

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISC APPLICATION NO. 0106 OF 2022

[ARISING FROM CIVIL SUIT NO. 043 OF 2022]

**MPONDWE CROSS BORDER TRADERS
COOPERATIVE SOCIETY LTD ::: APPLICANT**

VERSUS

ISANGO SUB COUNTY LOCAL GOVERNMENT ::::::::::::::: RESPONDENT

BEFORE HON. MR. JUSTICE VINCENT EMMY MUGABO

RULING

This is an application by notice of motion brought under Section 3(2) (a), 6 and 23 of the Local Governments Act, Section 98 of the Civil Procedure Act, Order 6 Rules 28, 29, 30 and Order 7 rule 14 of the Civil Procedure Rules S.I 71-1, for orders that;

1. Civil Suit No. 043 of 2022 and attendant Miscellaneous Applications No. 101 & 102 of 2022 be dismissed with costs to the applicants.
2. The respondent pays costs of this application

Background.

By a contract dated 27th July 2022, the applicant was contracted by Kasese District Local government to collect revenue from the cattle market located at Mpondwe-Lhubiriha Town Council. This contract was arrived at after a formal procurement process and the Solicitor General cleared the same. It appears that at the time, there was only one cattle market in the district.

On 08th September 2022, the respondent held an extra ordinary council meeting, resolved and approved the motion to create Isango cattle holding ground market at Kabafu 1 village, Isango Sub County. The same was

actually operationalized. It appears that the creation of the new cattle market in Isango Sub County brought about disagreement between the district, Isango Sub County and other stakeholders in light of how it would affect the tender/contract that had just been awarded to the applicant.

The Minister for Local Government convened a meeting with the Kasese district officials and other lower local governments to settle the looming issues and directed among others that the market business which was tendered for the Town Council and irregularly shifted to Isango Sub County be operated and regularized at Isango land but the revenue go to the town council. He also directed that the approved market tenderer to take on the tender with immediate effect.

The respondent filed Civil Suit No. 043 of 2022 against the applicant and Mpondwe – Lhubiriha Town Council alleging among others that the applicant and the said Town Council are trespassers on the land where the new cattle market is established and for a declaration that the suit land belongs to the respondent. The respondent also filed Miscellaneous Applications No. 101 & 102 of 2022 for a temporary injunction and interim order for an injunction respectively. It is this suit and applications that the applicant seeks court to dismiss for the various reasons they give.

The grounds of this application are set out in the affidavit of Bwambale Henry, a chairman of the applicant and are among others that;

- a. The plaintiff in Civil Suit No. 043 of 2022 who is the respondent in the present application is a fictitious and non-existing party incapable of commencing civil proceedings
- b. Civil Suit No. 043 of 2022 is frivolous and vexatious for the reason that it is based on trespass to land which is manifestly registered into the names of Kasese District Local Government from whom the

applicant derives her licence to occupy and collect revenue on the cattle market located on the said land

- c. The commencement of Civil Suit No. 043 of 2022 and attendant Miscellaneous Applications No. 101 & 102 of 2022 was done without the authority of Isango Sub County council as required by law
- d. The instructions to Bagenda & Co. Advocates, a private legal firm to represent the respondent without complying with Public Procurement laws is illegal.
- e. The respondent unlawfully started a cattle Market on the land registered in the names of Kasese district without proper approval and with intention to deprive the district from collecting revenue and which the Minister for Local Government has now directed that it be occupied and operated by the applicant.

The respondent opposed the application by an affidavit in reply deposed by Mr. Tsutsu Moses, the L.CIII Chairperson of the respondent and he states inter alia that;

- a. The approval for the creation of Isango Cattle market followed the Kasese District council resolution of 30th May 2022 that two animal holding grounds be established in the district, one in Busongora and another in Bukonzo
- b. The meeting involving the Minister for Local Government was informal with intent to settle the conflict between the respondent, Mpondwe-Lhubiriha Town council and the applicant but all failed.
- c. That Kasese District Local Government is by law the custodian of all properties owned by lower local governments in its jurisdiction, hence the reason the name Kasese District Local Government appearing on

the certificate of customary ownership of the Isango land but the land was applied for by the respondent together with the district council.

