

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
MISC. CAUSE NO. 006 OF 2020

SANDE AKUZEWO ::: APPLICANT

VERSUS

JINJA MUNICIPAL COUNCIL ::: RESPONDENT

BEFORE: HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA

NTAMBI

JUDGMENT

This Application was brought under Sections 33 & 36 of the Judicature Act, Cap 13, Section 98 of the Civil Procedure Act Cap 71 and Rules 3, 4, 6, 7 & 8 of the Judicature (Judicial Review) Rules 2009 as amended, seeking for: -

- a) An order of certiorari quashing the decision of the Town Clerk, Jinja Municipal Council dated 11th February, 2020 stopping the construction of a public toilet.
- b) An order allowing the Applicant to continue with the work as scheduled.
- c) An order prohibiting the Respondent from interfering with the construction work.
- d) Costs of the application.

The grounds upon which this application is premised are set out in the affidavit in support of the Application sworn by of Sande Akuzewo but briefly are that: -

1. The Applicant was allocated space by the Respondent to construct a council shop/public toilet.
2. The Applicant secured approval of the site plan, successfully engaged the community as a key stakeholder and contracted suppliers as well as workers.
3. When the Applicant commenced work after committing a number of resources, the Town Clerk of Jinja Municipal Council illegally, irrationally and irregularly stopped the construction works without hearing the Applicant claiming among others that the National Water and Sewerage Corporation (NWSC) had raised a complaint.



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4. On inquiring from National Water and Sewerage Corporation (NWSC), the Applicant was only advised to liaise with the Corporation for which she obliged.
5. It is in the interests of justice that this application be granted since the Town Clerk's decision is not justified.

In reply, the Respondent filed an affidavit sworn by Mawerere Peter, the Deputy City Clerk of Jinja City formerly Jinja Municipal Council opposing the application whose grounds are briefly that: -

1. That in January 2020, the Council learnt of a complaint from National Water and Sewerage Corporation (NWSC) that the Applicant had started digging a foundation, hoarded off the space blocking other users which intended works were likely to affect the sewer line and water supply in the area.
2. It was further stated that the Municipal Engineer was not invited to be present and supervise the setting of the intended structure and the digging of the foundation was in total contravention of the terms of the allocation letter.
3. That the applicant had no valid building permit from the Municipal Council.
4. That the Applicant's purported plans had expired and she was duty bound to seek for development permission before commencing any development, that the intended structure was illegal and the illegality could not be condoned.

Representation

Counsel Wafula Charles appeared for the Applicant while the Counsel Nakanaba Barbra appeared for the Respondent. Although the parties were ordered to file written submissions by Court, it was only the Applicant who complied. Notwithstanding the Respondent's default, Court will proceed and determine the matter.

Submissions

Counsel for the Applicant submitted that judicial review is concerned with challenging public bodies for acts which are illegal, irrational and procedurally improper. He relied on **Black's Law Dictionary at page 852, Section 36(1) of the Judicature Act Cap 13, the Judicature (Judicial Review) Rules (as amended in 2019)** and the cases of **Ridge -v- Baldwin [1964] AC 40, Clear Channel Independent (u) ltd -v- PPDA HMA No. 380/2008 and Council of service Union -v- Minister for the Civil Service (1985) AC NO. 374** to support this position.



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Counsel further submitted that in this case, the procedure that the Town Clerk adopted to stop the Applicant from construction claiming that there was a petition from neighbours to the Council against the development was ultra vires the provisions and principles of fair hearing as guaranteed under the 1995 Constitution of Uganda (as amended)

Counsel argued that despite the fact that the Town Clerk is a Senior Government Officer whom one would expect to appreciate the rules of fair hearing, he decided to violate the principles of fair hearing which renders his decision void and or unlawful for illegality, irrationality and procedural impropriety.

Issues

1. **Whether the application raises issues for judicial review?**
2. **What remedies are available to the parties?**

Consideration of the application

Issue No. 1: Whether the application raises issues for judicial review.

According to the **Black's Law Dictionary 7th Edition at page 852**, judicial review is defined as a Court's power to review the actions of other branches or levels of Government, especially the court's power to invalidate legislative and executive actions as being unconstitutional. Secondly, it refers to a Court's review of a lower Court's or administrative body's factual or legal findings.

