

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISC. CAUSE NO. 051 OF 2013**

- 1. AIDA GWOKYAYE
(suing through her lawful Attorney SSENTEZA SAM)**
2. FUNDI HARD WARE CONSTRUCTION LTD APPLICANTS

VERSUS

- 1. THE COMMISSIONER LAND REGISTRATION DEPARTMENT
MINISTRY OF LANDS, HOUSING & URBAN DEVELOPMENT**
2. THE ATTORNEY GENERAL RESPONDENTS

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

This is an application for judicial review brought by an amended Notice of Motion under Section 33 and 36 of the Judicature Act Cap 13, Rule 3 (1) and (2), Rule 6(2) and Rule 8 of the Judicature (Judicial Review) Rules 2009 seeking for orders of certiorari and prohibition quashing the decision of the 1st respondent communicated by a letter dated the 19th day of August 2013 stating that the 1st respondent still had the mandate to handle the dispute in respect of land comprised in Mawokota Block 124 Plots 302, 303 and 304 at Namutamala Mpigi District.

The application is supported by the affidavits of Michael Kawooya Mwebe (the managing director of the 2nd applicant) and Ssenteza Sam (the 1st applicant's lawful attorney) which grounds were briefly stated in the amended notice of motion and they include:-

1. The decision of the 1st respondent in stating that she still had the mandate to handle the dispute in respect of land comprised in Mawokota Block 124 Plots 302, 303 and 304 at Namutamala Mpigi District are irregular, procedurally, improper, irrational, unconscionable, *malafide*, unjustifiable and illegal.
2. The decision of the 1st respondent in requiring the applicants to appear for a further hearing of the dispute in respect of land comprised in Mawokota Block 124 Plots 302, 303 and 304 at Namutamala Mpigi District are irregular, *ultravires*, procedurally improper, irrational, unconscionable, *malafide*, unjustifiable and illegal.

3. It was legally and procedurally improper for the 1st respondent to state that she still had the mandate to handle the dispute in respect of land comprised in Mawokota Block 124 Plots 302, 303 and 304 at Namutamala Mpigi District yet the same dispute had already been handled and resolved by another Commissioner, Land Registration, Ministry of Lands, Housing and Urban Development thereby undermining the principles of natural justice and fair hearing.
4. That the 1st respondent is acting *ultravires* her powers.
5. That the decision of the then commissioner, Land registration which was communicated to the complainant, was made more than one year ago and the complainant had never raised any complaint against it or filed a suit in court.
6. That the 1st respondent is *functus officio*, the matter having been fully determined by her predecessor.
7. The 1st respondent is biased as she has already decided that the applicants' titles were issued in error by the then Commissioner and that the applicants engulfed more land than they were entitled to.
8. The applicant's have no effective alternative remedy.
9. The orders are necessary for the ends of justice to be met.

The 1st respondent in rebuttal filed two affidavits in reply which were sworn by Sarah Kulata Basangwa, Commissioner Land Registration, (hereinafter interchangeably referred to as the Commissioner 1st respondent and Wamboga Nicholas a Registrar of Titles (hereinafter referred to as the Registrar). They contended among others that no decision has ever been made or related by the office of the 1st respondent and therefore the application is premature and misconceived.

Ms Nabaka Barbra presented this application on behalf of the applicants while Phillip Mwaka, Principal State attorney, represented the respondents.

The applicants in their scheduling memorandum proposed issues for determination which include:-

- i) Whether this is a proper case for judicial review.

- j) If so, whether the 1st respondent's ruling/decision that she still had the mandate to hear the dispute and requiring the applicants to appear for further hearing was legal, regular and procedurally proper.
- k) Whether the 1st respondent was acting *ultra vires* her powers in hearing and insisting to hear a dispute which had already been handled and concluded by her predecessor.
- l) What was the proper procedure for the complainant to take after being dissatisfied with the decision of the then commissioner for land registration?
- m) Whether the 1st respondent is biased.
- n) Whether the applicants are entitled to the reliefs sought?

The facts as presented illustrate that the 1st applicant is the registered proprietor of land comprised in Mawokota Block 124 Plots 303 and 304 and the 2nd applicant is the registered proprietor of land comprised in Mawokota Block 124 Plot 302 at Namutamala in Mpigi District (hereinafter collectively referred to as the suit land). Plot 302 is stated to have been demarcated out of Mawokota Block 124 Plot 15 while Plots 303 and 304 were demarcated out of Mawokota Block 124 Plot 23. On an undisclosed date, a one George Kataabu (hereinafter referred to as the complainant) and others filed a complaint with the then Ag. Commissioner Land Registration claiming that the land belonged to his grandfather the late Erisaniya Yawe. In response to the complaint, Mr. R.V. Nyombi, the then Ag. Commissioner for Land Registration (hereinafter referred to as the Ag. Commissioner) halted the processes of issuing certificates of title to the applicants and as part of his investigations, requested the Commissioner, Surveys and Mapping to carry out an independent survey and furnish a report. The survey was concluded and all the parties to that dispute were furnished with copies.

