THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO. 65 OF 2021

SURGIPHARM (U) LIMITED ::: APPLICANT

VERSUS

1. UGANDA INVESTMENT AUTHORITY

2. ALLIED GRAPHICS SYSTEM (U) LIMITED :::::::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This application was brought by Notice of Motion under Section 33 of the Judicature Act Cap 13; Section 98 of the Civil Procedure Act Cap 71; Rules 3(1)(a), 4 & 6 of the Judicature (Judicial Review) Rules, 2009 and Order 52 Rules 1& 3 of the Civil Procedure Rules SI 71-1. The application sought for orders that;

a) An order of Certiorari does issue quashing the decision of the 1st Respondent allocating to the 2nd Respondent property comprised in FRV 425-16 LRV 3830 Folio 15 Plot 2A-4A-3rd Ring Road at Luzira Industrial Park (hereinafter called "Suit Property") that had been earlier allocated to the Applicant.

b) An Order of Prohibition does issue restraining the 1st and 2nd Respondents or anyone acting under their authority from acting upon, enforcing and/ or implementing the 1st Respondent's decision in allocating the Suit property to the 2nd Respondent.

c) General Damages and costs of this application be provided for.

[2] The grounds of the application are set out in the Notice of Motion and in an affidavit in support of the application deponed to by **Ms. Nina Nayer**. The grounds of the application are as follows;

(i) In 2008, the 1st Respondent (Uganda Investment Authority) allocated the suit property to the Applicant (Surgipharm (U) Ltd) and the latter registered its title on the property on the 6th February 2008 under Instrument No. 391796.

(ii) In 2010, an entity called M/s Victoria Best Ltd claimed that the suit property had been allocated to it by Uganda Land Commission with the knowledge of the 1st Respondent.

(iii) The Applicant filed a suit against the said M/s Victoria Best Ltd in the High Court; which suit was determined in favour of the Applicant herein. Throughout the proceedings in the said suit, the 1st Respondent in concert with the Applicant rightly defended the Applicant's interest in the suit property. The judgment in the above matter was appealed to the Court of Appeal which appeal is still pending.

(iv) In 2019, the Applicant applied to the 1st Respondent for a renewal of its lease over the suit property and on 20th December 2019, the 1st Respondent communicated to the Applicant accepting the application and renewing the lease for two years effective 8th February 2020.

(v) Sometime in February 2021 before the expiry of the extension of the Applicant's lease, the Applicant was handed a letter from the 1st Respondent alleging that it was in breach of Clause 6(b) of the lease agreement that pertained to a development clause. Pursuant to the said letter, the 1st Respondent cancelled the Applicant's title in the suit property for alleged failure to develop the suit property.

(vi) The decision in cancelling the Applicant's title and allocating the suit property to the 2nd Respondent was procedurally improper, irrational and illegal.

(vii) The cancellation of the Applicant's title and re-allocation of the suit property to the 2nd Respondent was done without according the Applicant a hearing; which is in breach of the right to a fair hearing and natural justice that are the cornerstone of the 1995 Constitution. The 1st

Respondent as a public body did not exercise its mandate in accordance with the canons of natural justice.

(viii) The decision by the 1st Respondent was also irrational to the extent that there was a subsisting extended lease that could not be unilaterally and casually terminated by the 1st Respondent without hearing the Applicant.

(ix) The 1st Respondent's letter cancelling the Applicant's title was just a few days after the demise of the Applicant's Managing Director Mr. Kinny Nayer and the re-allocation of the suit property to the 2nd Respondent by the 1st Respondent was done to take advantage of the situation.

(x) The 2nd Respondent was aware of the ownership of the suit property by the Applicant but elected to instead forcefully displace the Applicant from the suit property which was illegal.

(xi) The Applicant has suffered great inconvenience as a result of the activities of the Respondents.

(xii) This is a proper and fit case for judicial review as the actions of the Applicant are not only procedurally improper but also illegal and irrational. It is, therefore, in the interest of justice that this application is allowed.

[3] The application was opposed by the 1st and 2nd Respondents through their respective affidavits in reply. The 1st Respondent's affidavit in reply was deponed to by **Hamza Galiwango**, the Director of Industrial Parks Development in the Uganda Investment Authority who stated that;

a) The Applicant company applied for and was allocated a lease over the suit property. The Applicant registered its interest on the title on 5th February 2008. The lease was extended for a period of 3 years in 2010 upon the application of the Applicant. However, since the execution of the lease, the Applicant had not conducted certain activities in accordance with the lease agreement such as grading and fencing off the land; submitting acceptable building/architectural plans to UIA;

obtaining approvals to commence project implementation; and erecting any physical development on the land.

b) The Uganda Investment Authority accommodated the requests of the Applicant, despite its delays and lapses, to extend the lease. There has never been any injunction, stay of execution or court orders staying the development of the suit land; and the Applicant has been aware of this material fact.

c) The Applicant applied for another lease extension in 2014 which was granted and a lease agreement was executed on the 2nd October 2014. The Applicant, however, did not register its interest on the certificate of title after the lease was extended and, as result, its registration expired on the 27th September 2013. After the said expiry of the lease and non-registration of the extension by the Applicant, the land was vested in Uganda Investment Authority by the operation of law.

d) The lease agreement contained a development clause that mandated the Applicant to develop to completion the suit land within a period of 3years. The Applicant did not develop the land during the subsistence of the lease from 2014 – 2017. Despite this, the Applicant applied to the 1st Respondent for another extension of the lease on 16th January 2017; which the 1st Respondent granted for another 3 years. But still during this period (2017 – 2020), the Applicant did not develop the suit land within the requirement of the lease agreement.

