2004 took away the authority of the commissioner to cancel a certificate of title on the basis of fraud without referring the matter to a court. The commissioner’s action is rightly limited to actions for ‘errors’ or illegalities that do not require the rigors of a full trial where fraud would be established before a title is impeached. The Commissioner who may exercise quasi-judicial powers would not have the capacity to hear a matter involving fraud and make findings without calling evidence including cross-examination of the witness alleging fraud”

In the present case and like in all cases where titles are cancelled, the 1st respondent’s officers have attempted to craft their amendment orders to fit in the Supreme Court decision by not alluding to *‘Fraud’* but rather *‘illegalities’* as the court directed. I strongly believe this is a scheme or ploy used by all land fraudsters (including lands officials) in order to beat defeat the decision of the Supreme Court.

It is clear that what they allude to as illegalities are clear frauds which would require a full blown litigation where such evidence is likely to be tested through cross examination. An illegality simply means; An act that is forbidden by law: The state of not being legally authorised. *See Black’s Law Dictionary 11th Edition 2019.*

The 2nd respondents as Administrators of the Late Yoanna Maria Kigundu claim to have discovered illegalities and irregularities surrounding the registration of Saulo Bamuchumika, Juliet Kawugule Kafire and the Applicants. The transactions that lead to the registration of the persons are dated as far back as 1959 and 1968 and 1969 before the applicants got registered in 2018.

The registration of applicants on certificate of titles is not an illegality since it was not forbidden by any law and if the 2nd respondent’s wanted to impeach their registration, then they ought to have filed a substantive suit premised on fraud and not illegality.

The 1st respondent's officers seem to be aiding parties or fraudsters in resuscitating stale claims which are time barred or barred by limitation for recovery of land. The current claim is over 43 years and it is being brought as a complaint to the Commissioner Land Registration. This makes it equally difficult to establish the claim and it affects third parties who may have acquired interest in the land. If a court of law is barred from hearing a claim which is time barred, why should the 1st respondent exercise such power or entertain such a claim which is beyond the limitation period.

The 1st respondent while sending out the notice to show cause, the notices were sent to persons who got registered in 1968 or 1969. There is no evidence that such persons as they appeared on the certificates of title are still alive and living. The notices could have been sent to dead persons who ceased to have any interest in the said land and cannot be able to defend themselves before the 1st respondent.

The decision of the 1st respondent is tainted with illegality and contrary to the powers conferred under Land Act and the exercise of power is outside the jurisdiction of the office of Commissioner Land Registration.

In the case of *R v Lord President of the Privy Council, ex parte Page* [1993] AC 682 Lord Browne-Wilkinson noted;

"The fundamental principle (of judicial review) is that the courts will intervene to ensure that the powers of a public decision-making bodies are exercised lawfully. In all cases...this intervention...is based on the proposition that such powers have been conferred on the decision-maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a wednesbury sense, reasonably. If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is wednesbury unreasonable, he is acting ultra-vires his powers and therefore unlawful."

This court finds that the 1st respondent exercised the powers conferred unlawfully in cancelling the registration of the applicants from the certificates of title.

I therefore find and do grant the following orders;

1. *An Order of Certiorari issues quashing the 1st respondent's decision cancelling the 1st applicants' certificates of title for land comprised and registered under Kyadondo Block 268 plots 978, 979 and 980 land at Naziba.*
2. *An Order issues compelling the 1st respondent to reinstate and or restore the applicants' certificates of title of land comprised and registered under: Kyadondo Block 268 plot 978,979 and 980 land at Naziba*
3. *An Order of Certiorari issues quashing the respondent's decision cancelling the 2nd Applicants' certificate of Title for the land comprised and registered under Kyadondo Block 268 Plot 977 at Naziba.*
4. *An Order compelling the respondent to reinstate and or restore the 2nd Applicants certificates of Title for land comprised and registered under Kyadondo Block 268 Plot 977 at Naziba*

Each party should bear their own costs.

I so order.

Ssekaana Musa

Judge

30th September 2022