On 4/9/12, the Ag. Commissioner wrote to the complainant advising him to refer his complaint to court. On 28/4/13, the complainant lodged another complaint in the respect of the suit land, this time to the 1st respondent. The latter, through a Registrar of Titles, conducted several meetings involving the complainant and the applicants. On 9/8/13, the applicants' lawyers formerly objected to the proceedings before the 1st respondent for the reason that the matter had already been concluded by her office and declined to take part in any further meetings regarding the suit land. In her subsequent communication of 19/8/12, the 1st respondent indicated that she

still had the mandate to hear the dispute between the complainant and the applicants and invited them for a further hearing.

The applicants argue and the respondents deny that the 1st respondent's communication above was irregular, illegal and biased and was made *ultra vires* her powers. The applicants thereby seek judicial review to quash that communication and stay further proceedings before the 1st respondent with respect to the suit land.

Resolution of the issues:-

ISSUE ONE

Whether this is a proper case for judicial review?

Counsel for the applicants submitted that judicial review is an arm of administrative law which involves an assessment of the manner in which a decision is made. In her view, for an application of judicial review to succeed, any of the following grounds must be proved; illegality, unfairness, irrationality and procedural impropriety and quoted the authorities of **Namuddu Hanifa Vs. The Returning Officer, Kampala District and 2 Others (Misc Cause No. 57 of 2006)** and **Yustus Tinkasimire & 18 Others Vs. Attorney General and Dr. Malinga Stephen (Misc Cause No. 35 of 2012)**.

Counsel then argued that the decision of the 1st respondent communicated to the applicants by way of a letter dated 19/8/12 stating that the 1st respondent still had the mandate to handle the dispute with respect to the suit land and requiring the applicants to appear for a further hearing, plus, the whole process leading to the decision are what the applicants seek review by this court. That it was procedurally improper for the 1st applicant to revisit and try to review a dispute which has already been handled and concluded by another commissioner holding the same office as the 1st applicant. In her view, judicial review applies to any decision made by a public officer or quasi judicial body or person whether preliminary, interlocutory or final and therefore the instant application is not premature. She also argued that the 1st respondent was acting *ultra vires* her powers by exercising jurisdiction which is not vested in her by law, which is an illegality.

In reply, counsel for the respondents submitted that this is not a proper case for judicial review on the basis of the fact that no decision has been made by the 1st respondent within the meaning

of **Section 91 of the Land Act**. That the proceedings are incomplete having been stayed by an order of this honorable court and a final determination has not been made. They in particular argued that a matter is only ripe for judicial review when a decision and/or determination is made in accordance with the statutory provisions giving rise to the powers and decision being reviewed. That the applicant is challenging proceedings which have not in substance, culminated into a decision and therefore this application is premature and incompetent and not a proper case for judicial review.

My understanding of the arguments being raised by the applicants is that the communication of the 1st respondent in her letter of 19/8/12 is a decision, the content of which can be the subject of judicial review by this court. In response, the respondents contend that the communication is not a final decision within the meaning of Section 91 of the Land Act as the matter in dispute is still subject to investigations albeit which have been temporary halted by this court.

I agree with the authorities quoted by the applicants and if I were to break down the gist of those cases, I believe that in order for a party to succeed on an application for judicial review they must prove the following:-

- a. That there is a decision by a judicial or quasi judicial body or authority.
 - ii) There was or is a process or proceedings leading to such a decision.
 - iii) That the process or proceedings were fraught with any or any of the following; illegality, unfairness, irrationality, or procedural impropriety.

For a better evaluation, the facts of this case should be put into context with its background and therefore, it is important at this point to reproduce the communications made by the Ag. Commissioner and 1st Applicant for present and future reference.

The one by the Ag. Commissioner reads as follows:-

9th July 2012

Mr. George Kataabu
P.O. Box 133
Bombo

**RE: MAWOKOTA BLOCK 124 PLOTS 4, 6,10,12,15, 23 AND 40 LAND AT
NAMUTAMALA**

I refer to your letter dated 14th June 2012 regarding your claim for the above described land.

Your letter under reference was read together and/or in light of a Survey report/audit by the Commissioner Surveys and Mapping, prepared on the request of this office and a copy of which was availed to you for your information.

From my understanding, you are strongly contesting the contents of the said report which clarified on the historical ownership and transactions in the said land. That being the case, this office is rather constrained to solve this matter which certainly involves multiple interests.

This is therefore to advise that you refer your claim to Courts of Law for resolution and this office will certainly obey the outcomes from Court. (All Emphasis mine).

Signed

Robert V. Nyombi

AG. COMMISSIONER LAND REGISTRATION

That of the 1st respondent reads as follows

19th August, 2012

Aida Gwokyaye
Fundi Hardware & Construction Co. Ltd
P.O. Box 980
Kampala

**RE: LAND COMPRISED IN MAWOKOTA BLOCK 124
PLOT 302, 303, 304 AT NAMUTAMALA MPIGI DISTRICT**

Reference is made to a public hearing held on the 9th August 2013 where your Lawyer raised views in objection to the further hearing of the matter.

