THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

JUDICIAL REVIEW, MISCELLANEOUS CAUSE NO. 207 OF 2022

In the Matter of

An Application by Watoto Church Ministries and Kampala Playhouse Limited for Judicial Review Seeking Prerogative Orders of Certiorari, Mandamus, and Damages

between

1. Watoto Church Ministries
2. Kampala Playhouse Limited...……..……..Applicants

and

1. Kampala Capital City Authority (KCCA)
2. National Physical Planning Board (NPPB)……..……Respondents

Before: *Hon. Dr Justice Douglas Karekona Singiza*

RULING

1 Introduction

Some time ago, the Kampala Capital City Authority (KCCA) decided not to approve the mixed-use development plans of the Watoto Church Ministries on plots No. 87 & 89 Kampala Road and plots No. 28, 30, 32, 34 & 36 Buganda Road. That decision

fundamentally limited the ways in which Watoto Church Ministries had wished to use and make plans for their private property.

I have previously stated, and it is important to repeat it here, that land use and planning, both of which are grounded in spatial planning, are important tools for urban land development. The links between spatial planning and time have acquired considerable acceptance in many other jurisdictions. However, not many courts in Uganda have dealt significantly with these two concepts. Those few precedents which are available indicate that reliance is often placed on courts in foreign jurisdictions. Arguably, the two concepts are limited by different layers of rights that usually hinder the way land is planned for and used, resulting in serious policy and legal tensions.[1]

1.1 Representation

At the commencement of the application, the applicants were represented by ALP Advocates and the respondents, by the Directorate of Legal Affairs Kampala Capital City Authority. I found the motion papers and the reply, as well as the submissions, well-presented and of considerable quality. If some of the arguments and authorities cited have not been considered, this is due not to disrespect but space constraints.

2 Background

The complaint before this court deals with alleged interference with the applicants' right to develop their private property by the 1st and the 2nd respondents, because the latter had purportedly refused to approve their mixed-use development plans. For the sake convenience, I will refer to the 1st applicants as the "Watoto church" and

[1] See *Magoma Denis & 43 others v Kampala Capital City Authority* HC MC No. 191 of 2022 per Singiza J.

the 2nd applicant as the "Kampala Playhouse". Likewise, I will refer to the 1st respondents as the "KCCA" and the 2nd respondent as the "NPPB".

Apparently, the Watoto church acquired the property in question in 1984 and has to date operated a church therein. In 2010, the church embarked on an effort to develop the property into a mixed-use complex with conference facilities, a hotel, offices, and retail outlets. In 2019, Watoto's architects (the Kampala Playhouse) submitted their development plan to the KCCA for approval. This was denied on the ground that the building was a national heritage site. The KCCA indicated that rejection of the Watoto church's plans was based on the consideration that mixed-use plans would obliterate the Watoto church, which has features of cultural significance.

The Watoto church then engaged the NPPB in its quest for approval, a request that was rejected. Instead, the NPPB advised the Watoto church and KCCA to co-operate in finding an agreeable position. The Watoto church claims that its property is not listed under any statutory instrument as required by law and that it is thus illegal, improper, irrational, and unjust for the KCCA and NPPB to decide that the Watoto church building is a national heritage site – a decision that has resulted in a loss of more than UGX 4.4 billion in costs over the years.

The Watoto church and the Kampala Playhouse motion is "an omnibus application"[2] that seeks both an extension of time and a judicial review. This court directed that the two motions be argued together.

[2] Generally, there is no bar on omnibus applications. In *Dr Sheikj Ahmed Kisule v Greenland Bank* (in liquidation) HC MA No. 2 of 2012, the guidance of the court was that applications of this nature limit the risk of filing numerous applications, hence saving the court's time.

3 Summary of Notice of Motion

The Watoto church and Kampala Playhouse[3] seek the following orders and reliefs:

1. An order for an extension of time within which to file the application for judicial review.
2. An order to validate the filing of the application for judicial review.
3. An order of *certiorari* quashing the decision of the KCCA and NPPB that categorised their property, comprising plots No. 87 & 89 Kampala Road and plots No. 28, 30, 32, 34 & 36 Buganda Road, as a national heritage site without following proper legal procedure.
4. An order of *mandamus* compelling the KCCA and NPPB to consider for approval the applicant's mixed-development plan, *vide* application No. C/0850/20 of 2020 for property comprised in plots No. 87 & 89 Kampala Road and plots No. 28, 30, 32, 34 & 36 Buganda Road.
5. An order for general damages arising from the KCCA and NPPB's wrongful refusal to approve the Watoto church and Kampala Playhouse mixed-development plan, *vide* application No. C/0850/20 of 2020 for property comprising plots No. 87 & 89 Kampala Road and plots No. 28, 30, 32, 34 & 36 Buganda Road.
6. Costs of the application to be borne by the KCCA and NPPB.

The application is supported by the affidavit of Mr Julius Lubanga-Tyekeda, the Watoto church and Kampala Playhouse's legal team leader. The affidavit repeats the motion grounds. For the sake of clarity, I shall repeat some of its averments below.