e) When the Applicant applied for another lease extension on the 13th of August 2019, the 1st Respondent carried out inspections on the land and discovered that the same was completely undeveloped and that the Applicant had not complied with the lease agreement. The 1st Respondent, therefore, declined to renew the Applicant's lease. The Applicant appealed the decision and requested for an extension of the lease agreement with a commitment to comply with the development clause in the lease agreement. The Applicant attached a completion schedule and description of works, upon which condition the 1st

Respondent considered the Applicant's appeal and granted the extension for a further 2-year period provided the Applicant developed the suit land in accordance with the submitted schedule.

f) The Applicant still did not register this extension on the leasehold certificate of title. During the subsistence of this extension, the 1st Respondent observed that the Applicant did not develop the suit land at all in accordance with the schedule submitted and as per the development clause of the lease agreement. In a board decision dated 18th November 2020, the 1st Respondent decided to cancel the Applicant's lease on account of failure to fulfil the development clause of the lease agreement. The land, therefore, reverted to the 1st Respondent by operation of the law. The Applicant was informed of the cancellation on 19th November 2020.

g) There was no guarantee given to the Applicant that its lease would be maintained considering that the Applicant had repeatedly failed to meet the conditions of the lease. The 1st Respondent thoroughly entertained the Applicant and its numerous requests to extend the lease but the Applicant never complied with the lease conditions.

h) In accordance with its statutory mandate, the 1st Respondent allocated the suit land to Allied Graphics (U) Ltd (the 2nd Respondent) on a 5-year lease starting 31st December 2020. The allocation to the 2nd Respondent was made upon their demonstration of readiness to develop the land in accordance with the statutory requirement of the 1st Respondent. The 2nd Respondent registered their lease interest on the certificate of title and have taken full possession of the land and have made efforts to develop the land, including erection of a fence, among others. The 2nd Respondent should not suffer for the inaction and dilatory conduct of the Applicant who held the land for 13 years but did not develop it in accordance with the agreement.

i) The Applicant has no legal or equitable claim over the suit land on account of the fact that they no longer have a valid lease. The Applicant,

therefore, has no legal position of standing to bring an application to obtain or recover land. The court cannot compel a party to enter into a lease agreement which is a contract based on the meeting of the minds of the parties. The 1st Respondent was well within its rights to cancel the lease held by the Applicant.

j) It is in the interest of justice that the application be rejected and dismissed with costs to the 1st Respondent.

[4] The 1st Respondent filed a supplementary affidavit in reply, deposed by the same **Hamza Galiwango**, whose contents are in line with the above summarized averments.

[5] The 2nd Respondent's affidavit in reply was deponed to by **Rajesh Chaplot**, a Director of the 2nd Respondent who stated that;

a) On the 16th November 2020, the 2nd Respondent wrote to the 1st Respondent requesting for land to put up an industrial packing, labelling, commercial printing and garment manufacturing plant. On 19th November 2020, the 1st Respondent allocated the suit property to the 2nd Respondent.
b) On 31st December 2020, the 1st and 2nd Respondents executed a lease agreement over the suit land. On 12th February 2021, the Commissioner for Land Registration issued a certificate of title in respect of the suit land in the name of the 2nd Respondent.
c) The 2nd Respondent immediately took possession of the allocated land and embarked on developing the same.
d) The 2nd Respondent obtained its certificate of title in respect to the suit land lawfully and without any fraud.
e) The Applicant's case in this application is premised on breach of contract, to which judicial review is unavailable. The judicial review application cannot be sustained as the decision of the 1st Respondent

being challenged affects the 2nd Respondent's rights yet the 2nd Respondent is not a public body.

f) This application if frivolous, vexatious and a clear abuse of court process aimed at frustrating the 2nd Respondent.

g) It is in the interest of justice and fairness that the application be dismissed with costs to the 2nd Respondent.

[6] The Applicant filed an affidavit in rejoinder on 26th March 2021 and another supplementary affidavit on 29th July 2021. The filing of this supplementary affidavit has been contested by the Respondents. I will pronounce myself over this contest which will be framed as one of the issues for determination by the Court.

Representation and Hearing

[7] The Applicant was represented by M/S ENSafrica Advocates; the 1st Respondent by the Attorney General; and the 2nd Respondent by M/s Kampala Associated Advocates. Counsel were directed to make and file written submissions which they duly filed. I have adopted and considered the submissions in the course of resolution of the issues that are before the court for determination. The preliminary objections raised by the Respondents' Counsel will be raised as issues and will be resolved accordingly.

Issues for determination by the Court

[8] The following issues are up for determination by the Court;

1. Whether the Applicant's supplementary affidavit lodged on the 29th July 2021 is improperly before the court and should be struck off the record?
2. Whether this application is amenable to judicial review?
3. Whether the cancellation of the Applicant's title by the 1st Respondent and re-allocation of the suit property to the 2nd Respondent was lawful?
4. What remedies are available to the parties?

[9] The other issues raised by the 2nd Respondent's Counsel as preliminary objections do touch the merits of the application and will be considered during resolution of issue 3 above.

Resolution of the Issues

Issue1: Whether the Applicant's supplementary affidavit lodged on the 29th July 2021 is improperly before the court and should be struck off the record?