- d. The contract for revenue collection that was awarded to the applicant was in respect to the cattle market in Mpondwe-Lhubiriha Town council and the same cannot be applied to collect revenue from the Isango Sub County cattle market.
- e. The commencement of Civil Suit No. 043 of 2022, its attendant applications and the instructions to M/s Bagyenda & Co. Advocates were duly authorised by the respondent's council.

Representation and hearing.

The applicant is represented jointly by Owoyesigire, Muhereza & Co. Advocates and PHLEB Associated Advocates while the respondent is represented by M/S Bagyenda & Co. Advocates. On the direction of this court, the hearing proceeded by way of written submissions. Both parties filed submissions which have been considered in this ruling.

Preliminary matters

Most of the grounds of this application are in the form of objections to Civil Suit No. 043 of 2022 and Miscellaneous Applications No. 101 & 102 of 2022. I will summarise them bellow;

- a. That the respondent who is the plaintiff in Civil Suit No. 043 of 2022 is a fictitious and non-existent entity.
- b. That Civil Suit No. 043 of 2022 is frivolous and vexatious because it is based on trespass to land which is manifestly registered into the names of Kasese District Local Government and not the respondent.
- c. The commencement of Civil Suit No. 043 of 2022 was done without the authority of Isango Sub County council as required by law

- d. The instructions to Bagenda & Co. Advocates, a private legal firm to represent the respondent without complying with Public Procurement laws is illegal.
- e. The respondent unlawfully started a cattle Market on the land registered in the names of Kasese district without proper approval and with intention to deprive the district from collecting revenue.

It is convenient that they are handled first and I am pleased to do so. I will handle them in the order presented.

That the respondent who is the plaintiff in Civil Suit No. 043 of 2022 is a fictitious and non-existent entity.

In his written submissions, counsel for the applicant argues that the respondent by the name of Isango Sub County Local Government is a non-existent entity without locus to commence civil proceedings. He cited **Section 3(2)(b) of the Local Governments Act** to argue that the local governments in a district rural area shall be the sub-county councils. He notes that the entity created under the act is the sub-county council to represent the sub-county as a local government. He further cited Section 6 of the Local Governments Act which states as follows;

“6. Local governments to be bodies corporate.

Every local government council shall be a body corporate with perpetual succession and a common seal, and may sue or be sued in its corporate name.

He concludes that the legal entity known under the Act and which ought to have commenced the proceedings is Isango sub-county council and not the respondent.

Counsel for the respondent argued that in line with **Sections 1(i) and 3(2)(b) of the Local Governments Act**, local government means local councils established under the Act. From this, counsel argues that a sub-county council is a local government and the same is a corporate body with capacity to commence civil proceedings.

From the onset, I need to note that while the respondent chooses to use the words “Isango sub-county local government” in its pleadings, the legal entity created under the provisions the Local Governments Act cited by both counsel is the sub-county council and not sub-county local government. For this, I agree with counsel for the applicant.

However, I need to state that the Local Governments Act describes sub county councils as local governments. The naming of a sub-county council as a local governments is not fatal. A sub-county with the respondent’s name actually exists and reference to the respondent as a local government may not refer to any other person but the respondent. The naming in this regard is a misnomer that may be cured by an amendment without affecting the substantive rights of either party.

Black’s Law Dictionary, 9th Ed. defines a misnomer at page 1090 as a mistake in naming a person or place. With the guidance from **The Principles Pleading and Practice Civil Actions by W. Blake Odgers, 6th ed. Pg. 187**, a mere misnomer on the writ can be amended without leave in the statement of claim. The applicant’s contention could be upheld in circumstances that would cause confusion as to who is actually the party to the suit being referred to, which is not the case presently.

This objection therefore fails

That Civil Suit No. 043 of 2022 is frivolous and vexatious because it is based on trespass to land which is manifestly registered into the names of Kasese District Local Government and not the respondent

Counsel for the applicant relies on the certificate of customary ownership for the land located at Kabafu 1 village, Kabafu parish, Isango sub-county (the suit land) to argue that the respondent's cause of action in Civil Suit No. 043 of 2022 cannot be sustained because the suit land is registered in the names of Kasese District Local Government. He argues that the name of the respondent included in the brackets on the certificate of ownership is merely a geographical locator of the land and does not mean that the land belongs to the respondent.