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[3] The Notice of Motion was brought under Article 42 of the Constitution of Uganda; sections 96 & 98 of the Civil Procedure Act, Cap 71; sections 33, 36, and 37 of the Judicature Act, Cap 13; rules 3, 5 (1), 6 (1), 7A, and 8 of the Judicature (Judicial Review) Rules 2009 (As amended); Order 51 Rule 6 of the Civil Procedure Rules SI 71-1.

The Watoto church property was allegedly listed as a national heritage site by the Ministry of Tourism, Wildlife, and Antiquities (MTWA). As a result, the proposed mixed-use redevelopment plans submitted by their architects, Symbion Uganda Limited, for approval were rejected by the KCCA after consulting the NPPA from the period 27 October 2020 and dated 23 March 2021.

The decision to reject the application for mixed-use development was communicated to the Watoto church and Kampala Playhouse on 10 September 2021, but without the information and guidance they sought concerning the basis on which the decision to reject the mixed building plan had been made. The Watoto church and Kampala Playhouse opted to write to the KCCA requesting that the matter be handled by the NPPB since the KCCA had "failed" to decide.

Later the Watoto church and Kampala Playhouse escalated the dispute to the Honourable Attorney-General on 21 January 2022 and 19 April 2022 in an effort to obtain legal guidance on the alleged listing of their property as a national heritage by the Ministry of Tourism, Wildlife, and Antiquities (MTWA). They also sought an audience with the Executive Director (ED) of the KCCA on 27 June 2022 in order to gain information on the status of the review of the decision made on their proposed mixed plans. The evidence is that the ED KCCA never responded to their request.

Conveying the gist of the complaint by the Watoto church and Kampala Playhouse, Mr Lubanga-Tyekeda depones in regard to three critical areas of disagreement that:

a) the KCCA and NPPB failed in their statutory duty to consider and approve the Watoto church and Kampala Playhouse's mixed-use developments plan;
b) the KCCA and NPPB's refusal to consider and approve the above plans was unjust and unfair; and

c) the categorisation of the Watoto church's property as a national heritage site, in absence of a statutory instrument, was procedurally wrong, irrational, and improper.

3.1 Summary of the reply to the motion

Ms. Anita Kusiima, the Deputy Director Physical Planning of the KCCA, depones that the application is incomplete, premature, of no merit, and an abuse of court process because

1. there is no cause of action against the KCCA because all it did was to implement the recommendations of the NPPB; and
2. no final decision has been made on the matter by the KCCA.

Ms. Kusiima provides a detailed chronology of the events resulting in the KCCA's declining of approval of the Kampala Playhouse's application for mixed-use development. For instance, she indicates that several meetings were held between the KCCA Physical Planning Committee and Watoto church before the application was referred to the NPPB.

She depones, furthermore, that after the hearing of the appeal, the NPPB and MTWA recommended that a team of experts from all the stakeholders involved conduct an in-depth investigation. It had been recommended that, in addition to the two parties, the MTWA, Ministry of Works and Transport, and Makerere University should form part of the investigation, a proposal that the Watoto church turned down. The recommendations that were finally adopted by the constituted team were also rejected by the Watoto church.

Ms. Kusiima said she had an obligation to follow the recommendations of the NPPB. She called for the claim by the Watoto church and Kampala Playhouse against the KCCA to be dismissed, with costs, as devoid of any merit.

3.2 Arguments by the applicants on extension of time

The Watoto church and Kampala Playhouse submitted that, as demonstrated in the affidavit in support of the application, the time within which to bring the application for judicial review expired while they were exhausting the remedies as required by Rule 71(1)(b) of the Judicature (Judicial Review) Rules as amended.

Thus, the delay in approaching this court was not borne out of their own guilt. They relied on *Kintu Samuel and Anor v Registrar of Companies and Others*[4] to rationalise their failure to file the application within the prescribed time. The evidence of their diligent and relentless exploration of internal remedies, they argue, should be considered as a sufficient cause to grant an extension of time. Rule 5(1) of the Judicature (Judicial Review) Rules 2009 and *Dr. Pariyo Bonane v Dr. Nathan Onyanchi & Others*[5] are cited to make the point that the court should strike a balance between protecting the rights of diligent and aggrieved litigants while promoting the proper administration and settlement of matters.

3.3 Decision on the time constraint

The importance of time limits in litigation has been discussed by many a court. The view of the courts is that a litigant cannot treat statutory time limits in a wishy-washy manner or argue that they are merely technical.[6] When a statute imposes limits within which to access courts, a claimant, no matter how valid his or her claims, will not deflate the defendant's shield arising out of those limitations.[7] The position of courts has always been clear:

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[4] Miscellaneous Cause 58 of 2021 [2021] UGHCCD 75.
[5] Miscellaneous Application No. 48 of 2020.
[6] See *Uganda Revenue Authority v Consolidated Properties Ltd* CA no 13 of 2000.
[7] *Prime Constructors Ltd v Public Procurement and Disposal of Public Assets Authority and others* HC MA No. 91 of 2014.