Submissions

[10] It was submitted by Counsel for the 1st Respondent that the supplementary affidavit filed by the Applicant alongside their written submissions was manifestly illegal, an abuse of the court process and ought to be struck off the record. Counsel submitted that this was because the Applicant did not seek any leave before filing the said supplementary affidavit yet it was filed long after the Respondents had filed their replies to the application and the Applicant had filed an affidavit in rejoinder. Counsel relied on the Court of Appeal decision in ***Mutembuli Yusuf vs Nagwomu Moses Musamba & Another, EP Appeal No. 43 of 2016***. Counsel concluded that it would be a gave miscarriage of justice to admit the said supplementary affidavit without affording the Respondents an opportunity to counter the evidence contained therein; which evidence the Respondents find prejudicial to their case. Counsel prayed that the said affidavit be struck out. Counsel for the 2nd Respondent reiterated the same objection.

[11] In reply, Counsel for the Applicant stated that the position of the law cited by the 1st Respondent's Counsel based on the decision in ***Mutembuli Yusuf vs Nagwomu Moses Musamba & Another (supra)*** was not applicable to the present case since the same applied where a supplementary affidavit is filed after the filing of a rejoinder and where the said supplementary affidavit

introduces new matters from those stated in the earlier affidavits. Counsel for the Applicant argued that in the present case, no affidavit in rejoinder had been filed and the filed supplementary affidavit did not introduce any new matter. Counsel further argued that where a party can show exceptional circumstances for the late filing of an affidavit, the court may exercise its discretion to allow the same so as to serve the purpose of furthering the administration of justice rather than hampering it. Counsel cited the decision in ***Dr. Lam-Lagoro James vs Muni University, HC M.C No. 07 of 2016***. Counsel prayed that the supplementary affidavit be allowed and relied on by the Court.

Determination by the Court

[12] With due respect, it appears to me that Counsel for the Applicant misconstrued the *ratio decidendi* in both cited cases of ***Mutembuli Yusuf vs Nagwomu Moses Musamba & Another (supra)*** and of ***Dr. Lam-Lagoro James vs Muni University (supra)***. It is not true that in the ***Mutembuli Yusuf*** case, the court held that the filing of a supplementary affidavit without leave of the court is only barred after an affidavit in rejoinder is filed. Although in that particular case reference was made to the affidavit in rejoinder, the holding of the Court was actually in reference to closing of pleadings in matters determined on basis of affidavits. As such, even where no affidavit in rejoinder is filed but the pleadings have closed with the filing of an affidavit in reply, a party would not be at liberty to file a supplementary affidavit after the closure of pleadings without seeking the court's leave and giving the other party an opportunity to respond to the additional averments. The only question that arises is, when do pleadings in that kind of proceedings close in absence of an affidavit in rejoinder?

[13] The position is that in an application to be determined on basis of affidavits, all affidavits and pertinent documents should be filed and served on the opposite party before the date fixed for the hearing of the particular

application. This is the view that was held by Justice Mubiru in ***Dr. Lam-Lagoro James vs Muni University (supra)***. The Learned Judge held the view that an affidavit in reply, being evidence rather that a pleading in *stricto sensu*, should be filed and served on the adverse party within reasonable time before the date fixed for hearing. It was in that sense that the Learned Judge allowed the late filing of an affidavit in reply. In that regard, therefore, even in absence of an affidavit in rejoinder in a particular matter, if a party waits up to after the matter has come up for hearing, and for some reason the matter does not take off, a party seeking to file any supplementary affidavit would need to seek leave of the court and to notify the opposite party. The point therefore is that, contrary to the submission of the Applicant's Counsel, the cut-off point is not the filing of an affidavit in rejoinder but closure of the pleadings in such a matter.

[14] Incidentally, on the present case, it is not even true that there was no affidavit in rejoinder. The Applicant itself filed an affidavit in rejoinder on 26th March 2021. But I found it important to make the above point so as not to lose the *ratio decidendi* in the above cited decision of the Court of Appeal in the ***Mutembuli Yusuf*** case. It is also important to point out that contrary to the construction by the Applicant's Counsel, the decision of Mubiru J. in the ***Dr. Lam-Lagoro*** case was not in respect of filing of a supplementary affidavit. The Learned Judge called for flexibility in regard to the filing of affidavits in reply and did so on sound basis, in my view. The same reasoning cannot extend to the filing of supplementary affidavits; and the rationale is not hard to find. A supplementary affidavit filed after closure of all evidence in a matter to be determined on basis of affidavits denies the adverse party an opportunity to counter such evidence. Such would amount to trial by ambush and would contravene the principle of fair hearing.

[15] In the circumstances, therefore, I am in agreement with Counsel for the Respondents that the supplementary affidavit filed by the Applicant on 29th

July 2021 alongside their written submissions is improperly on record and ought to be struck off. This objection by the Respondents' Counsel is accordingly upheld. The supplementary affidavit filed on 29th July 2021 on behalf of the Applicant is accordingly struck off the record.

Issue 2: Whether this application is amenable to judicial review?

Submissions

[16] It was submitted by Counsel for the 1st Respondent that this application is not amenable to judicial review for reason that the subject matter involves matters of private law over which the Applicant had alternative remedies, including filing a civil suit in the High Court Land Division to address his grievances, if any. Counsel submitted that the decision challenged by the Applicant was made under private law and not public law. Counsel cited Article 42 of the 1995 Constitution of the Republic of Uganda; a text from **Ssekaana Musa, Public Law in East Africa (2009), Law Africa Publishing, Nairobi at pg. 37** and the decision in ***Arua Kubala Park Operations & Market Vendor's Cooperative Society Limited V Arua Municipal Council, High Court Miscellaneous Application No. 3 of 2016*** to support his view that since the legal relationship between the Applicant and the 1st Respondent was borne primarily out of private law (a lease contract), and not from public law, the matter was not amenable for judicial review. Counsel for the 2nd Respondent reiterated the same opinion and referred the Court to several decisions highlighting the fact that the present matter was not amenable for judicial review. Counsel referred the Court to the decisions in ***Amal vs Equal Opportunities Commission, HCMC No. 233 of 2016; Nakasero Market Sitting Vendors & Traders Ltd vs KCCA & Another, HCMC No. 348 of 2020 and National Information Technology Authority Uganda vs Uganda Investment Authority & Another, HCMC No. 105 of 2021***. Counsel prayed that this application be dismissed on this ground.

