

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(CIVIL DIVISION)**

**MISCELLANEOUS CAUSE NO. 144 OF 2021**

**MURTAZAALI KASSAM ::: APPLICANT**

**VERSUS**

**THE DEPARTED ASIANS PROPERTY  
CUSTODIAN BOARD ::: RESPONDENT**

**BEFORE: HON. JUSTICE BONIFACE WAMALA**

**RULING**

**Introduction**

[1] This application was brought by Notice of Motion under Section 36 of the Judicature Act Cap 13 and the Judicature (Judicial Review) Rules 2009 seeking orders that;

- (a) A declaration that the property comprised in Leasehold Register Volume 4478 Folio 23 Plot 4 Burton Street (hereinafter referred to as **‘the subject property’**) was repossessed by its proprietors, to wit, Kulsum Binte Dahyabhai, Ebrahim Alarakhia Kassam and Jamal Walji Limited and the same ceased to be vested in the Government of Uganda under the custodianship of the Respondent.
- (b) A declaration that the acts of the Respondent in purporting to deal with the subject property are ultra vires the mandate of the Respondent and are, thereby, illegal and void.
- (c) An order of Certiorari quashing the decision of the Respondent that purports that the subject property reverted back and is vested

in the Government of Uganda under the custodianship of the Respondent.

- (d) An order of Prohibition doth issue against the Respondent, its officials, agents, assigns or any other person(s) acting on the Respondent's instructions or deriving interest and authority from the Respondent, restraining them from interfering with the ownership, use and possession by the Applicant of the subject property.
- (e) An order of a permanent injunction doth issue restraining the Respondent from holding out as the custodian of, dealing with and, in any event, interfering with the Applicant's ownership, use and quiet enjoyment of the subject property.
- (f) An order that the Respondent pays to the Applicant general and exemplary damages for the inconvenience suffered and for the wanton and reckless actions of the Respondent in interfering with the possession, use and ownership of the Applicant by holding out that the subject property is vested in the Government of Uganda under the custodianship of the Respondent.
- (g) An order that the Respondent pays the costs of this application.

[2] The grounds to the application are summarized in the Notice of Motion and contained in the affidavit sworn in support of the application by Murtazaali Kassam, the Applicant. Briefly, the grounds are that the Applicant is one of the named executors under the will of the late, Ebrahim Alarakhia Kassam who was one of the registered proprietors of the land in issue comprised in Leasehold Register Volume 4478 Folio 23 Plot 4 Burton Street (the subject property). The Applicant is a beneficiary of the said estate and it is in that capacity that he brought this

application. The said subject property belonged to the late Kuslum Binte Dahyabhai, the late Ebrahim Alarakhia Kassam and Jamal Walji Limited who were tenants in common. The property was expropriated to the Government of Uganda and placed under the custodianship of the Respondent following the expulsion of persons of Asian origin. On 28th August 1992, the Respondent through the Minister of Finance of the Government of Uganda returned the said property to its owners. On 7<sup>th</sup> September 1992, the Respondent issued a notice of repossession and notified the occupants at the time that the land had been returned back to the registered proprietors. The said notice directed the then occupants to negotiate new tenancy agreements with the registered proprietors. The Applicant's father being one of the tenants in common took possession and use of the subject property in his capacity as administrator of the estate of the late Kulsum Binte Dahyabhai and in his own right. Together with Jamal Walji Ltd, the Applicant's father sought for a new lease upon the expiry of the then existing lease which was granted for a term of 47 years with effect from 2012.

[3] While the owners of the subject property were enjoying quiet possession and use thereof, the Respondent on 1<sup>st</sup> March 2021 issued a notice stating that the said property was vested in the Government of Uganda under the custodianship of the Respondent. The Respondent required vacant possession of the property, directed the occupants to pay rent arrears to the government since 1972 and all dealings on the said land were to be halted. The Applicant thus filed this application challenging the acts of the Respondent as being illegal, irrational and ultra vires the Respondent's mandate.