> [W]here rules have prescribed time for bringing an action and also the remedy for failure to bring the action in the prescribed time … such a party cannot throw itself at the mercy of court because the court can no longer have any spare remedy to offer.[8]

An interesting authority is found in the decision of *Green Pastures Ltd v Cooperative Bank Ltd (in liquidation)* MA No. 172/2015. The application arose from CS No. 540/1990, which itself relied on the authority of *Bazirio Kivumbi v Iburahim Ismail* CS No 48/1957. These cases highlight specific exceptions such as disability, acknowledgment, past payment, fraud, and mistake. The earlier English decision of *RB Policies at Lloyd's* also offers interesting guidance, in that it highlights the indifference with which the court will treat claimants who sleep on their rights and choose to come to it late in the day.[9]

The argument that the Watoto church and Kampala Playhouse's case for the extension of time is rationalised by the delay in exhausting the respondents' internal remedies is valid. Indeed, it seems that the delay in bringing the application for review arose in part from the NPPB's incorrect assumption that it was the final internal appeal mechanism within the KCCA, when in fact this should have been the MPPA. For that reason, I hereby extend the time within which to bring the application.

3.4 Exhaustion of local remedies

The question on exhaustion of local remedies has been dealt with by many courts in Uganda. The courts take exception whenever parties try to circumvent readily available mechanisms to resolve disputes by rushing to courts prematurely.[10] The

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[8] See *In the matter of an application for Judicial Review by Dawson Kadope v Uganda Revenue Authority (URA)* CV-CS-MC-0040-2019.
[9] *RB Policies at Lloyd's v Butler* [1949]2 ALL ER 226 pp 229-230.
[10] See *Microcare Insurance Limited v Uganda Insurance Commission* CV-MC No. 218 of 2009.

courts' rationale is not difficult to decipher. The costs of litigation and the ever-increasing workload of judges are probably the most prominent considerations.[11]

Chenwi, writing about the African human rights court, explains that the rule on exhaustion of local remedies, as reflected in the decisions of the African Court of Human and Peoples' Rights, shows a preference for a flexible approach. She argues that the more flexible approach is meant to facilitate access to the courts by litigants. That notwithstanding, however, Chenwi criticises the court for exercising its *propria motu* power on the rule restrictively and hence limiting access to itself.[12] She gives the following as the exceptions: (1) where no remedies exist at all; (2) where the available procedure is unduly delayed; (3) where the available procedure is unfair; and (4) where the available remedies cannot remedy the wrong complained of.[13]

3.5 Internal appeal mechanisms in physical planning frameworks in Uganda

The framework on physical planning in Uganda is detailed in the Physical Planning Act 2010 as amended. The framework creates a single entity known as the National Physical Planning Board (NPPB) to deal with national physical planning.[14] Provision is also made for urban physical planning committees whose function it is, in the main, to approve physical development plans for specific areas.[15] Emphasising the importance of transparency, the framework calls for the public display of the urban physical planning committees' physical development plans. The requirement

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[11] See *Classy Photo Mart Limited v Commissioner Customs Uganda Revenue Authority* CV-MC No. 30-2009 per Kiraybwire J.
[12] Chenwi L 'Exhaustion of local remedies rule in the jurisprudence of the African Court of Human and Peoples' Rights' *Human Rights Quarterly John Hopkins University Press* Vol 41(2) May 2019 pp 374-398.
[13] *Ibid*.
[14] See section 4 of the PPA.
[15] Section 12 of the PPA.

to display these plans is intended to give a chance to any person aggrieved by any physical development planning decision to object to it before it is adopted.[16]

The functions of the NPPB include the determination of appeals lodged by those aggrieved by the decisions of the urban physical planning committees. The board also plays an advisory role in physical planning policies and standards by ensuring that plans are translated into social economic outcomes.[17] The decisions finally adopted by the NPPB are then appealable to the high court.[18] In other words, a party that seeks to challenge a planning decision of an urban authority is insulated from possible shocks through such appellate mechanisms. The discussion that follows highlights the unique nature of the Kampala Capital City's physical planning role.

3.6 Uniqueness of the Kampala Capital City Authority

Before the 2010 constitutional amendment, the Kampala Capital City Authority (KCCA) was part of the decentralised institutions of local governments and had the character of a district council. Its divisions were like subcounties under the district councils. Its recentralisation notwithstanding, the KCCA retains the remnants of its previously decentralised character in its governance, political structures, administration, functions, and supervision. In fact, the divisional council of the KCCA has as its chief executive a Town Clerk (TC).[19] In the paragraphs below, I briefly highlight the land use and planning functions of the KCCA division councils.