[17] In the reply contained in the Applicant's submissions in rejoinder, it was submitted by Counsel for the Applicant that the Applicant's challenge is not towards the terms of the lease agreement but the legality and process leading to the purported cancellation of the lease by the 1st Respondent on the 18th November, 2020. The Applicant's challenge is as to whether the 1st Respondent as an administrative body treated the Applicant justly and fairly in accordance with Article 42 of the Constitution. Counsel argued that the Respondents' submission that the present application for judicial review is premised on breach of contract is, therefore, misplaced. Counsel also stated that the authorities cited by the Respondents' Counsel were distinguishable from the facts and circumstances of the present case. Counsel prayed to Court to overrule this objection.

Determination by the Court

[18] Under the *Judicature (Judicial Review) (Amendment) Rules 2019,* the factors to be considered by the Court when handling applications for judicial review are set out under *Rule 7A (1) thereof*; which provides as follows:

(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.

[19] For a matter to be amenable for judicial review, it must involve a public body in a public law matter. Two requirements, therefore, need to be satisfied; first, the body under challenge must be a public body whose activities can be controlled by judicial review; and secondly, the subject matter of the challenge must involve claims based on public law principles and not the enforcement of private law rights. See: **Ssekaana Musa, *Public Law in East Africa*, (2009) LawAfrica Publishing, Nairobi**, at **Pg. 37.** In ***Arua Kubala Park Operators***

and Market Vendors' Cooperative Society Ltd vs Arua Municipal Council, HC MC No. 003 of 2016, **Mubiru J.** expressed the opinion that in order to bring an action for judicial review, it is a requirement that the right sought to be protected is not of a personal and individual nature but a public one enjoyed by the public at large. The "public" nature of the decision challenged is a condition precedent to the exercise of the courts' supervisory function.

[20] In the instant case, there is no dispute that the decision or action sought to be challenged by the Applicant was done by the Uganda Investment Authority (the 1st Respondent), which is a public body. What is in dispute is whether the subject matter of the challenge involves claims based on public law principles and that the rights sought to be protected are not of a personal or individual nature but public ones enjoyed by the public at large.

[21] At this juncture, it is important to dissect the decision or action of the 1st Respondent that the Applicant seeks to challenge by way of judicial review. From my understanding of the facts, there are two decisions or actions cited by the Applicant. The first is the cancellation of the Applicant's lease agreement/interest in the manner it was done. The second is the allocation of the subject property to the 2nd Respondent in the manner it was done. There is evidence that the Applicant's lease interest was extended by the 1st Respondent on 20th December 2019 for a period of two years with effect from 8th February 2020. There are on record two letters dated 20th December 2019 communicating the extension; one to the Managing Director of the Applicant (Annexture "C" to the affidavit in support of the application); and the other addressed to the Commissioner Land Registration (Annexture "D1" to the affidavit in support of the application). Apart from citing the development covenant in the lease agreement, the two letters do not make any condition that had to be satisfied by the Applicant before expiry of the two years. As such, a legitimate expectation was created on the part of the Applicant that he had two years within which to comply with whatever covenant that was

embedded in the lease agreement. The question is, therefore, whether a public body, such as the 1st Respondent, could lawfully withdraw such a grant without affording the affected body an opportunity to show cause as to why the same should not be withdrawn? That, as I understand the Applicant's case, is the gist of this matter. In view of Article 42 of the Constitution that enjoins any public or administrative body to treat any person appearing before it justly and fairly, the Applicant's complaint cannot be thrown outside the public domain. It does contain public connotations that are worth investigation and examination in accordance with the supervisory powers of this Court.

[22] It was argued by Counsel for both Respondents that the present matter involves contractual and commercial obligations which are enforceable by ordinary action and not by judicial review. This is correct only to the extent that in execution of its contractual and commercial obligations, a public body (like the 1st Respondent) exercises its power and functions in accordance with Article 42 of the Constitution and the other body of the law governing such exercise of power. Where the public body omits or deliberately chooses not to accord fair and just treatment to the other party it deals with, then such conduct is prohibited under the law and is amenable to judicial review. The public body cannot then claim that because the dealing was contractual or commercial, its conduct cannot be subjected to judicial review by the Court. The Court is obliged to invoke its supervisory power and examine the conduct of such public body on any of the grounds disclosed for legality, rationality or judicial propriety of such a decision. Clearly, this puts such a matter within the realm of public law as neglecting such conduct may have a run-down effect on other members of the public.

[23] In the instant case, the allegation by the Applicant is not simply one of breach of contract. Rather, it is that the 1st Respondent high-handedly and in breach of the established rules of natural justice cancelled or withdrew extension of their lease agreement in issue. This is not an allegation that one

can say would better be investigated by the Court under an ordinary suit. It is certainly one that calls for the Court's invocation of its supervisory powers and prerogative remedies in case any grounds are established to the court's satisfaction. This makes the present matter amenable for judicial review. This situation is certainly different from the circumstances the court was dealing with in the cases cited above to which the Court has been referred by Counsel. See: ***Arua Kubala Park Operations & Market Vendor's Cooperative Society Limited V Arua Municipal Council, High Court Miscellaneous Application No. 3 of 2016; Amal vs Equal Opportunities Commission, HCMC No. 233 of 2016; Nakasero Market Sitting Vendors & Traders Ltd vs KCCA & Another, HCMC No. 348 of 2020; and National Information Technology Authority Uganda vs Uganda Investment Authority & Another, HCMC No. 105 of 2021***.