In Uganda, judicial review has its foundation in **Article 42** of the Constitution and **Section 36** of the Judicature Act. **Art.42 of the Constitution provides that: -**

"Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her."

Rule 3 of the Judicature (Judicial Review) (Amendment) Rules, 2019 defines *Judicial Review as the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of subordinate courts, tribunals and other bodies or persons who carry out quasi - judicial functions or who are charged with the performance of public acts and duties.*

In the case of **Dr. Stella Nyanzi V Makerere University High Court at Kampala Misc. Cause No. 304 of 2018**, the Court explained the concept of judicial review as a matter of administrative law and is a process by which High Court exercises its



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supervisory powers over the proceedings and decisions of inferior courts, tribunals, and other bodies or persons who carry out quasi-judicial functions.

Therefore, the right to judicial review is premised or arises from the decisions of the administrative bodies or organs where the aggrieved party feels that his or her rights have been infringed upon by a decision taken by the administrative body. In **Arua Kubala Park Operators and Market Vendors' Cooperative Society Limited-v-Arua Municipal Council MC No.3 of 2016**, Stephen Mubiru, J, observed, while upholding the decision of Court in the case of *Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1948] 1 KB 223* that:

“judicial review is premised on allegations that a public body; - acted without powers (lack of jurisdiction); went beyond its powers (exceeded jurisdiction); failed to comply with applicable rules of natural justice; proceeded on a mistaken view of the law (error of law on the face of the record); or arrived at a decision so unreasonable that no court, tribunal or public authority properly directing itself on the relevant law and acting reasonably could have reached it”

In the case of **Chief Constable of North Wales Police -v- Evans [1982] 3 ALL E.R. 141**, Lord Hailsham of St. Marylebone LC stated that: -

"It is trite that judicial review is concerned not with the decision in issue per se, but with the decision making process. Essentially, judicial review involves the assessment of the manner in which the decision is made, it is not an appeal and the jurisdiction is exercised in supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised in accordance with basic standards of legality, fairness and rationality."(emphasis added)

In the case of **Kassibo Joshua and the Commissioner of Customs Uganda Revenue Authority HCT-MA44/2007**. Hon. J. Kiryabwire stated that the test to be applied is that stated by Hillary Delany in his book “Judicial Review of Administrative Act” 2001 Sweet and Maxwell at pages 5 and 6 which is stated as;

“Judicial Review is concerned not with the decision but the decision making process. It involves an assessment of the manner in which the decision is made. It’s to ensure that public powers are exercised in accordance with basic standards of legality, fairness and rationality.

Therefore, there are traditionally three grounds for judicial review and these include:-



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- 1) Illegality,
- 2) Irrationality and
- 3) Procedural impropriety.

Therefore, in an application for Judicial Review, an applicant must show that the decision or act complained of is tainted with either illegality, irrationality or procedural impropriety. In the case of **Ignatius Loyola Malungu -v- Inspector General of Government, MC No. 59/2016 [2017] UGHCCD 196**, the Court while relying on the case of **Pastoli -v- Kabale District Local Government Council & Others [2008] 2 EA 300** noted that in order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety.

The said grounds were elaborated in the case of **Council of Civil Service Unions vs. Minister for Civil Service 1984 AC 374** where Lord Diplock further elaborated upon the grounds of illegality, irrationality and procedural impropriety as: -

"By 'illegality' as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision making power and must give effect to it."

"By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (Associated Provisional Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".

"I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision".

In the case of **His Worship Aggrey Bwiire Vs Attorney General Civil Appeal No.9 of 2009**, it was held that;

"it's trite law that judicial review can only be granted on three grounds that is illegality, irrationality and procedural impropriety. Whereas the first two grounds are substantive as they relate to the substance of the disputed decision, procedural impropriety is a procedural ground because it aims at the decision making procedure rather than the content of the decision itself.



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From the instant case, the Applicant filed this matter to this Court seeking for judicial review on grounds that the Respondent's Town Clerk acted illegally, irrationally and irregularly when he stopped the construction works without hearing the applicant claiming among others that National Water and Sewerage Corporation had raised a complaint. The Applicant relied on a letter written to her on 11th February 2020 by Mr. Ocen Ambrose, the Town Clerk of Jinja Municipal Council whose contents I have reproduced as follows: -

"It has been noted with great concern that you have commenced development at the above site without authorization from Council.