The nearest the Constitution comes to vesting the KCCA with roles that are analogous to planning powers is found in Article 189.[20] The enactment of the

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[16] Section 27 of the PPA.
[17] Section 6(1) of the PPA.
[18] Section 20(5) of the PPA.
[19] See section 17 of the Kampala Capital City Act No. 1 2011.
[20] See Item 7 & 13 of the sixth schedule made under the provisions of Article 189 of the Constitution. See also Article 5(4)-(6) of the Constitution.

Kampala Capital City Authority Act vests the city authority with the functions of promoting economic development, constructing and maintaining major drains, managing traffic, and carrying out physical planning and development control, among other things. These functions are executed thorough the Metropolitan Physical Planning Authority (MPPA).[21]

4 Interplay of mandates in national physical planning frameworks and the Kampala Capital City Act

The application before me deals mainly with the developmental role of the KCCA within the broader principles of physical planning as a tool for land management, matters which I explained in the preceding paragraphs. It follows that the focus of the application is on the capital city's physical planning functions rather than its other roles. Indeed, these other roles are merely functionally related to physical planning.

The framework reviewed above raises the question of whether the provisions of the National Physical Planning Act (NPPA) are applicable to the MPPA. A narrow reading of the Kampala Capital City Authority Act may suggest that the city authority adopts a self-executing physical planning system in which case the provisions of the NPPA, in so far as the appeal processes are concerned, are inapplicable. For a start, it is noted that the Kampala Capital City Authority Act does not provide mechanisms for aggrieved persons to internally challenge decisions of the MPPA. At first glance, the inclination is that persons aggrieved by a physical planning decision of the KCCA must inevitably approach the High Court for a remedy.

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[21] See section 21 of the Kampala Capital City Act No. 1 2011.

It may appear that the two statutory provisions discussed above are in tension with each other. Again, the approach of courts when constructing two statutory provisions that may result in tension seem to favour harmony rather than destruction to give them the relevant effect.[22] An expansive reading of the NPPA therefore draws an inference that an "urban physical planning committee" provided for under the NPPA is analogous to the MPPA under the Kampala Capital City Authority Act.

The ambit of section 27 of the NPPA must be constructed so widely in its reach because it seeks central control of land use and planning in every part of the country. It is my judgment, in adopting the rules of interpretation of the statutes, that the MPPA is another name for the urban physical planning committee, given its physical planning roles. The difference in the name is merely for purposes of nomenclature and has no clearly ascertainable legal consequences. Besides, it cannot be true that, by allowing the application of the provisions of NPPA, the powers of the MPPA of the city authority are therefore weakened.

Thus, in terms of the physical planning competency of the KCCA, the word "urban" as used in the NPPA must be interpreted liberally. When considering an "urban planning committee" within the context of the Kampala Capital City Act, its name has been changed to the MPPA without losing its original character under the national physical planning framework. That notwithstanding, there is nothing in the framework that prohibits any aggrieved person from challenging the decisions made by the MPPA before the NPPB considering the now increased number of cities in the country.

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[22] Section 2 of the NPPA defines the term "physical planning committee" as inclusive of the urban physical planning committees.

Using the same logic, this court does not find any reasons to suggest that the national physical planning framework or the appeal mechanisms thereunder are not applicable to the decision of the MPPA. Whereas the correct approach would have been to appeal the KCCA planning decision to the MPPA, the decision by the Watoto church and Kampala Playhouse to appeal to the NPPB was not seriously flawed in the circumstances. That said, I find valid reasons to adopt the approach of Chenwi on the four exceptions and hold that the available remedies are not only uncertain but also evidently unfair to the applicants.

5 Whether the applicable is amenable for judicial review

It is not in doubt that that remedies available in judicial review are discretionary. In fact, at times, depending on the facts of the application, judicial-review remedies are not considered at all, notwithstanding the apparent regressions of certain procedural requirements.[23]

Judicial review has several writs which can be granted by the court, each of which operate differently depending on the act complained of. Whenever decisions against public bodies are challenged on account of illegality, irrationality, or procedural impropriety, three remedies are triggered. These are (1) a writ of *certiorari;* (2) a writ of *mandamus;* and (3) a writ of *prohibition*.

The writ of *certiorari* is concerned with the High Court's oversight role of ensuring that an illegally made decision is nullified. A writ of *mandamus* is an exercise of the High Court's oversight power requiring an administrative authority to perform an act, especially where there is an allegation that a public statutory duty has not been performed. Finally, a writ of prohibition deals with the High Court's oversight power

[23] *Credit Suisse v Allerdale Borough Council* [1997] QB 306 at 355D.

to prohibit any proceedings of a public body, especially where a public authority is preforming acts that are illegal or outside their scope of authority.[24]

Certain considerations must exist before a court can entertain the remedies indicated above. Thus, to obtain the above writs, the applicant must show:

1) a duty of the opposing party to perform the act;
2) the ministerial nature of the act;
3) the applicant's specific legal right for which discharge of the duty is necessary;
4) a lack of any other legal remedy;[25] and
5) time limits within which the court may grant the remedies sought.[26]