It is further argued for the applicant that for the respondent to raise a cause of action in trespass, it must prove that it is in physical possession of the land or the rightful owner of the same (legal possession) which they have failed to do. Also that it would be problematic for the court to make a decision on the same when the person in whose name the land is registered is not a party to the suit and would not have been afforded a right to be heard.

In response, counsel for the respondent argues that the suit land belongs to the respondent. He relied on the certificate of customary ownership, the demarcation form for the land, and the inspection report for the land. Counsel further argued that Kasese district local government is by law the custodian of all properties owned by lower local governments in its jurisdiction and that is the reason its name appears on the certificate of ownership.

I will for purposes of clarity reproduce the contents of the certificate of ownership, the inspection report and the demarcation form for the suit land with respect to the owner of the same.

Under the certificate of ownership, ownership is captured as thus under Owner's name and address;

Kasese District Local Gov't (Isango Sub County) of Kabafu 1 Village.

In the inspection report;

Kasese District Local Government Isango S/ County of Kabafu 1 Village

In the demarcation form under "Customary Owners"

(i) *KASESE DISTRICT LOCAL GOVERNMENT*

(ii) *ISANGO SUBCOUNTY OF KABAFU 1 VILLAGE*

In our jurisprudence, the only two types of joint ownership that are exercised over property are joint tenancy and tenancy in common. The description of ownership in the certificate of ownership does not suggest any of these types of co-ownership.

I may agree with the argument advanced by counsel for the respondent that the district council is by law the custodian of all properties owned by lower local governments in its jurisdiction, but also note that **Section 6 of the Local Governments Act** clothes sub-county councils with corporate personality and therefore the right to own property of its own or jointly with others. There is no argument from the respondent that it owns the suit land jointly with the district council even when it is the district council's name that appears on the certificate of ownership.

Trespass to land occurs when a person directly enters upon land in possession of another without permission and remains upon the land, places or projects any object upon the land (see **Salmond and Heuston on the Law of Torts, 19th edition (London: Sweet & Maxwell, (1987) 46)**). It

is a possessory action where if remedies are to be awarded, the plaintiff must prove a possessory interest in the land. It is the right of the owner in possession to exclusive possession that is protected by an action for trespass. Such possession should be actual and this requires the plaintiff to demonstrate his or her exclusive possession and control of the land. The entry by the defendant onto the plaintiff's land must be unauthorised. The defendant should not have had any right to enter into plaintiff's land.

It is the right of the owner in possession to exclusive possession that is protected by an action for trespass. The cause of action for trespass is designed to protect possessory, not necessarily ownership, interests in land from unlawful interference. An action for trespass may technically be maintained only by one whose right to possession has been violated. The gist of an action for trespass is violation of possession, not challenge to title. To sustain an action for trespass, the plaintiff must be in actual physical possession. See **Odyeki & Anor v Yokonani & 4 Ors HCCA No. 9 of 2017**.

As such, in order to disclose a cause of action of the tort of trespass to land, the plaintiff had to plead facts to show that; (a) he was in possession at the time of the entry complained of; (b) there was an unlawful or unauthorised entry by the respondents; and (c) the entry occasioned him damage.

It may be argued that the respondent is in possession of the suit land because it has established a cattle holding ground market there but the question would be whether the respondent is in exclusive possession of the suit land. The respondent has argued that its creation of the Isango cattle market followed a resolution by Kasese district council that two animal holding grounds be established in the district, one in Busongora and another in Bukonzo in May 2022. I wonder whether a sub county like the respondent has the mandate to implement the district decisions without

the express delegation. More so in an extra ordinary meeting of its council. Where is the urgency? It also leaves wonder whether a market created under such circumstances would be under the management of the sub county council or the district council.