[4] The Respondent did not file a reply to the application despite sufficient evidence of service of process on record. It was ordered that the hearing would proceed ex parte. The Applicant was represented at the hearing by Mr. Marzuk Swabur who opted to proceed by written submissions which were duly filed and adopted by the Court.

### **Issues for determination by the Court**

[5] Two issues are up for determination by the Court, namely;

**a) Whether the application discloses grounds for judicial review?**

**b) Whether the Applicant is entitled to the reliefs sought?**

### **Resolution of the Issues**

**Issue 1: Whether the application discloses grounds for judicial review?**

#### **Submissions by the Applicant's Counsel**

[6] It was submitted by Counsel for the Applicant that in an application for judicial review, the Applicant only has to establish a prima facie case as to whether the public body took into account matters which ought not to be taken into account; or it did not take into account matters which it ought to have taken into account; or it did not have jurisdiction or it exercises excessive jurisdiction; or the conclusion was so unreasonable that no authority could come to it; or the rules of natural justice were violated. Counsel relied on the case of ***Gordon Sentiba & Others V U.R.A Miscellaneous Cause No. 35 of 2010*** to support his submission.

[7] Counsel submitted that in the present case, the provisions of the Expropriated Properties Act provide for repossession by former owners

and that once such is accomplished, the Respondent ceases to wield any control over such property. The Respondent cannot for any reason take back the control of such reposed property. Counsel relied on the case of ***Jaffer Brothers Ltd V Mohammed Magid Bagalaliwo & 2 ors C.A.C.A No. 43 of 1997*** which was cited in ***Firdoshali Madatali Kashwani Habib & Another V the Departed Asians Property Custodian Board & Others, HCMC No. 11 of 2019*** to support his submissions. Counsel also relied on the case of ***Ladha Kassam & Co. Ltd V DAPCB Miscellaneous Cause No. 230 of 2019*** and submitted that on facts similar to the present case, the court found the Respondent, in purporting to deal with the Applicant's property, to have acted illegally, irrationally and ultra vires its legal mandate. Counsel prayed to Court to grant the reliefs sought in the application.

### **Determination by the Court**

[8] The position of the law is that judicial review is concerned not with the merits of the decision but with the decision making process. Judicial review involves an assessment of the manner in which a decision is made. It is not an appeal against the decision and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality. See: ***Kuluo Joseph Andrew & Others vs The Attorney General & Others, HC MC No. 106 of 2010.***

[9] The *Judicature (Judicial Review) (Amendment) Rules 2019* set out the different factors to be considered by the Court when handling applications for judicial review. *Rule 7A* thereof provides that;

*“(1) The court shall, in considering an application for judicial review, satisfy itself of the following –*

*(a) That the application is amenable for judicial review;*

*(b) That the aggrieved person has exhausted the existing remedies available within the public body or under the law; and*

*(c) That the matter involves an administrative public body or official.*

*(2) The court shall grant an order for judicial review where it is satisfied that the decision making body or officer did not follow due process in reaching a decision and that, as a result, there was unfair and unjust treatment.”*

[10] As a matter of law, for a matter to be amenable for judicial review, it must involve a public body in a public law matter. It is thus a requirement that the right sought to be protected is not one of a personal or individual nature but a public one enjoyed by the public at large. In the instant case, this test is passed since the Respondent Departed Asians Property Custodian Board is a public body and the matters raised are of a public nature. The present matter is therefore amenable for judicial review.

[11] Under judicial review, the court may provide specific remedies where it is satisfied that the named authority has acted unlawfully. A public authority will be found to have acted unlawfully if it has made a decision or done something: without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of unreasonableness or irrationality); or without observing the rules of natural justice (unlawful on grounds of

procedural impropriety or unfairness). See: **ACP Bakaleke Siraji vs Attorney General, HC MC No. 212 of 2018.**

[12] In the present case, the allegation is that the Respondent acted illegally and irrationally. The claim based on the Respondent acting ultra vires its mandate does not introduce a separate claim since the plea of ultra vires falls under the ground of illegality. I will begin by considering the ground of illegality.