Where the duty to perform the act is doubtful, the obligation is not regarded as imperative and the applicant will be left to his or her other remedies. Whenever the statute prescribing the duty does not clearly and directly create a judicial-review remedy, the writ will not lie. The duty to perform an act must therefore be indisputable and plainly defined.[27] In whatever event these writs cannot enforce doubtful rights that are the subject of disputes.[28]

5.1 Main arguments on the merits of the applicants' complaints

Besides the time constraint, in the same application, the Watoto church and Kampala Playhouse insist that the KCCA and NPPB seem to misconstrue the provisions of

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[24] Section 36(1) of the Judicature Act Cap 13. See also *Shah v Attorney General* (1970) EA 543.
[25] In *Re Afro-Motors Ltd & Ano*r (Miscellaneous Cause 693 of 2006) [2008] UGHC 33 (2 April 2008).
[26] Rule 5(1) of the Judicature (Judicial Review) Rules 2009 as amended.
[27] See High Court Miscellaneous Cause No. 31 of 1969: *Jayantilal S Shah v The Attorney General*: 1970 HCB 99. See also *Redmond v Lexington County School* District No. Four: 314 S.C. 431) 4371445 S.E. 2d 441) 445, (1994).
[28] *Ibid*.

the Historical Monuments Act, 1968, with the result that their right to property was infringed upon by the approach taken in not considering their mixed-use development plan. Thus, the Watoto church and Kampala Playhouse maintain that the refusal to consider and approve application No. C/0850/20 of 2020 is evidence of a failure to perform a statutory duty in that the refusal was procedurally irregular, irrational and illegal, and gives rise to a claim in damages.

In a rather slippery-slope argument (this court will give a detailed comment later), the Kampala Playhouse invited the court to examine the history of the KCCA and NPPB's decisions on historic sites such as UTV Station, which has been replaced by Pearl of Africa Hotel, to emphasise the evidence of irrationality in rejecting their mixed-use development plans.

5.2 Arguments by the respondents

The thrust of the argument by the KCCA and NPPB is that key criteria in listing the property as a national heritage site relate not only to its age but its cultural significance. The building was constructed as a cinema in the 1950s by an Asian-Ugandan businessman and was the first of its kind in Uganda. It has served many roles, first as a cinema, then as a centre for creative arts, and most recently as a church; it has gone through just as many hands. As a centre for creative arts in the 1980s, it was managed by Uganda's acclaimed literary giant, Okot p' Bitek.

It was to preserve this history that the KCCA and the planning board suggested that a multi-sectoral committee be formed to make the Watoto church's development plans culturally sensitive. The committee would consist of representatives from the Watoto church, the KCCA, Makerere University and the MTWA. The KCCA therefore, for some reasons 'innocently' decided to unilaterally vest its planning

functions to other entities of the state that are better positioned to deal with the listing of private properties as heritage sites.

The framework on the listing of heritage sites empowers the Minister to identify and declare any object to be a preserved or protected object. There is no doubt that such a decision to list such a building require an instrument. The Minister must also enter into an agreement with the owner regarding maintenance, repair, custody and any other duties or restrictions.

The Watoto church and Kampala Playhouse argue, however, that there has never been an instrument listing the property in question as a heritage site. This court follows the argument that, in the absence of any such mandatory instrument, there is no legal obligation on the Watoto church and Kampala Playhouse to comply with a requirement to make their development plans more sympathetic to their property's cultural significance. The MTWA has confirmed that, while the suit property is regarded as one of historical importance, there is as yet no statutory instrument. The argument advanced in this regard is that the reason for the delay to take out an instrument is that the bill on heritage sites is before the Cabinet, and therefore, and therefore suggesting that even without an instrument, the reasons for rejecting the mixed-use plans was rationale. The question, then, is whether this kind of reasoning should be allowed to succeed against the Watoto church and Kampala Playhouse.

It is a given that the 1968 Act does not provide for interim measures to protect heritage sites before the passing of a statutory instrument. Arguably, there may be serious legal weaknesses in the 1968 Act which the draft Museums and Monuments Bill 2022 seeks to cure.

5.3 Listing of national heritage sites as a land use and planning decision

It is easy to see the motivation of KCCA and NPPB in their noble task of preserving history in a country that has witnessed rapid and often insensitive construction. In my view, as discernible from the affidavits, the application revolves around the functional planning mandate of the respondent, as a capital city authority of Uganda, to protect certain buildings as national heritage sites without any fetter.

