

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT KAMPALA

MISCELLANEOUS APPLICATION NO. 859 OF 2012

ARISING OUT OF MISCELLANEOUS CAUSE NO. 06 OF 2011

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF

- 1. JAMES HAM SSALI**
- 2. GEORGE KASEDDE MUKASA.....APPLICANTS**

VERSUS

COMMISSIONER FOR LAND REGISTRATION.....RESPONDENT

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This is an application by notice of motion brought under sections 36 & 37 of the Judicature Act, cap 13, rules 3, 6 & 8 of the Judicature (Judicial Review) Rules SI No. 11 of 2009, for an order for relief of mandamus, directing the respondent to effect/note a re entry in respect of a lease over the applicants' land comprised in Kyaggwe Block 295 Plot 2 Njeru; and that costs of the application be in the cause.

The grounds for the application are that this honourable court issued an order against the respondent requiring him/her to note a re entry on the register for the suit land; the respondent has for a long time refused to effectuate the aforesaid order; the respondent has not given any tangible reasons for failure to obey the order; and in the interests of justice the application is granted. The application is supported by the affidavit of **James Ham Ssali** the 1st applicant. The respondent did not file any affidavit in reply.

The background to the application is that the applicants are legal administrators for the estate of the late Lakeri Nalubale the registered owner of land comprised in Kyaggwe Block 295 Plot 2 at Njeru. The said land had been leased from their predecessor in title by Njeru Town Council. The applicants terminated the lease on 11/03/2011 due to deliberate failure by Njeru Town Council to pay ground rent and re entered the land. When the respondent ignored or refused their requests to note the re entry on the register and to cancel the lease, they filed miscellaneous cause no. 6/2011 against the respondent who is the Chief Registrar of Titles/Commissioner Land Registration to show cause why their request would not be effected. The court ruled in their favour. The respondent however refused to obey the court order

requesting him/her to note the re entry and cancel the lease. The applicants filed this application for a prerogative order of mandamus compelling the respondent to effectuate the court order.

When this matter was called for hearing on 25th June 2013, the respondent was absent. The applicants' counsel applied to proceed *ex parte* against the respondent. This court allowed counsel to proceed *ex parte* on being satisfied that the respondent was duly served. This was on basis of an affidavit of service on the court record indicating that the respondent was served with the hearing notice and his/her secretary did endorse the same, but he/she neither appeared in court nor explained his/her absence when this matter came up for hearing. Counsel made oral submissions before court. After the submissions, this court ordered that certified true copies of the certificate of title of land comprised in Kyaggwe Block 295 Plot 2 at Njeru be availed to court before writing the judgment, which was done. The applicants' counsel were also requested to, and they did, avail this court with photocopies of the case decisions they had cited.

Learned counsel D. Kanaabi, A. Jjabo and B. Mutyaba for the applicants reiterated the 1st applicant's affidavit in support of the application. They submitted that the respondent's failure to note the re entry had necessitated the application; and that court will grant the orders prayed for if it is shown that there is some action that had to be undertaken but the respondent refused to do it. They contended that the order for mandamus is intended to ensure that the earlier order is respected and implemented; that section 36(1) of the Judicature Act gives discretionary powers to this court to compel someone to do the act; and that this case falls under such situation. They cited **Allan Nyirikindi V Commissioner Land Registration Miscellaneous Cause No. 45/2011; Issa Ssekitto V Attorney General Miscellaneous Cause No. 014/2012** to support their case.

I have carefully looked at the application and its supporting affidavit, together with the submissions of learned counsel, and the authorities cited.

On the issue of not filing a defence, in this case, an affidavit in reply to the application and its supporting affidavit, Order 9 rule 11(2) of the CPR provides that where the time allowed for filing a defence has expired and the defendant has failed to file a defence, the plaintiff may set down the suit for hearing *ex parte*. In such circumstances, the defendant will not be allowed to participate in the proceedings though he/she may be present in court. In **Kubibaire V Kakwenzire [1977] HCB 37** court held that since the appellant had been served with summons and failed to enter appearance, they had by that failure put themselves out of court and had no *locus standi*. This is the reason why the instant application was allowed to proceed *ex parte*. However, whether a suit proceeds *ex parte* or not, the burden of the plaintiff to prove his/her case to the requisite standards remains, as was held in **Yoswa Kityo V Eriya Kaddu [1982] HCB 58**.

In the course of learned counsels' submissions, I tasked them to address court on how the order of mandamus they were seeking for the applicants would be any different from the order already issued by this court in miscellaneous cause no. 6/2011 requesting the respondent to effectuate the re entry and cancel the lease. Counsel contended that the order for mandamus is intended to ensure that the earlier order is respected and implemented and that section 36(1) of the Judicature Act gives discretionary powers to this court to compel someone to do the act.

Section 36(1) of the Judicature Act provides that the High Court may make an order as the case may be, of mandamus, requiring an act to be done, among others. Judicial review can only be granted on three

grounds namely illegality, irrationality and procedural impropriety – **Council of Civil Service Unions V Minister for the Civil Service [1985] AC 374**. In **Patrick Kasumba V Attorney General & Treasurer Officer of Accounts MA 121/ 2010, Bamwine PJ** held that before the remedy can be given, the applicant must show a clear legal right to have the thing sought by it done. Mandamus is a discretionary order, like all other prerogative orders, which the courts will grant only in suitable cases and withhold in others. It cannot be granted as a matter of course. A demand for performance must precede an application for mandamus and the demand must have been unequivocally refused.