Without the temptation to discuss and dispose of the merits of the main suit, it is my finding that with the available evidence, the respondent has not proved that it is in exclusive possession of the suit land. Exclusive possession has to be derived from a particular lawful arrangement. The arrangement could either be derived from ownership, a lease or other permission of the rightful owner. Again the respondent has not proved any of these.

It has been recorded that the applicant is in a contractual obligation to collect revenue from the cattle market located at Mpondwe-Lhubiriha Town Council. The respondent has irregularly created another cattle market at Isango. It is my finding that the hurried creation of the cattle market at Isango on land registered in the names of the district council is not only intended to frustrate the district's effort to collect revenue from already established cattle markets but also to frustrate the tender/contract that has already been awarded to the applicant after going through a lawful procurement process.

For the above reasons, Civil Suit No. 043 of 2022 would therefore be dismissed for failure to disclose a reasonable cause of action.

The commencement of Civil Suit No. 043 of 2022 was done without the authority of Isango Sub County council as required by law.

In his submissions, counsel for the applicant relies of **Regulation 27 of the Local Government Councils Regulations** to argue that a prosecution

by or on behalf of a district council, urban or sub county council or in any civil case in which the local council is a party, the council must convene and pass a resolution to that effect. Counsel further relied on the case of ***Fakrudin & another Vs Kampala District Land Board & another*** to argue that the failure to attach the respondent's approving resolution to its plaint renders the plaint fatally defective.

In response, counsel for the respondent relies on paragraph 16 of the affidavit in reply to argue that the commencement of Civil Suit No. 043 of 2022 was made after the respondent had approved the same in an executive meeting and the same was duly authorised in the council resolution. Counsel argued that the requirement to attach the resolution to the plaint has been dispensed with by the amendment of the Civil Procedure Rules in 2019. **Order 11A rule 5 of the Civil Procedure (Amendment) Rules 2019** requires that parties to the suit are under duty to provide all the information at the hearing.

I have carefully examined the respondent's affidavit in reply and the same bears a minute extract from the ordinary council meeting of the respondent's council dated 8th October 2022 and signed by Kaija Chris as Clerk to Council and Siriwayo Justus as the Speaker to Council. In the said resolution the respondent's council approved the motion to commence proceedings against the applicant and Mpondwe-Lhubiriha Town Council and also seek interim reliefs against them.

In the affidavit in rejoinder, the applicant deposes that the minute allegedly authorizing the commencement of proceedings is a forgery owing to the fact that it was made before the applicant could start collecting revenue from the Isango cattle market but also because it was signed by Kaija Chris as

Clerk to Council yet he had already been transferred elsewhere and a new sub county chief had already reported for work.

I am unable to agree with the assertion of the applicant. Looking at the plaint, the alleged actions of trespass against the applicant are said to have taken place on 6th October 2022. The minute extract is for a meeting held on 8th October 2022. Also, the applicant was required to adduce evidence that the said Kaija Christ was actually transferred before signing the extract, that the position of sub county chief is the same as clerk to council.

It is the finding of the court the commencement of civil proceedings against the applicant and Mpondwe-Lhubiriha Town Council was duly authorised by the respondent's council.

The instructions to Bagenda & Co. Advocates, a private legal firm to represent the respondent without complying with Public Procurement laws is illegal

Counsel for the applicant relied on **Section 2 of the Public Procurement and Disposal of Public Assets Act 2003** to categorise a local government as a procuring and disposing entity in as far as procurement and disposal of public assets is concerned. He relied on **section 3** of the same Act to argue that legal services are professional services that the respondent should have procured through a formal process of public procurement. Counsel relied on the case of **Attorney General & another Vs Uganda Law Society UGHCCD 99** where court stated thus;

“Instructions to advocates by the Attorney General is a public procurement activity that has to be acquired through a procurement process as prescribed under the PPDA Act and Regulations as amended since it is a procurement of a professional service.”

Counsel for the applicant concluded that in the absence of a formal process to procure the services of Bagenda & Co. Advocates, this firm cannot legally represent the respondent.

