

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

MISCELLANEOUS CAUSE NO. 344 OF 2021

PASTOR WALUGEMBE DANIEL ===== APPLICANT

VERSUS

KAMPALA CAPITAL CITY AUTHORITY ===== RESPONDENT

BEFORE: HON. JUSTICE EMMANUEL BAGUMA

RULING.

Background.

The applicant applied for issuance of development permit for his equitable interest (Kibanja) at Katanga Valley Wandegeya and the Respondent declined to grant the permit on ground that the land the applicant wanted to develop is a subject of an appeal in the Court of Appeal. The applicant being dissatisfied with the decision of the Physical Planning Committee applied for judicial review in this court.

The application.

This is an application by Notice of Motion under Article 26, 28, 42 and 44 of the 1995 Constitution of Uganda as amended, section 33 of the judicature Act, Rules 3, 4, 6, 7 and 8 of the Judicature (Judicial Review) Rules of 2009 and Rule 3A, 7A of the Judicature (Judicial Review) (Amendment) Rules of 2019, section 98 of the Civil Procedure Act and Order 52 rule 1&3 of the CPR seeking for orders that;

- i) A declaration that the applicant is entitled to apply for and obtain development permission for his equitable interest on land comprised in Kyadondo FRV 59 Folio 21 located in Katanga valley, Wandegeya.
- ii) A declaration that the Respondent is duty bound to review and determine on merit the Applicant's building plans.

- iii) A declaration that the decision to halt and or refuse to review and determine the applicant's building plans is unlawful, irrational, ultra vires, arbitrary, unreasonable and against public interest.
- iv) A prerogative order of mandamus doth issue compelling the Respondent and any other person acting on authority there from to urgently process on merit, the Applicant's building plans in line with the existing procedures.
- v) An order of prohibition doth issue against the Respondent curtailing the use of its security agents from illegally and irrationally interfering with the possession, use and enjoyment of the Applicant's right over his kibanja on the land comprised in FRV 59 Folio 21 at Katanga valley.
- vi) An order compelling the Respondent to pay general damages to the applicant.
- vii) Costs of this Application be granted to the Applicant.

The application is supported by the affidavit of **Pastor Daniel Walugembe** the applicant in which he depones that;

1. I am a bonafide occupant/owner with an equitable interest in Kibanja measuring approximately 28.75 acres on land comprised in FRV 59 Folio 21 located in Katanga valley Wandegeya, Kawempe division having purchased the same from Bulasio Buyise, Jonathan Masembe, G Kalimu, Samali Namboga and others.
2. My predecessors in title successfully litigated and were decreed rightful owners of the subject land in Civil Suit No. 857 of 2000 in 2015.
3. Makerere University was dissatisfied with the judgment and orders of the High court and appealed to the court of appeal which appeal remains unheard to date and no orders for stay of execution have ever been issued.
4. I applied for issuance of a development permit from the Respondent, paid all the requisite fees and attached all the relevant orders proving ownership of the subject land.
5. I was shocked when the Respondent wrote back to me on 20th September 2021 declining to grant the development permit on ground that the land I want to develop is subject of an Appeal in the Court of Appeal which is contrary to the doctrine of lis pendens.
6. Makerere University failed to prosecute its appeal filed in 2015 and the said fault cannot be visited on the equitable owners of the land in issue.

7. I have been advised by my lawyers that an appeal does not operate as a stay of execution or be used to defeat enjoyment of a person's existing rights and interests conferred by law.
8. I have been advised by my lawyers and I believe the advise to be true that the Respondent's omission and refusal to review and determine my application is an affront to my enjoyment of the rights over my land recognized and guaranteed by the constitution.
9. I have been advised by my lawyers that the respondent's refusal to entertain my application is a breach of their statutory duty.
10. I have been subjected to grave inconvenience and expense like cost of drawing plans, inspection and approval fees, instruction to advocates to pursue the matter at KCCA and the opportunity cost of failure to utilize my land and develop it for commercial purpose hence a claim for general damages.
11. This is a matter for judicial review and it is only just and fair that this court compels the Respondent to grant me a development permit.

In reply, the Respondent in an affidavit sworn by **Anita Kusiima** the Director legal affairs at KCCA opposed the application and deposed inter alia that;

1. The Respondent has legal mandate to control development in Kampala and is therefore in charge of all planning matters in Kampala.
2. The application is incompetent because the applicant has not exhausted all other existing remedies available under the law including an appeal before the Respondent's Physical Planning Board.
3. The application is incompetent because it offends the lis pendens rule. The Applicant filed high court civil suit No. 80 of 2020 against the Respondent based on similar facts and cause of action and it is pending determination.
4. The Respondent received and considered the Applicant's application and raised six issues of concern including the fact that the Applicant is engaged in an ongoing land dispute and court battle with Makerere University vide HCCS No. 857 of 2000 the registered proprietor of the land in respect of which the applicant sought development permission.
5. The decision of the Respondent's Physical Planning Committee was communicated to the Applicant in a letter dated 20th September 2021.
6. The Respondent's Physical Planning Committee acted within its mandate to consider comments brought to its attention regarding any application for development.

7. The applicant willingly put in his application for development well aware that his application did not guarantee an automatic approval of his development plans and as such the damages sought are unwarranted.

Legal Representation.

Mr. Rubehayo Brian of M/S Mwesigwa Rukutana & Co. Advocates represented the applicant while Ms Dorothy Namutebi from KCCA legal department represented the respondent.

At the hearing of this application, both counsel agreed to file written submissions whose details are on record and I have considered them in writing this ruling.

Submissions by counsel for the Applicant.