Under section 33 of the Judicature Act, this court is empowered to grant absolutely or on such terms as and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and any multiplicities of legal proceedings concerning any of those matters avoided.

In **Goodman Agencies & 3 Others HCT – 00 – CC – ME 0108 – 2012 Arising From HCT – 00 – CV – CS – 0917 – 1997**, Madrama J, when handling a roughly similar situation in which the applicants sought mandamus to compel the Secretary to the Treasury to pay them compensation awarded in a consent decree that had not been paid for over ten years from the alleged taking over of their property, reasoned that the High Court is empowered to grant the mandamus order to compel the Secretary to the Treasury to pay the agreed sum. The learned Judge alluded to a series of authorities where mandamus was issued against the Secretary to the Treasury by the High Court of Uganda. These included **Benon Turyamureeba & 132 others V Attorney General & The Treasury Officer of Accounts/Secretary to the Treasury MA 440/2005** (Kasule Ag J, as he then was); **Oil Seeds Uganda Ltd V Secretary to the Treasury of Accounts MA 126/2008** (Arach J, as she then was); and **Shah V Attorney General (No. 3) [1970] EA 453**. He noted that the applicants raised serious questions of infringement of fundamental rights and freedoms under section 26 of the Constitution which needed to be remedied.

In this case, the applicants' affidavit evidence as deduced from the 1st applicant's supporting affidavit and its annexures, is that they are legal administrators for the estate of the late Lakeri Nalubale the registered owner of land comprised in Kyaggwe Block 295 Plot 2 at Njeru. Their predecessor in title had leased the said land to Njeru Town Council. The applicants terminated the lease and re entered the land on 11/03/2011 due to deliberate failure by Njeru Town Council to pay ground rent. The respondent ignored or refused the applicants' requests to note the re entry on the register and to cancel the lease. The applicants consequently filed miscellaneous cause no. 6/2011 against the respondent to show cause why their request would not be effected, which was determined in their favour. An order was extracted and served on the respondent requesting him/her to effectuate the re entry and cancel the lease but the respondent refused to obey it, which prompted the applicants to make this application.

The applicants attached annexure **A**, a copy of letters of administration, to the affidavit in support of the application showing they are the administrators of the estate of the late Lakeri Nalubale. Annexure **B** the certificate of title shows Nalubale as still being the registered proprietor of the mailo interest while Njeru Town Council holds a leasehold interest on the same land for 99 years effective 01/11/48. However a certified true copy of the title later availed to this court on request showed that the applicants were registered on the certificate of title as administrators of the estate of the late Rakeri Nalubale on 10/11/2011 vide instrument no. MK0129239. It also shows that the applicants' re entry on the certificate is yet to be entered or endorsed on the same. The certificate still reflects Njeru Town Council as the lessee

on the land effective 01/11/48. Annexures **D E** and **F**, to the applicant's supporting affidavit are copies of the judgment decree and correspondence to the respondent.

The 1st applicant's affidavit evidence remains uncontroverted. The applicants have a court decree against the respondent who is a government officer. The decree is not appealed against. Where government officials are under a legal obligation to perform their public duties, an order of mandamus will lie for the performance of those duties. The affidavit evidence adduced is that the respondent has continued refusal to note the re entry and cancel the lease in favour of Njeru Town Council despite a decree by this court issued two years ago. This, in addition to clearly being contemptuous of court, violates the applicant's property rights under section 26 of the Constitution. If the respondent has issues with the court order, he/she is entitled to challenge it before courts of law but not to continue ignoring it with impunity. It was held in **The Protector & Gamble Company V Kyobe James Mutisho & 2 Others HCMA No. 135/2012**, by Kiryabwire J, as he then was, that a party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it. It would be most dangerous for parties to a suit, or their solicitors to themselves judge whether an order was null and void, regular or irregular. Such parties should come to the court and not take it upon themselves to determine such a question. The course of a party knowing of an order which is null and irregular is plain. The party concerned should apply to the court that it might be discharged. As long as a court order exists, it must not be disobeyed.

Thus, if the respondent has a challenge with the court order he/she should apply to have it set aside instead of disobeying it, because the consequences infringe on the decree holders' property rights in addition to being clearly civil contempt of a court order. In this case where respondent's contemptuous conduct is trampling upon the property rights of the applicants, I am persuaded by the foregoing decisions that a way must be found to address the applicants' claims and not turn them away on basis of procedural technicalities, so that their rights are enforced where they have sought redress in this court. For those reasons, this application should succeed.

In the premises, and on the foregoing authorities, I grant against the respondent the prerogative order of mandamus, directing the respondent to effect/note a re entry in respect of a lease over the applicants' land comprised in Kyaggwe Block 295 Plot 2 Njeru. There will be no order as to costs.

Dated at Kampala this 11th day of July 2013.

Percy Night Tuhaise

JUDGE.