In response, counsel for the respondent argued that the authorities cited by counsel for the applicant are distinguishable from the present circumstances. He argues that the respondent is a distinct corporate body under Section 6 of the Local Governments Act and with capacity to sue in its corporate name. Further that **Regulation 27 of the Local Government Councils Regulations** states that in any case where the local government is a party, it may be represented any member of staff, or a legal firm duly authorised in that behalf by the council. Counsel relied on the minute extract from the respondent council meeting held on 28th April 2022 to argue that the legal firm M/S Bagenda & Co. Advocates was duly instructed by the respondent to provide legal services to the respondent.

From the onset, I need to agree with counsel for the applicant that every local government is a public body and a procurement and disposing entity in as far as procurement and disposal of public assets and services is concerned. The need to subject public authorities to public procurement procedure is to safeguard public resources from potential acts involving conflict of interest. While the respondent may be a corporate body under the Local Governments Act, it is also a public body that is subject to the PPDA Act. It cannot procure professional services without the formal procedures of public procurement. See the case of **Attorney General & another Vs Uganda Law Society (supra)**

I have carefully examined the minute extract on which the respondent relies. In the third paragraph, it states that the council has realised that the services of Bagyenda & Co. Advocates in Kasese are relatively cheaper

in comparison with others. I would wonder how the comparison was made without allowing other firms to present their quotations and bids to supply the service. I agree that the professional legal services provided by M/S Bagyenda & Co. Advocates were not formally procured and are therefore irregularly being utilized.

It is however noted in ***Attorney General & another Vs Uganda Law Society (supra)*** and in line with **Section 14A of the Advocates (Amendment) Act**, the disqualification of the advocate on any ground would not invalidate the pleadings filed on behalf of the party. The disqualification is from further representation.

The respondent unlawfully started a cattle Market on the land registered in the names of Kasese district without proper approval and with intention to deprive the district from collecting revenue

It has been argued for the applicant that the establishment of the Isango cattle holding market was not authorised by Kasese District council and that the same was aimed at depriving the district council of the benefit to collect revenue which would be contrary to government policy and the policy of this court.

In return, it was submitted for the respondent that the respondent has power under the law to establish and manage markets within its local limits of its jurisdiction. In line with **Section 85 of the Local Governments Act**, sub counties are empowered to collect revenue in rural areas and for the sub county to retain 65% of the revenues collected. Counsel argued that by the respondent collecting revenues within its local limits, it is not contrary to any government policy.

Looking at **Part 4 of the second schedule** to the Local Governments Act, some of the functions and services to be devolved by a district council to

lower local government councils include but are not limited to markets establishment, management and collection of revenue, the control of trading centres, markets and landing sites; and the carrying on of local industries and the organisation and encouragement of local trade.

Ordinarily, the establishment of local markets and collecting revenue from the same would be a function the respondent is empowered to execute. I have however noted earlier that the establishment of the Isango Cattle market was irregular and it is not one of those markets that the respondent could have established bona fide in execution of its functions. It is no doubt that the minister for Local Governments found that the said market was irregularly started and the same had the effect of irregularly relocating the cattle market at Mpondwe-Lhubiriha Town Council.

While it is hard to agree that the collection of revenue by the respondent is against public policy and the policy of this court, I maintain that the establishment of the Isango cattle holding ground market was irregular and I so hold.

In the final result, this application partly succeeds with the following orders;

- a. Civil Suit No. 043 of 2022 is struck out with no order as to costs
- b. Miscellaneous Applications No. 101 & 102 of 2022 pending before this court are also discontinued with no order as to costs
- c. M/S Bagyenda & Co. Advocates are disqualified from further representing the respondent in any legal matter until their services have been formally procured by the respondent
- d. The establishment of the Isango cattle holding ground market at Kabafu 1 village, Isango Sub County by the respondent was irregular. As such, the same be regularised at the same place with the consent

of the Kasese District Council and the applicant to be allowed to collect the revenue from the said market in accordance with its contract with Kasese District Council.

e. Each party bears its own costs of this application

I so order

Dated at Fort Portal this 16th day of November 2022



Vincent Emmy Mugabo
Judge.

Court: The Assistant Registrar shall deliver the Ruling to the parties.



Vincent Emmy Mugabo
Judge
16/11/2022