Experiences from other jurisdictions such as South Africa demonstrate the risks associated with the consideration of physical development plans. Thus, a decision to grant or reject an approval of a physical development plan either instantly creates wealth or impoverishes a given community. In other words, the wealth created out of a planning decision could lead to two likely outcomes. The first is that a physical planning decision results in corruption in which bureaucrats demand their "cut" of investment decisions. The second is that serious exclusionary risks may arise in which those who can no longer afford the standards established in certain areas are forced out. Even so, cities the world over continue to depend for their financial survival on increasingly expensive developments such as large urban marketplaces (sometimes called malls).[29]

Physical planning agencies usually adopt two key planning instruments in the execution of their planning mandates. The first is the land use management tool, and the second is what is known as the spatial planning tool. The former deals with the questions of who has been given rights to use the land for a specific purpose – for instance, a right may be granted to use land for drainage, open space, or parking

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[29] See De Visser J "Land regulation in South Africa: Lessons for Uganda? Position paper developed for the commission of inquiry into the effectiveness of laws polices and process or acquisitions, land administration, land management and land registration in Uganda" Kampala (2017: 4).

purposes. The latter tool deals with the consideration of policies for future spatial development, in terms of which space and tempo become key considerations in physical planning or what in other countries is known as the development of "master plans".[30]

The arguments in other jurisdictions that have dealt extensively with land use and planning litigation have always been that, for physical planning to result in development which is desirable, those plans must be guided by certain essential considerations. Thus, spatial justice, spatial sustainability and spatial resilience become key considerations.[31]

Courts will always question how accommodating certain physical planning decisions are to demands for security of tenure. Thus, a court must examine how flexible those planning decisions are in order to shield communities affected by them from economic and environmental shocks.[32] It has been argued that insulating land use management from undue influence by local politicians is desirable; in turn, the presence of internal appeal mechanisms which are populated by experts is critical to ensuring neutrality in resolving disputes about physical planning.[33]

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[30] *Ibid.* (2017: 5); section 24 of the PPA.
[31] Moore A "Trading Density for Benefits: Section 37 Agreements in Toronto" *Institute on Municipal Finance & Governance Munk School of Global Affairs University of Toronto* (2013 pp 3-10).
[32] See *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others* CCT 89/09 [2010] ZACC 11 para 32. Particularly after the promulgation of the 1996 Constitution of South Africa, the courts grappled with old legislation that sought to integrate the former homeland territories and Bantustans into the development agenda of the country through land use and planning.
[33] *Ibid.* paras 37-39.

5.4 International comparative law on listing national heritage sites as a land use and planning tool

The United Nationals Education, Scientific and Cultural Organization (UNESCO) World Heritage Convention, adopted in 1972, provides an extensive definition of the term "cultural heritage"[34] and enjoins every member state to preserve and protect cultural heritage sites within its territory.[35] In determining whether a site should be considered a cultural site, the Operational Guidelines for the Implementation of the World Heritage Convention give 10 selection criteria, [36] four of which are relevant here. This court must therefore inquire if the rejection of the applicant's building plans by the respondents fall within at least any of the four criteria to determine if the Watoto church building site:

1) represents a masterpiece of human creative genius;
2) exhibits an important interchange of human value, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town planning or landscape design;
3) is an outstanding example of a type of a building, architecture or technological ensemble or landscape which illustrates a significant stage(s) in human history; and
4) is an outstanding example of traditional human settlement, land use or sea use which is representative of a cultural (or culture), or human interaction with

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[34] Article 1 of the UNESCO World Heritage Convention defines "cultural heritage" with reference to "architectural works … which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science ...."

[35] See Article 5 of the UNESCO World Heritage Convention.

[36] See the Operational Guidelines for the Implementation of the UNESCO World Heritage Convention, which is the main working tool of the Convention.

the environment especially when it has become vulnerable under the impact of irreversible change.[37]

In a way, the protection of cultural heritage sites essentially becomes a third tool of land use and planning. In the paragraphs below, I deal with the nature of the decision (if any) complained of to determine if the application before me is amenable for judicial review. As discussed earlier, the Watoto church and Kampala Playhouse complaint is anchored on the following suppositions:

1) the failure to execute a statutory duty;
2) the refusal to consider and approve the development plans; and
3) the wrongful categorisation of property as a national heritage site.

I propose to discuss the three wrongs to determine if these acts and or omissions satisfy the usual criteria under the present rules and precedents.

6 Understanding judicial review as a branch of public law

Judicial review is considered an oversight role that courts perform in regard to the processes by which public bodies and officials exercising statutory functions make decisions. Judicial review involves the courts' scrutiny of public bodies' scope of decision-making power; it is less concerned with whether those decisions are in fact good.[38] Indeed, courts have been warned time and again to take care to heed the narrow mandate within which their oversight of public authorities' decision may be exercised.[39]

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[37] See Operational Guidelines Nos. 1, 2, 4 & 5.
[38] *Ibid.* p 3.
[39] See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*: (1986) 162 CLR 24, 40-41, which cites *Wednesbury Corporation [1948] 1 KB, 228*. See also *Oyaro John Owiny ibid.*

6.1 Assessment of the decision to list Watoto church and Kampala Playhouse

Judicial review generally operates in three ways. The first deals with the question of whether there is a breach of law, implying that a decision-maker must be aware of the nature and extent of the legal parameters within which he or she is operating. The second deals with the question of whether a decision was unreasonably wrong. In this regard, the court is concerned with whether the decision-making was so shockingly bad, illogical and/or in poor taste that no one in his or her right mind would have made a similar decision. This largely depends on the judge's objective legal reasoning and philosophical background.[40]