Furthermore, the immediate neighbours have petitioned Council about siting this development in their rear lane.

Relatedly, National Water and Sewage Corporation has also written indicating that your development is disrupting their services in this neighborhood.

This is therefore to instruct you to immediately stop all the constructions works and remove the temporary hoarding that is hindering the neighbors from accessing their premises from the rear.

By copy of this letter the Enforcement Officer is to ensure compliance.

Signed
Ocen Ambrose
TOWN CLERK

cc. His Worship the Mayor
"The Senior Assistant Town Clerk, Jinja Central Division
"The Enforcement Officer"

From the above foregoing letter, it is observed that there were several complaints that were cited by the Town Clerk that had been brought to his attention regarding the construction works of the Applicant. Following the complaints, the Town Clerk directed the applicant to immediately stop all the constructions works and remove the temporary hoarding that was hindering the applicant's neighbors (complainants) from accessing their premises from the rear. The directives of the Town Clerk therefore amount to administrative decisions.


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In the Court's analysis as to whether the administrative decision by the Town Clerk is a subject of judicial review, Court relied on the case of **Oyaro v Kitgum Municipal Council (Miscellaneous Civil Cause No. 7 of 2018) [2018] UGHCCD 40 (13 September 2018)** in which Justice Stephen Mubiru, stated that: -

"The right to fair treatment in administrative action is guaranteed by article 42 of The Constitution of the Republic of Uganda, 1995. The duty to act fairly is specifically applicable to decisions that are likely to have serious adverse effects on someone's rights, interests or status. This duty to act fairly is flexible and changes from situation to situation, depending upon: the nature of the function being exercised, the nature of the decision to be made, the relationship between the body and the individual, the effects of that decision on the individual's rights and the legitimate expectations of the person challenging the decision (see Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (S.C.C.)."

"... The right to fair treatment in an administrative action is a guarantee that Public Officers have the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. It may also include the right to be given reasons for any administrative action that is taken against them, where an administrative action is likely to adversely affect their rights or fundamental freedoms."

"The Court is concerned with evaluating fairness as Lord Hailsham L. C. ably puts it in Chief Constable of North Wales Police v. Evans, [1982] 1 W. L. R. 1155 at 1160;

It is important to remember in every case that the purpose ... is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the



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opinion of the judiciary or of individual judges for that authority constituted by law to decide the matters in question.

"The court will not intervene in decisions that are fair and reasonable lest it substitutes its opinion for that of the decision-maker. Decisions are seen as "fair" when they are perceived to be morally right, e.g. ethical, dictated by conscience, honest, uncorrupted and free from prejudice, favouritism or self-interest, balanced, etc (the focus is primarily internal and subjective). Conduct is seen as "reasonable" if it is perceived to be administratively just, e.g. lawful, in accordance with accepted standards of conduct, in good faith and for legitimate reasons, unbiased, rational, consistent, what is appropriate for a particular situation, etc. (the focus is primarily external and objective). Fairness can be seen as one of the criteria for assessing reasonableness, and vice versa, and some of the criteria that can be used to assess fairness can also be used to assess reasonableness, for example honesty, legality, regularity, provision of a fair hearing, etc."

"One option when reviewing the reasonableness of a decision is the standard of a "reasonable person." The concept of the "reasonable person" is the standard used by the courts to assess conduct in a range of contexts. However, depending on a degree on the context there are a number of variations in the formulation or description of this standard, for example: the "reasonable person," the "reasonable or fair minded observer," the "fair-minded observer," the "fair-minded and informed observer," what "fair-minded people reasonably apprehend or suspect," a "hypothetical fair-minded lay observer," or "right-minded people." It is generally agreed that this test, however expressed, focuses on what the court believes the public would be likely to think about the issue in question. Alternatively, the court may review administrative conduct primarily from the perspective of whether or not the framework of policies, procedures and processes supporting decision-making were fair and reasonable, within that framework that the conduct itself was



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reasonable, and the decisions / outcomes were reasonable in the circumstances.”
(emphasis mine).