Counsel submitted that according to annexure F which is the decision from the respondent, the respondent irrationally declined to consider the Applicant's application for the development of his kibanja due to a pending appeal by Makerere University. Counsel referred to that part of the letter which reads that;

“This is to inform you that KCCA is constrained to determine your application for development of your Kibanja in Katanga Valley because of the ongoing court process. You are advised to resubmit your application for development of the land when the matter before court are disposed of”.

Counsel submitted that the Respondent's refusal to consider the Applicant's application for development permission due to the pending appeal is so unreasonable and should be quashed.

Counsel submitted that it is a well-known principle of law that an appeal cannot curtail a decree holder from enjoying the fruits of his judgment.

Counsel referred to the case of **Stanbic Bank Uganda Ltd Versus Atyaba Agencies Ltd SCCA No. 31 of 2004** where court held that;

“it is trite law that an intention to appeal is not a ground for stay of execution and instituting an appeal does not operate as a stay of execution. A party seeking a stay of execution must satisfy court that there is sufficient cause why the party with the judgment should postpone the enjoyment of its benefits”.

Counsel submitted that the Applicant furnished the Respondent with a copy of the purchase agreement and court decree as proof of ownership of the kibanja.

Counsel referred to the case of **George William Katerega Versus Commissioner of land Registration & 12 others, HCMA NO. 181 OF 2013** where court held that;

“..... a judgment in rem binds all persons even when they are not parties to the proceedings and are stopped from averring that the status of persons or things or the right to title to property are other than what the court has by its judgment declared it to be”.

Counsel further submitted that the decision made by the Respondent was illegal since the Respondent refused to entertain the Applicant’s application because there is a pending appeal.

Counsel concluded that this court be pleased to grant this application with costs and issue an order of mandamus compelling the Respondent to entertain the Applicant’s application for development permit.

At the time of hearing, both counsel agreed to file written submission, no counsel indicated that they will raise preliminary objections in written submission. For the interest of Justice, I will not consider the preliminary objection but proceed to handle the merits of the case.

Submissions by Counsel for the Respondent.

Counsel referred to the case of **Patrick Moni Omony T/A Omony Consulting Co. Ltd Vs Uganda Revenue Authority Misc. Cause No. 234 of 2020** where court defined illegality as follows;

“illegality has been described as the instance when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of the law or its principles are instances of illegality.”

Counsel submitted that **section 34(3)(c) of the Physical Planning Act** states that;-

“Physical Planning Committee shall when considering a development application submitted to it under this section shall have regard to any comments received from the Physical planning or authorities”.

Counsel submitted that the applicant had already been served with an enforcement notice for engaging in illegal activities and the fact that the Applicant had been involved in court battles. That all those observations were put to the notice of the

applicant and hence it was not the only the pending appeal that formed the decision of the committee.

On the aspect of irrationality, counsel referred to the case of **Patrick Moni Omony T/A Omony Consulting Co. Ltd** (supra) which referred irrationality as to;

“arriving at a decision which is so outrageous in its defiance of logic or of accepted moral standard that no sensible person who had applied his mind to the question to be decided could have arrived at it”.

Counsel submitted that the decision of the respondent was justified and does not meet the standard of irrationality or unreasonableness under the law.

Counsel for the Respondent submitted that the applicant has failed to prove that the Respondent’s decision was tainted with illegality, procedural impropriety, irrationality or unreasonableness to merit any of the remedies prayed for under judicial review.

Counsel referred to the case of **Ochengel & anor Vs Attorney General No. 67 of 2020** where court held that;

“Under judicial review proceedings, damages are awarded in the rarest of the rare cases upon court being satisfied of a possible tort of misfeasance. Otherwise, judicial review proceedings will turn into ordinary proceedings for damages and yet it is not intended for that purpose”.

Analysis of court.

In the case of Pastoli -v- Kabale District Local Government Council & Others [2008] 2 EA 300 court 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”.

Also in the case of **Arua Kubala Park Operators and Market Vendors' Cooperative Society Limited-v- Arua Municipal Council MC No.3 of 2016**, court

while relying on the decision of *Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1948] 1 KB 223* held 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 addition, in the case of **Stanbic Bank Uganda Ltd Vs Atyaba Agencies Ltd SCCA No. 31 of 2004** court held that;

"it is trite law that an intention to appeal is not a ground for stay of execution and instituting an appeal does not operate as a stay of execution. A party seeking a stay of execution must satisfy court that there is sufficient cause why the party with the judgment should postpone the enjoyment of its benefits".

Basing on paragraph 4, 5, 6, and 7 of the affidavit in support of the notice of motion by Pastor Daniel Walugembe, the applicant's predecessors obtained judgment in their favour vide Civil Suit No. 857 of 2000 which has never been overturned or stayed by a competent court. The alleged appeal was filed close to seven years ago and unprosecuted to date cannot be used as a basis to deny a beneficiary of a valid judgment to be issued with development permit.

It is my considered finding that the decision of the respondent was unreasonable, irrational, a violation of principles of natural justice and the same cannot stand.

Conclusion.

In the final result, court will allow this application with the following declarations;

1. The decision of the Respondent refusing to issue the Applicant with a development permit for his equitable interest was unreasonable, irrational and a violation of the principles of natural justice.
2. The Respondent is duty bound to review and determine on merit the applicant's application for a development permit for his equitable interest.

3. Let the Respondent process on merit a development permit to the Applicant for his equitable interest on land comprised in Kyadondo FRV 59 Folio 21 located in Katanga valley, Wandegeya.
4. Costs of this application are awarded to the applicant.

Dated, signed, sealed and delivered by email at Kampala this **17th** day of **January 2023**

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Emmanuel Baguma

Judge