[24] On the ground of alternative remedy, my finding is that beyond filing an ordinary suit to enforce their rights under the lease agreement, there is no other remedy disclosed by the facts. The law is that the alternative remedy ought to be legally provided for and more effective than judicial review. See: ***Leads Insurance Limited vs Insurance Regulatory Authority & Another, CACA No. 237 of 2015*** and ***John Ssentongo vs Commissioner Land Registration & Others, HCMC No. 13 of 2019***. In view of my finding herein above, institution of a civil suit would not have been a more effective remedy for the grievances presented by the Applicant. In the circumstances, my finding is that the application is amenable for judicial review and the Applicant properly brought it as such. This issue is answered in the affirmative.

Issue 3: Whether the cancellation of the Applicant's title by the 1st Respondent and re-allocation of the suit property to the 2nd Respondent was lawful?

Submissions

[25] Counsel for the Applicant submitted that the cancellation of the Applicant's lease over the suit land by the 1st Respondent and re-allocation of the suit property to the 2nd Respondent was unlawful for having been taken without affording the Applicant its constitutional right under Article 42 of the Constitution and a fair hearing in accordance with the law. Counsel further stated that the said actions were contrary to the rules of natural justice and were, therefore, tainted with procedural impropriety. Counsel laid out the essential principles of fair hearing, natural justice and what constitutes procedural impropriety under the law and on decided cases. Counsel prayed to Court to find that the decision or action by the 1st Respondent be found to have contravened the said principles.

[26] For the 1st Respondent, it was submitted by its Counsel that the 1st Respondent acted in observance of the principles of natural justice and with procedural propriety when it decided to cancel the Applicant's lease over the suit land and to allocate or grant a lease to the 2nd Respondent over the same land. Counsel submitted that the 1st Respondent's conduct was justified on account of the fact that the lease agreement empowered the Landlord (the 1st Respondent) to determine the Lessee's rights upon failure of the latter to comply with the lease covenants. Counsel submitted that the lease agreement herein in issue contained a building clause whose non-performance to the satisfaction of the 1st Respondent entitled the 1st Respondent to cancel the lease upon which the Applicant would forfeit any premiums or other fees or investments made. Counsel argued that under such an agreement, the law does not envision the Landlord seeking the Lessee's permission or hearing the Lessee before determining the parties' rights. Counsel referred the Court to the text in **Halsbury's Laws of England, 4th Edition, (Re-issue) Vol. 27(1), 1994, paragraphs 502 – 503** and to the case of ***Quesnel Forks Gold Mining Co. Ltd v Ward [1920] AC 222***.

[27] Counsel for the 1st Respondent, on the other hand, further submitted that in the circumstances of the present case, the Applicant was treated fairly and justly, the decision by the 1st Applicant was not arbitrary or irrational as alleged by the Applicant and the Applicant was given a fair hearing prior to cancellation of the lease and allocation of the same to the 2nd Respondent.

[28] For the 2nd Respondent, Counsel submitted that the 1st prayer made by the Applicant in the Notice of Motion is untenable before the Court as it affects an innocent third party (the 2nd Respondent) who is not a public body and did not participate in making of the decision challenged by the Applicant. Counsel further submitted that the second prayer in the Notice of Motion has since been overtaken by events as the Court cannot prohibit what has already taken place. The 2nd Respondent was already offered a lease by agreement dated 31st December 2020 and a leasehold certificate of title issued to the 2nd Respondent on 12th February 2021. Counsel for the Respondent further submitted that the application is also untenable on account of the lease agreement between the Applicant and the 1st Respondent being illegal going by the provisions under Section 101 of the Registration of Titles Act, Cap 230 (the RTA) which provides that a lease under the operation of the Act is to be for a term exceeding three years.

[29] Counsel for the 2nd Respondent also submitted that the claim by the Applicant does not disclose any illegality, irrationality or procedural impropriety. Counsel argued that there was no requirement to accord the Applicant a fair hearing prior to the cancellation and re-allocation of the suit property since the cancellation was a matter of a statutory implied term of the lease agreement. Counsel referred the Court to Section 103(b) of the RTA. Counsel argued that since the Applicant did not observe the Clause 6(c) of the lease agreement, the Lessor (the 1st Respondent) was empowered to terminate

the lease without the need to accord the Applicant (the Lessee) any hearing. Counsel prayed that the application be dismissed with costs.

[30] The Applicant's Counsel made further submissions in rejoinder which I have also taken into consideration.

Determination by the Court

[31] *Rule 7A (2) of the Judicature (Judicial Review) (Amendment) Rules, 2019* provides as follows:

> *"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".*

[32] In that regard, the duty of the Applicant in an application such as this is to satisfy the Court on a balance of probabilities that the decision making body or officers subject of his challenge did not follow due process in making the respective decisions or acts and that, as a result, there was unfair and unjust treatment of the Applicant and which is likely to have an effect on other members of the public.

[33] Under the law, the court may provide specific remedies under judicial review where it finds 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***.

[34] In the instant case, although the Applicant pleaded illegality and irrationality in the Notice of Motion and the supporting affidavit, they appear to have abandoned these two grounds, seeing that in their submissions, the Applicant's Counsel only made arguments on the ground of procedural impropriety. I have seen no evidence or circumstances pointing to illegality or irrationality in the matter before the Court. I will therefore deal with this application as premised on the ground of procedural impropriety.