Basing on the above authorities, it is the finding of this Court that the decision by the Town Clerk directing the applicant to immediately stop all the constructions works and remove the temporary hoarding that was hindering the applicant’s neighbors (complainants) from accessing their premises from the rear in the letter dated 11th February 2020 was an unfair and unreasonable decision to the Applicant.

On receipt of complaints about the Applicant’s works, the Town Clerk should have done the reasonable thing which would have been for the Town Clerk to accord the Applicant a fair hearing about the complaints that were raised against her given that she had already proceeded with the construction works which had an economic bearing to her livelihood. The Town Clerk’s decision halting the construction works without hearing from the Applicant made it impossible for the Applicant to defend herself to the complaints and also affected her economical rights.

It should be noted that the Respondent in his affidavit in reply averred that the Municipal Engineer had not been invited to be present and supervise the setting of the intended structure and the digging of the foundation which was in total contravention of the terms of the allocation letter. That the applicant had no valid building permit from the Municipal Council and that the Applicant’s purported plans had expired and she was duty bound to seek for development permission before commencing any development. That therefore, the intended structure was illegal and such illegality could not be condoned.

In the case of Oyaro v Kitgum Municipal Council (Supra) Justice Stephen Mubiru, observed that: -

“Judicial review on any of those grounds is concerned not with the merits of the decision, but rather with the question whether the public body has acted lawfully. Judicial review is not the re-hearing of the merits of a particular case, but rather the High Court reviews a decision to make sure that the decision-maker used the correct legal reasoning or followed the correct legal procedures. If the Court finds that a decision has been made unlawfully, the powers of the court will generally be



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confined to setting the decision aside and remitting the matter to the decision-maker for reconsideration according to law."

Therefore, I would like to clearly state that these issues that were raised by the Respondent in the affidavit in reply were matters regarding the contract between the Applicant and the Respondent. That in matters of administrative review courts look at the administrative decisions made by administrative bodies to ascertain whether they were done either illegally, irrationally or with procedure impropriety. The issues of breach of terms of the allocation letter averred in the Affidavit in Reply by the Respondent do not arise in the instant case.

Distinguishing this current case from the decided case of **Arua Kubala Park Operators and Market Vendors Cooperative Society Ltd (Miscellaneous Cause 3 of 2016) [2018] UGHCCD 6 (9 January 2018)** Justice Stephen Mubiru stated that: -

"I have considered the nature of the dispute in the instant case. The contract in issue comprehensively set out the terms. It also provides for arbitration as a remedy in the event of a dispute between the parties. It is not pleaded that the relationship, or key aspects thereof, were founded in statute. The disputed termination of the contract required no exercise of discretionary or statutory power by the respondent. It does not involve exercise by a local government official of a power under legislation. There is no allegation of abuse of any of statutory powers of the respondent or any other administrative law principles, save for the thinly veiled allegation of denial of a hearing. In the absence of any pleaded unlawful action on the part of the respondent as a public authority, the claim made against it is essentially one of breach of contract. In fact it is merely a matter of a private law nature, the right of one party to a contract to terminate it. There is no statutory duty or protection which makes this a matter one of public law. There is no statutory power of decision involved in the decision to terminate the contract. This is purely a matter of the relationship between parties to a contract. The termination was simply a consequence of the terms of the contract that the parties had agreed upon. Each of the parties cites some of the clauses and seeks to have them enforced in its favour."

"Ultimately, the decision to maintain or terminate the contract in issue it is not regulated by any Act of Parliament or exercise of a statutorily regulated power, but rather by the terms of the contract between the parties. The private law of contract provides for remedies in case that termination was effected in breach of contract. A body can be public and yet exercise a private power that is not susceptible to judicial oversight. The fact that one of the parties to the dispute happens to be a public



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authority, is only incidental to the nature of the dispute in this case. This is therefore, in my judgment, a purely contractual dispute.”

“Where a relationship is regulated by the law of contract, administrative law remedies should generally not be available. It is important that parties are held to their contractual obligations through ordinary suits and not by invoking public law remedies. A party should not take advantage of public law simply because it contracted with a public body, and thereby obtain an advantage in the enforcement of that contract, that would otherwise not be available against a non-public body or private person.”