The second way is intrinsically linked to an inference of an "unidentifiable mistake of law by the decision maker",[41] which takes us to the last way, which deals with "procedural impropriety".[42] Procedural impropriety entails that the decision-making authority did not observe the basic principles of fair hearing, including adherence to the established rules "by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice …".[43] The guide has always been that courts of law should strike a careful balance to ensure that the ends of justice are met.[44]

As already highlighted, the Watoto church and Kampala Playhouse attack the KCCA and NPPA's decision to list the property as a "failure to make a decision" by a statutory body; curiously, the KCCA and the NPPB are at the same time accused of

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[40] Aleinikoff T "Constitutional law in the age of balancing" (1987) 96(5) *Yale Law Journal* 943 cited in Singiza D *Constitutional Law, Democracy and Development: Decentralization and Governance in Uganda* London: Routledge (2019) 122.
[41] See *Edwards (Inspector of Taxes) v Bairstow* [1955]3 ALL ER [1956] AC 14.
[42] *Ibid.*
[43] *Ibid*.
[44] *Council of Civil Service Union v Minister for Civil Service* [1984]3 ALL ER 935 at p 950**.**

making an illegal and therefore irrational decision. Logic would dictate that a statutory body cannot be accused of indecisiveness while at the same time accused of making an illegal or irrational decision. Either there is a decision to be complained of, or there is no decision at all.

From the motion papers and the submissions by both parties, it clear that:

1) the Watoto church owns the property on which they sought to have a mixed-use development plan;
2) the KCCA and NPPB rejected the mixed-use development plan as development by the Kampala Playhouse on the grounds that the property is listed as a national heritage site; and
3) there was an engagement within the internal appellate mechanisms as already described.

The first line of attack by the Watoto church and Kampala Playhouse is that the KCCA and NPPB had no legal power to list their property as a national heritage site. Their argument is that under the existing framework it is a legal requirement for such a decision to be preceded by a statutory instrument. I take note that the requirement for an instrument is under a very old law of 1968. Since then, a lot of water has passed under the bridge.

The enactment of the NPPA together with the Kampala Capital City Act created a new legal regime that controls the way land may be used. The new regime empowers the KCCA in exercise of its physical planning mandate to decide whether to reject a development plan or to allow it. It is not envisaged that in exercising its physical planning mandate it must be subjected to the requirement for a statutory instrument under the old Historical Monuments Act, 1968. I am at pains to understand why the

KCCA thought it legally sustainable to rely on the opinions of the MTWA to reject the Watoto church and Kampala Playhouse mixed-use development plans.

In enacting the Kampala Capital City Act and NPPA, Parliament must have intended that the provisions of the Historical Monuments Act would no longer be applicable. This position is discernable from three main considerations:

1) The first is that the old act was enacted under the old constitution of 1967, while the Kampala Capital City Act and the NPPA were enacted under the 1995 Constitution as amended. This is highly suggestive that, probably, the new legal framework by implication amended the requirement for a statutory instrument in physical planning decisions.
2) Secondly, the draft Museums and Monuments Bill 2022 is indicative of the policy drive towards the protection of national heritage sites in Uganda.[45]
3) Finally, the consideration of UNESCO World Heritage Convention as part of the international legal framework is supportive of the land use and planning control of developments around national heritage sites in Uganda.

It was within the legal mandate of the KCCA and NPPB to take a land use and planning decision, even if such a decision might have taken the nature of protecting a national heritage site. I find that by relying on opinions of the MTWA, the KCCA and NPPB adopted a formalist approach as opposed to functionalist approach in protecting national heritage sites, including those found on private properties. As a

[45] This ruling was drafted before the newly enacted *Museum and Monuments Act 2023* was assented to by the Presents on the 27th April 2023. It would therefore be unfair to discuss the details of the Act here when at the time of filing of the pleadings, it was pending debate in Parliament.

result, the KCCA and ultimately the NPPB, unreasonably fettered their own authority.

The Watoto church and Kampala Playhouse also argued that the KCCA and NPPB rejection of their plans were unreasonable and therefore illogical. In determining this question, I have had to go back to what both sides put across as their major points of arguments. The Watoto church own the property that they now seek to develop. The Kampala Playhouse submitted their development plans, which were rejected. All the internal mechanisms were exhausted. The argument then would be that it was without reason that their mixed-development plans were rejected. I have reviewed the reasons for the rejection of the mixed development plans by the KCCA and NPPB.

Some of the arguments put forward by the Watoto Church and Kampala Playhouse to challenge the KCCA and NPPB decision are, ironically, of the weakest kind. In my view, simply because a decision was ever made on one national heritage site allowing change of use does not make a subsequent one rejecting the change of use unreasonable. It could be that the KCCA and NPPB are more functional today than they were at the time a decision was made to permit the development on the land on which the UTV Station was, came about. Besides, the NPPA and KCCA are too relatively new as institutions to be blamed for any omissions.