[13] Illegality has been described as the instance when the decision making authority commits an error in law in the process of making a decision or making the act the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of the law or its principles are instances of illegality. **Lord Diplock** in the case of **Council of Civil Service Unions v Minister for Civil service (1985) AC 375**, made the following important statement;

***“By illegality as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulated his decision making power and must give effect to it. Whether he has or not is par excellence a justifiable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercised.”***

[14] A public authority will be found to have acted unlawfully if it has made a decision or done something without the legal power to do so. Decisions made without the legal power are said to be made *ultra vires*; which is expressed through two requirements: one is that a public

authority may not act beyond its statutory power; the second covers abuse of power and defects in its exercise.

[15] In ***Dr. Lam - Lagoro James v Muni University, HCMC No. 007 of 2006***, the court held that decisions classified as illegal include the following;

- i) decisions which are not authorized;
- ii) decisions taken with no substantive power or where there has been failure to comply with the procedure;
- iii) 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 a power was conferred);
- iv) where power is not exercised for 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);
- v) taking into account irrelevant considerations in the exercise of discretion or failing to take account of relevant considerations;
- vi) failure to exercise discretion, including acting under dictation (where an official exercises a discretionary power on direction or at the behest of some other persons or body. An official may have regard to government policy but must apply their mind to the question and the decision must be their decision).

[16] On the present facts, there is evidence that the subject property falls under properties that were expropriated under the Expropriated Properties Act Cap 87. Under Section 6(1) of the Expropriated Properties Act (EPA), one of the ways the expropriated properties could be dealt with was through issuance of a certificate of repossession. The said certificate



was issued by the Minister upon being satisfied of the merits of the application. The certificate, once issued, is deemed to be proof that all the necessary steps of verification have been undertaken and the issuing authority, the Minister, thereby becomes *functus officio* and is not empowered to revisit his/her decision. In ***Mohan Kiwanuka v Asha Chand, SCCA No.14 of 2002***, it was held by the Supreme Court that once a Minister issues a Repossession Certificate, he or she or any Government official cannot reverse, review or otherwise modify that decision. The only course of action available to any aggrieved party is to seek redress in the courts of law as prescribed by the procedure set out under Section 15(1) of EPA; which is to appeal to the High Court within 30 days from the date of communication of the decision.

[17] In the instant case, there is evidence that the subject property was repossessed by its proprietors as evidenced by a certificate dated 26<sup>th</sup> August 1992 issued by the Minister (Annexure C to the affidavit in support) and another document issued by the Executive Secretary of the Respondent (Annexure D to the affidavit in support). The above documents constitute conclusive evidence of repossession. The above evidence is further strengthened by the fact that following the repossession, the controlling authority, Kampala District Land Board, went ahead to renew the lease for the said land for 47 years with effect from 2012. A certificate of title was accordingly issued and the land was registered in the said proprietors' names on 14<sup>th</sup> August 2012; as per Annexure B to the affidavit in support. This evidence of ownership is, however, contradicted by the Respondent by letter dated 1<sup>st</sup> March 2021 in which the Respondent demanded for vacant possession of the subject

property, for arrears of rent from 1972 and halting any dealings on the said land (Annexure G to the affidavit in support).

[18] In view of the foregoing evidence, by operation of the law, the Respondent had ceased having any control or power over the subject property. Even if at some point the Respondent harbored a view that there was any fault in the repossession process, neither the Respondent nor the Minister had power to reverse the process. Any aggrieved person could only take recourse to the provision under Section 15(1) of the EPA. As such, any action by the Respondent that contradicted or interfered with the ownership of the subject property was ultra vires the power and mandate of the Respondent and was thus illegal. The Applicant has, therefore, established that by interfering with the ownership, possession and use of the subject property, the Respondent acted illegally. The application would thus succeed on the ground of illegality.