Therefore, from the above foregoing case, the decision that the applicant is aggrieved with is that in the letter dated 11th February 2020 and not in the allocation letter and dated 21st March 2016. Hence this matter was rightly brought under judicial review and having already observed above that there was procedural impropriety on the part of the Respondent in arriving at that decision since the applicant was not accorded a fair hearing against the complaints raised against her and that the decision also affected her economic rights.

Issue 2: Whether the applicant is entitled to the reliefs sought.

It should be noted in application for judicial review if successful, a Court can offer different kinds of solutions called prerogative remedies in accordance with Section 36 of the Judicature Act as amended.

Section 36 (1) of the Judicature Act as amended provides that: -

(1) The High Court may make an order, as the case may be, of—

(a) Mandamus, requiring any act to be done;

(b) Prohibition, prohibiting any proceedings or matter; or

(c) Certiorari, removing any proceedings or matter to the High Court.

Section 37(1) of the Judicature Act as amended also provides that: -

“The High Court may grant an order of mandamus or an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the High Court to be just or convenient to do so.”

Section 37(1) of the Judicature Act as amended also provides that: -

“The High Court shall have power to grant an injunction to restrain any person from doing any act as may be specified by the High Court.”



In the case of *John Jet Tumwebaze Vs Makerere University Council and Others Misc Appln No. 353 of 2005*. It was held that the orders of mandamus, certiorari and prohibition are discretionary in nature. In exercising its discretion with respect to those prerogative orders, court must act judicially and according to settled principles which include: -

- Common sense and justice.
- Whether the application is meritorious.
- Whether the application is reasonable,
- Level of vigilance.

In the instant case the Applicant prayed for an order of Certiorari quashing the decision of the Town Clerk Jinja Municipal Council dated 11th February, 2020 stopping the construction of a public toilet, an order allowing the Applicant to continue with the work as scheduled, an order prohibiting the Respondent from interfering with the construction work and costs of the application.

It should be noted that the prerogative order of certiorari is designed to prevent the excess of or the outright abuse of power by public authorities. While certiorari issues to quash decisions which are *ultra vires* or vitiated by error on the fact of the record or are arbitrary and oppressive; prohibition serves to prohibit the happening of some act or taking of some decision which would be *ultra vires*. See, *The King v. Electricity Commissioners Expert London Electricity Joint Committee 1924 1 KB 171* and in *Re An Application by Bikoba Gymkhan Club (1963) EA 473, Rv. Inland Revenue Commissioner Exparte National Federation of Self employed and Small Business Ltd 1962 AC 617, R V. National Council for Dental Technicians, Exparte Meatrl (1935) 1 QB 704*. The principle from all the cited authorities above is that orders for Certiorari and Prohibition as prerogative orders are designed to control inferior courts, tribunals, administrative and statutory authorities in the exercise of their power and authority.

That further in the Applicant's supplementary affidavit and submissions, the Applicant prayed for compensation worth UGX 12,532,000 for the loss occasioned by the Respondent and general damages of UGX 50,000,000 on the basis that the Applicant was constructing a public toilet intended to generate income.

On the issue of compensation, general, exemplary and punitive damages, Rule 8 of the Judicature (Judicial Review) Rules (supra) states;
"Claims for damages.


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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 to 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.*”

Indeed, the applicant incurred losses in stopping the construction works and in the removal of hoarding for which I believe she is entitled to be compensated for loss and damages incurred in the process.

Overall, I therefore consider that this was a proper case of judicial review and the application is allowed with the following orders and declarations:

1. An order of Certiorari is issued quashing the decision of the Town Clerk Jinja Municipal Council (now Jinja City) dated 11th February 2020 stopping the applicant from the construction works.
2. An order of Prohibition restraining the Respondent from interfering with the construction works.
3. The Applicant is awarded compensation for loss of UGX 12,532,000/= occasioned by the Respondent's decision to halt the construction works.
4. The Applicant is awarded general damages of UGX 20,000,000/= with Interest of 10% p.a on above is awarded from the date of ruling until payment in full.
5. The applicant is awarded the costs of this application.

I so order.



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JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI
Judgment delivered on 1st September, 2023.