I also find that even though the KCCA and NPPB never made reference to the international framework, they seem to have adopted the criteria given by international guidelines on the protection of national heritage sites. Considering the government's policy direction on heritage sites together with the international

framework that seeks to protect such sites creates an inference of general principles of law that a court of law may apply.[46]

However, the impugned decision by the KCCA in a letter dated 12th December 2019 Ref: DPP/KCCA/1701/2 may be amenable for judicial review on the ground of unreasonableness given the convoluted nature of a policy driven decision. As I have already indicated, there was no reason why the KCCA and NPPB abdicate their physical development planning functions to other government bodies when the existing legal framework clearly vests does so.

It is my finding that the above policy drive without support from a bylaw from KCCA seriously fetters its physical development planning powers as the discussion below shall highlight. That the KCCA is now centrally controlled is not in doubt. However, it retains almost all the features it had under the decentralized system as earlier indicated. It is therefore legally safe to discuss the KCCA's executive authority through the prism of its legislative power as interrelated governing tools in the context of urban municipal governance systems.

The KCCA, just like any other municipal authority, governs using two major tools: executive and legislative powers. Writers conceded that while the precise meaning of the term 'executive power' is contested[47] nonetheless define the term by reference to certain powers held in common with the executive branch of government, such as foreign relations and the power to appoint staff.[48] The term 'executive power', however, is considered as '... a shorthand for the power to execute the laws',[49] usually

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[46] See section 14(c) Judicature Act Cap 13.
[47] Singiza D *Opcit* (2019) 159.
[48] Garner B *et al* (eds) *Black's Law Dictionary* (9 ed) (2009) New York: Thomson Reuters p 651.
[49] Prakash S 'The Essential Meaning of Executive Power' *University of Illinois Law* Review 2003: 702.

by a supreme body. Thus, flowing from this definition, the term implies that if the KCCA is to carry out any of its functions, it must be vested with the 'necessary and proper' powers to execute its functions.

On the other hand, a term "legislative power" refers to the authority to make laws.[50] The KCCA's power to make laws is not an end in itself, but a mechanism through which its policies can be legally executed. For instance, its laws may specify the particular service to be delivered, the geographical boundaries of a service and the consequences of the breach of the rules governing the delivery of a service. In addition, its legislative power may determine how land may be used and or controlled.[51] It can therefore be argued that a legislative power is a tool through which land in a city authority may be used and controlled.

If the decision of the KCCA, in the exercise of its executive and legislative powers is to be reviewed by this court, just like any other municipal authority although of a special kind, three parameters must be considered: first, is a determination whether the impugned decision was easy to predict, secondly, is a consideration whether this court may take into account the asymmetrical nature of the KCCA,[52] and thirdly is the examination of the decision the subject of review as proportional.[53] Thus, the key test becomes the courts intervention is 'confined to *a posteriori* verification of the legality of local authority acts'.[54]

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[50] Kavanagh *et al* (eds) *Oxford Dictionary Advanced Learner's Dictionary* (10 ed) (2002) Oxford: Oxford University Press p 662.
[51] See section 21 of the Kampala Capital City Act No 1 2011.
[52] De Visser J *Developmental Local Government: A Case Study of South Africa* (2005) Antwerp: Intersentia pp174-98.
[53] De Visser Opcit 199.
[54] The UN Governing Council of United Nations Human Settlement Programme/AGRED UN-HABITA para. C 11.

It is my judgement, that in absence of the any bylaw by the Kampala Capital City Authority listing the Watoto Church as a national heritage, it is unreasonably wrong for the KCCA and the NPPB not to approve the mixed-use development plans of the Watoto church. The idea that they could hide behind the 'wings' of the other government bodies to reject the Watoto church and Kampala Playhouse mixed use development plan was not only illegal but manifestly irrational.

7 Final orders

1. The decision to reject the mixed-use plans of the Watoto church and Kampala Playhouse by the KCAA and the NPPB, is reviewed and set aside on account that the decision was procedurally illegal and improper.
2. A writ of *mandamus* is issued against the respondents to reconsider the Watoto Church mixed-use development plans application 3 months from the date of the ruling.
3. In complying with paragraph 2 of this order, the respondents are at liberty to consider the existing KCCA physical development planning regulations and guidelines.
4. In future, should the KCCA wish to declare any property within its geographical limits, a national heritage site, a bylaw should first be enacted to give it effect.
5. The role of the NPPA, in the planning and controlling of land use in the KCCA should be minimized given the provision of the MPPA which is self-executing.
6. The KCCA should, within a period of 3 year, enact a bylaw, listing all the properties within the capital city that should be to be protected as national heritage sites.

7. Where necessary, the properties to be listed should be compulsorily acquired and the owners compensated first as required under the law.
8. Costs of the application are awarded.

Dated at Kampala this 7th day of July 2023

Douglas Karekona Singiza

Acting Judge