[35] According to **Lord Diplock** in ***Council of Civil Service Unions & Others vs. Minister for the Civil Service [1985] AC 374***, "procedural impropriety" has been defined to mean ***"the failure to observe basic rules of natural justice or failure to act with procedural fairness toward the person who will be affected by the decision."*** Procedural impropriety encompasses four basic concepts; namely (i) the need to comply with the adopted (and usually statutory) rules for the decision making process; (ii) the requirement of fair hearing; (iii) the requirement that the decision is made without an appearance of bias; (iv) the requirement to comply with any procedural legitimate expectations created by the decision maker. See: ***Dr. Lam – Lagoro James Vs. Muni University (HCMC No. 0007 of 2016)***.

[36] Procedural propriety calls for adherence to the rules of natural justice which imports the requirement to hear the other party (*audi alteram partem*) and the prohibition against being a judge in one's cause. The latter essentially provides against bias. Natural justice requires that the person accused should know the nature of the accusation made against them; secondly, that he/she should be given an opportunity to state his/her case; and thirdly, the tribunal should act in good faith. See: ***Byrne v. Kinematograph Renters Society Ltd, [1958]1 WLR 762***.

[37] The complaint by the Applicant is that the 1st Respondent took two decisions that are alleged to have been tainted with procedural impropriety. The first was the cancellation or withdrawal of the lease interest of the Applicant in the suit land. The other was re-allocation of the same land to the 2nd Respondent.

[38] I will first examine the decision by the 1st Respondent to withdraw the lease extension. As already noted in the background facts, the Applicant and the 1st Respondent had a business relationship dating way back in 2008 when the suit property was first allocated to the Applicant. A lease agreement was concluded and the suit property was registered into the name of the Applicant (as per Annexture "A" to the affidavit in support of the application). It is shown in evidence that the said lease got extended upon mutual consent of both parties until the year 2019. On 13th August 2019, the Applicant applied for a further renewal of the lease (as per letter attached as Annexture "E" to the 1st Respondent's affidavit in reply). By letter dated 29th August 2019 (Annexture "G" to the 1st Respondent's affidavit in reply), the 1st Respondent responded declining to extend the lease term for a further term of 3 years for reason that the Applicant had not complied with the development covenants for the last six years. By letter dated 30th September 2019 (Annexture "A" to the 1st Respondent's supplementary affidavit in reply), the Applicant applied to the Acting Director General of the 1st Respondent for review of the decision denying the extension of the lease term. By letter dated 20th December 2019 (Annexture 'C" to the affidavit in support of the application), the 1st Respondent communicated its acceptance of the application for review and the granting of an extension of the Applicant's lease for a further term of two years with effect from 8th February 2020. The 1st Respondent also, by a letter of the same date (Annexture "D1" to the affidavit in support of the application) requested the Commissioner Land Registration to extend the Leasehold Certificate of title over the suit land in the name of the Applicant.

[39] By a different turn of events, before the expiry of the said two years, the 1st Respondent took the decision to withdraw the lease extension of the Applicant by letter dated 19th November 2020 (Annexture "F" to the affidavit in support of the application). The circumstances under which this decision was reached are not clear as there is neither evidence nor any correspondence as to what happened between the parties for the period December 2019 (when the extension was made) and December 2020 (when the same was withdrawn). As a matter of fact, the Applicant denies receiving any correspondence concerning withdrawal of the lease extension including the very letter communicating the withdrawal which the Applicant says was never served upon them. The Applicant states that they only came to learn of this letter at a later stage. The Applicant also later came to learn of the allocation of the suit land to the 2nd Respondent.

[40] In view of the above sequence of events, it is not in dispute that the 1st Respondent had the right not to extend the lease provided there was default of any of the covenants. This is the power the 1st Respondent had exercised by the decision in the letter dated 29th August 2019 (Annexture "G" to the 1st Respondent's affidavit in reply). That power was available to the 1st Respondent within the agreement and under the law. But the moment the 1st Respondent reviewed its decision and granted an extension for two years, it then became imperative that the Applicant was entitled to hold the lease for the said two years or in case the 1st Respondent decided to terminate before time, then they had to do so in accordance with the rules of natural justice; that is, by affording the Applicant an opportunity to show cause why the grant should not be terminated. The omission on the part of the 1st Respondent to observe this cardinal rule points to procedural impropriety.

[41] It is acceptable from the evidence on record that the Applicant had not satisfied the covenant concerning development of the land within agreed time as per Clause 6(c) of the Lease Agreement. But as I have indicated above, that

clause only entitled the 1st Respondent to exercise its power of non-renewal of the lease. The exercise of the same power could not be extended to withdrawal or cancellation of a lease already renewed. The Applicant was, therefore, entitled to enjoy the renewed term which, in the present case was to run up to February 2022. In case, for sound reason, the 1st Respondent wished to review and/or rescind its decision of 20th December 2019 (granting the extension), then they had to do so properly; that is, in accordance with procedural propriety. At the minimum, they were obliged to give the Applicant fair and just treatment in accordance with Article 42 of the Constitution. This included a right to be heard before any such adverse decision was reached. Taking such a decision in contravention of such a well laid down legal requirement was an act of procedural impropriety which makes the 1st Respondent's conduct impeachable by way of judicial review.