[19] In view of the above finding based on lack of legality of the Respondent's action, it becomes unnecessary to investigate the ground of irrationality. The first issue is, therefore, answered in the affirmative.

**Issue 2: Whether the Applicant is entitled to the reliefs sought?**

[20] Given the finding on issue one above, the Applicant is entitled to the declarations, and the orders of certiorari, prohibition and a permanent injunction in the terms claimed and as I will lay out hereinafter.

[21] The Applicant further prayed for general and exemplary damages. The law is that award of damages in an application for judicial review is not automatic and is only considered in exceptional circumstances. In

judicial review applications, there is indeed no right to claim for losses caused by the unlawful administrative action. Damages may only be awarded if the applicant, in addition to establishing a cause of action in judicial review, establishes a separate cause of action related to the cause of action in judicial review, which would have entitled him or her to an award of damages in a separate suit. In that regard, *Rule 8(1) of the Judicature (Judicial Review) Rules, 2009* provides as follows:

*“8. Claims for damages*

*(1) On an application for judicial review the court may, subject to subrule (2), award damages to the applicant if,*

*(a) he or she has included in the motion in support of his or her application a claim for damages arising from any matter which the application relates; and*

*(b) the court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his or her application, he or she could have been awarded damages.”*

[22] It appears from decided cases that the additional causes of action which may be added to an application for judicial review may include a claim for breach of statutory duty, misfeasance in public office or a private action in tort such as negligence, nuisance, trespass, defamation, interference with contractual relations and malicious prosecution. See: ***Three Rivers District Council versus Bank of England (3) [3003]2 AC 1; X (Minors) versus Bedfordshire County Council [1995]2 AC 633;*** and ***Fordham, Reparation for Maladministration: Public Law Final Frontiers (2003) RR 104 at page 104 -105.***

[23] In the instant case, it was claimed by the Applicant that the Respondent ought to be ordered to pay to the Applicant general and exemplary damages for the inconvenience suffered at the hands of the Respondent and for the wanton and reckless actions of the Respondent of interfering with the possession, use and ownership of the subject property by the Applicant. From the evidence before the Court, I do not find circumstances that warrant award of any damages over and above the writs sought and granted by the Court in judicial review. I do not find proof of any additional cause of action for which the Applicant would have been entitled to damages if the same was brought by a separate action. I have therefore made no award of either general or exemplary damages. The Applicant is, however, entitled to costs of the application.

[24] In all, therefore, the application by the Applicant succeeds and is allowed with the following declarations and orders:

- (i) A declaration that the property comprised in Leasehold Register Volume 4478 Folio 23 Plot 4 Burton Street (hereinafter referred to as **‘the subject property’**) was lawfully repossessed by its proprietors, to wit, Kulsum Binte Dahyabhai, Ebrahim Alarakhia Kassam and Jamal Walji Limited and the same ceased to be vested in the Government of Uganda under the custodianship of the Respondent.
- (ii) A declaration that the acts of the Respondent in purporting to deal with the subject property are ultra vires the mandate of the Respondent and are, thereby, illegal and void.
- (iii) An order of Certiorari quashing the decision of the Respondent purporting to reverse the repossession of the subject property.
- (iv) An order of Prohibition against the Respondent, its officials, agents, assigns or any other person(s) acting on the Respondent’s

instructions or deriving interest and authority from the Respondent, restraining them from interfering with the ownership, use and possession by the Applicant of the subject property.

(v) An order of a permanent injunction restraining the Respondent from holding out as the custodian of, dealing with and, in any event, interfering with the Applicant's ownership, use and quiet enjoyment of the subject property.

(vi) The costs of the application shall be paid by the Respondent.

It is so ordered.

***Dated, signed and delivered by email this 25<sup>th</sup> day of October, 2022***

A handwritten signature in blue ink, appearing to read 'Boniface Wamala', with a long horizontal flourish extending to the right.

**Boniface Wamala**

**JUDGE**