[42] The 1st Respondent's Counsel attempted to rely on Clauses 2 and 4 of the Lease Agreement as the basis of their power to cancel the lease without affording the Lessee any hearing. With due respect to the 1st Respondent's Counsel, there is no such covenant in the named clauses either expressly or by necessary implication. Clause 2 states:

"When the lessee shall have complied with the development covenant herein contained in clause 6c, and if there shall not at the time be any existing breach or non-observance on the part of the lessee of any of the covenants and conditions in this lease whether expressed or implied, the said term shall, on application by the lessee at least 3 (three) months before the expiry of the initial term, be extended to Ninety Nine (99) years and this lease shall henceforth be read and construed as if the said term of Ninety Nine (99) years had been originally granted".

[43] Clause 4 states:

"The demised land shall be used for establishment of a packaging and labelling of pharmaceutical products for export or any other purpose which may be conveniently carried out for that purpose."

[44] Clause 6 provides that the Lessee hereby covenants with the Lessor as follows:

a) *"…*
b) *…*
c) *At its own cost within 3 (three) years from the date hereof to develop, erect, cover in and finish fit for immediate occupation and use … and in conformity in every respect both with plans, elevation sections and specifications PROVIDED that if after 3 (three) years the lessee has not completed development of the demised premises to such a stage as in the opinion of the Lessor is substantial, the Lessor shall not grant any extension of the lease period and the lessee shall forfeit the premium, park service charge, ground rent and any fees and charges already paid to the Lessor, notwithstanding application for extension thereof by the Lessee".*

[45] As I have indicated above, there is nothing in clauses 2 and 4 that give any power to the 1st Respondent (the Lessor) to terminate the lease, let alone without any notice. In Clause 6(c) which is the one purportedly invoked by the 1st Respondent, and as I have already found herein above, the power of the 1st Respondent was limited to not granting an extension of the lease period; certainly not revoking and/or cancelling an already granted extension. The 1st Respondent cannot use this clause to revoke an already granted extension; and certainly not without affording the affected party a hearing. As such, the conduct of the 1st Respondent was not justified either under the law or the contract herein in issue. In accordance with the holding in ***Eng. Pascal***

Gakyaro vs Civil Aviation Authority, CACA No. 6 of 2006, such decision reached pursuant to denial of natural justice is rendered void and of no effect.

[46] The 1st Respondent's Counsel further argued that because the Applicant received communication of the cancellation decision through a letter and an email, that such was sufficient fair and just treatment in accordance with the law. With due respect, I find this submission bizarre. The communication, which itself is disputed by the Applicant, was post facto. The decision was already taken. However well a decision is communicated, if the same was taken irregularly, such communication does not reduce the irregularity by an inch. The 1st Respondent does not show anywhere that the Applicant received any communication regarding the intention to cancel or withdraw the extension between the time of the lease extension (20th December 2019) and the time of cancellation (19th November 2020). All that the 1st Respondent is able to show is that prior to the earlier refusal to extend the lease, dated 29th August 2019, the 1st Respondent had made reminders to the Applicant about delayed commencement of developments on the land. Such earlier correspondence done outside the period that is relevant to the impugned decision cannot form part of any hearing afforded to the Applicant. On record, there is no scintilla of evidence that any opportunity to be heard was extended to the Applicant during the period relevant to the impugned decision.

[47] Counsel for the 2nd Respondent on their part argued that there was no requirement to accord the Applicant a fair hearing prior to the cancellation and re-allocation of the suit property because the cancellation was a matter of a statutory implied term of the lease agreement. Counsel relied for this submission on Section 103(b) of the Registration of Titles Act Cap 230 (RTA). I do not agree that the cited provision of the law dispensed the need for the 1st Respondent to afford the Applicant an opportunity to be heard. The Applicant's lease had been extended subsequent to an engagement between the 1st Respondent and itself. This created a procedural legitimate expectation that if

the extension was to be rescinded before its due time, the Applicant would have to be engaged over the same. It was certainly unfair for the 1st Respondent to unilaterally take the decision to withdraw the offer in absence of any hearing or notice to the Applicant. It ought to be noted that the 1st Respondent was not merely a contracting party in the agreement. It is a public body that is enjoined to afford fair and just treatment to the persons that come into dealings with it. This breach of duty on the part of the 1st Respondent cannot be obviated by reliance on the implied term under Section 103(b) of the RTA.

[48] Counsel for the 2nd Respondent further argued that the application was also untenable on account of the lease agreement between the Applicant and the 1st Respondent being illegal going by the provision under Section 101 of the Registration of Titles Act, Cap 230 (the RTA) which provides that a lease under the operation of the Act is to be for a term exceeding three years. I have to note that, like it was submitted by the Applicant's Counsel in their submissions in rejoinder, the above cited provision is coached in permissive terms. There is nothing in the provision that makes a lease contract of less than three years strictly illegal. Be as it may, the decision to make an extension of two years was solely taken by the 1st Respondent, without any participation of the Applicant. I do not see how such a position taken by the 1st Respondent unilaterally would be used to the Applicant's prejudice. I, therefore, do not find any merit in this argument.

[49] On the evidence, therefore, the Applicant has established that he was not afforded fair and just treatment before the decision to withdraw extension of its lease was taken. As such, that part of the decision by the 1st Respondent was reached in a procedurally improper manner. The same is subject to judicial review for any appropriate remedies.

[50] However, the same may not be said of the second decision taken by the 1st Respondent; that is, the allocation of the suit land to the 2nd Respondent. This

is because granting or allocation of land by the 1st Respondent is a statutory function exercised by the Authority in accordance with the provisions of the Investment Code Act No. 6 of 2019. Before exercising this function, the Authority is not obliged to first consult any other party who may be interested in the same land. It was therefore not expected of the Authority to afford anyone an opportunity to be heard before making the decision to allocate the suit land to the 2nd Respondent. Similarly, the 2nd Respondent had no obligation to inquire as to whether any other person had a claim over the suit land before accepting the offer from the 1st Respondent. The 2nd Respondent, therefore, correctly executed the lease agreement and had the land registered in its name. Such registration on title cannot be impeached in these circumstances since none of the grounds for impeachment of a certificate of title is available going by the provisions under Sections 176 and 181 of the RTA.

[51] As such, the second part of the decision by the 1st Respondent was lawfully taken by the 1st Respondent. No procedural impropriety or any other irregularity that would affect its lawfulness has been established.

[52] The question, therefore, that remains is, what happens to the Applicant whose lease interest was terminated unlawfully by the 1st Respondent. In such a situation, the law permits the Court to grant such an aggrieved party compensation by way of damages. Subject to the law, the 1st respondent may be found liable in damages in favour of the affected party. This, however, is the subject of consideration under the next issue. The third issue is therefore accordingly answered.

Issue 4: What remedies are available to the parties?

[53] In view of my finding on the third issue, the Applicant is entitled to an order of Certiorari quashing part of the decision of the 1st Respondent cancelling the lease extension that had been granted in favour of the Applicant

on 20th December 2019. As such, the decision by the 1st Applicant contained in the letter dated 19th November 2020 is accordingly quashed for procedural impropriety. On the other hand, the remedy of Certiorari in as far as it was sought against the second part of the 1st Respondent's decision is not granted for the reasons set out herein above. Equally, the prerogative remedy of prohibition cannot be granted in the circumstances. I will, however, proceed to consider the Applicant's claim for damages.

[54] The law is that in judicial review, there is 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."

[55] On the authority of decided cases, the agreed position is that the additional cause 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***.

[56] On the case before me, the facts and the law as analyzed above have disclosed a case of misfeasance in public office in general and, in particular, breach of contract, on the part of the 1st Respondent. The facts indicate that owing to the 1st Respondent's unlawful conduct, the Applicant has been wrongfully deprived of property. This by itself entitles the Applicant to compensation. Since the Applicant made a claim for damages in the Notice of Motion, I find this a fit and proper case for assessment and award of damages.

[57] Because of the nature of pleadings in an essentially judicial review application, the Applicant did not make claims for damages under special heads. As such, the Court can only make assessment for general damages. The position of the law is that general damages are awarded at the discretion of the Court and the purpose of general damages is to restore the aggrieved party to the financial position that he/she would have been in had the breach complained of not occurred and in as far as money can do. See: ***EAPT CORPORATION LTD VS. DR. L.P LODHIA C.A NO. 52/1974*** and ***Robert Cuossens vs. Attorney General SCCA No. 8 of 1999***.

[58] In the assessment of general damages, the court should be guided by the value of the subject matter, the economic inconvenience that the plaintiff may have been put through and the nature and extent of the injury suffered. See: ***Uganda Commercial bank v. Kigozi [2002] 1 EA 305***). The damages available for breach of contract are measured in a similar way as loss due to personal injury. The court should look into the future so as to forecast what would have been likely to happen if the contract had not been entered into or breached. See: ***Bank of Uganda Vs Fred William Masaba & 5 Others SCCA No. 3/98*** and ***Esso Petroleum Co. Ltd Vs Mardon (1976) 2 ALL ER***.

[59] In the instant case, the Applicant showed that they had incurred some expenses in preparation of the land for development in accordance with the lease agreement. According to the letter written by the Applicant dated 30th September 2019 (Annexture "A" to the 1st Respondent's supplementary affidavit in reply filed on 26th March 2021), the Applicant claims to have made substantial investments in the land including payment to the 1st Respondent for purchase of the land, payment of all rent and taxes, payment of legal fees, initial surveys including cadastral surveys, topographical and drawing of plans, initial fencing and clearing of the land, security costs, expenses towards the High Court case involving Victoria Best Ltd, payment to and eviction of squatters on the land, among others. Apart from indicating that the land was still vacant and bushy, the 1st Respondent did not dispute the fact that the Applicant incurred the claimed expenses. Since the said expenses were not claimed as special damages, they cannot be granted in the sums stated by the Applicant. Rather, their purpose is to guide the Court as to an appropriate award to be made.

[60] In their submissions, Counsel for the Applicant stated that it was apparent that the Applicant lost valuable property without a fair hearing. The Applicant's planned projects were halted and greatly hampered. The Applicant has lost valuable time and resources and continues to suffer as a result of the 1st Respondent's unlawful actions. Counsel proposed a sum of UGX 180,000,000/= as general damages as being fair and reasonable compensation to the Applicant.

[61] From the above facts and analysis, it is ascertainable that the Applicant has suffered loss and hardship as a result of the 1st Respondent's conduct. Given the apparent loss, I agree that the sum proposed by the Applicant's Counsel of UGX 180,000,000/= would suffice to provide fair and reasonable compensation to the Applicant given that the Applicant's interest in the suit

land was completely extinguished by the 1st Respondent's decision or action; in addition to all the other loss and expenses suffered by the Applicant. I accordingly award the sum of UGX 180,000,000/= (One Hundred Eighty Million Only) to the Applicant as general damages.

[62] Regarding costs, the Applicant shall be paid the costs of this application by the 1st Respondent. Since the 2nd Respondent is a beneficiary from the wrongful conduct of the 1st Respondent, the 2nd Respondent shall meet their own costs of the application.

It is ordered.

Dated, signed and delivered by email this 13th day of May 2022.

Boniface Wamala
JUDGE