This is to inform you that this office still has the mandate to handle the dispute.

You are therefore invited for a further hearing to be held on the 23rd August at 8.30am in my office. By copy of this letter, the other party is also invited to attend the meeting with all their documents. (All Emphasis mine).

Signed

Sarah Kulata Basangwa

COMMISSIONER LAND REGISTRATION

C.C. Mr. Kataabu George
P.O. Box 132
Bombo

In legal terms, **Black's Dictionary 8th Edition at page 436** defines a decision to be “*a judicial or agency determination after consideration of the facts and the law*”. The question therefore would be, does the 1st respondent's letter amount to a decision of the 1st respondent?

It is a strong contention by the 1st respondent that all her interventions in this dispute were in line with her mandate under section 91 Land Act. Therein, she is given powers to take such steps that are necessary to give effect to the Land Act by way of endorsement, alteration, cancellation or issuance of fresh certificates of title or otherwise. I fear that there was a misconception by the 1st respondent that her decision had only to be one which is contemplated under S.91 Land Act. This was not so in this case especially when one has to consider the facts that lead her to write the above letter. This is because, in her letter of 19/8/12 she states that a public hearing was conducted on the stated date during which the applicants' lawyers raised objections against further hearing of the dispute by her office. She must have been reacting to those particular objections (after evaluating both the facts and the law) and not necessarily making a decision, the one contemplated by S.91. Nonetheless when she related that she still had the mandate to hear the dispute, she was making and communicating a decision on that particular dispute and not necessarily on the entire complaint before her.

The Land Act does not provide format that the decision of the Commissioner should take and the practice (as was the case here) is that it takes the form of a simple letter. Further, I see nothing in the law to state that a decision to be subject to review must be a final decision, and even if it

were so, to my mind, this was a final decision made with respect to the objections raised by the applicant's lawyers. My finding therefore is that the 1st applicant's letter of 9/8/12 is a decision and therefore, the first requirement is satisfied.

That there were proceedings leading to the 1st applicant's decision is not in dispute. The 1st applicant provided evidence that public hearings were held during July and August 2013 respectively which were attended by the complainant and the applicants. She even provided some of the minutes. On the other hand, Mr. Mwebe states in his affidavit that the applicants and their counsel on 7/8/13 and 9/8/13 communicated their strong objections to the proceedings before the 1st respondent and indicated that they were no longer able to submit to her jurisdiction. Indeed, those proceedings have been temporarily halted by this court upon a consent being filed by the parties on 5/9/13. The second requirement is therefore also satisfied.

It is the 1st applicant who provides the information that there is an earlier complaint dated 17/10/10 which the Ag. Commissioner at one time handled. She also admits that the Commissioner Surveys and Mapping did at one time provide a survey report to assist in resolving the dispute. There is no doubt that both communications (quoted above) were issued by the same office, by persons holding the same position, albeit Mr. Nyombi was by then only in acting capacity. The relevant property in issue in Mr. Nyombi's communication is Mawokota Block 124 Plots 4, 6, 10, 15, 23 and 40 at Namutamala and that in the communication of the 1st respondent is Mawokota Block 124 Plots 302, 303 and 304 Namutamala Mpigi District. It is not in dispute that the latter three plots came as a result of subdivision of Block 124 Plots 15 and 24 and this is in fact, the crux of the complaint by the complainant Kataabu. It is therefore an issue that can be presented to this court for adjudication as to whether the 1st respondent was *functus officio* and acted *ultra vires* and with procedural irregularity when she made her decision. On those surrounding facts and in my view, the applicants were thus correct to seek an interim stay of the proceedings and seek judicial review.

I accordingly find that the communication of the 1st respondent dated 19/8/12 amounted to a decision, the type which can be the subject of judicial review and I accordingly find the first issue in favor of the applicant.

ISSUE TWO

If so, whether the 1st respondent's ruling/decision that she still had the mandate to hear the dispute and requiring the applicants to appear for a further hearing was legal, regular and procedurally proper?

In the case of **Nazarali Punjwani Vs. Kampala District Land Board and Another (HCCS No. 7 of 2005)** Justice Kasule held that “*judicial review controls administrative action under three heads; illegality, irrationality and procedural impropriety.....illegality is when a decision subject to review is made contrary to the law empowering the decision maker. The test is whether the decision maker has acted or not acted within the law.....*”

My brother Justice Eldad Mwangusya in **Yunus Tinkasimire and Others (supra)** while quoting the decision of **Council of Civil Service Unions Vs Minister of Civil Service (1985) Ac 2** held that;

“The grounds, a combination or one of them that an applicant must satisfy in order to succeed in a judicial review application are illegality, irrationality and procedural impropriety”

Justice Mwangutsya in that same case was of the view that;

“Illegality is when the decision making authority commits an error of law in the process of taking a decision”. He gave examples of illegality to include acting without jurisdiction or *ultra vires*.

He also found at page 10 that;

“Procedural illegality is when the decision making authority fails to act fairly in the process of its decision making. Which would includefailure by an administrative authority or tribunal to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision”.

In brief, the applicant argues that the 1strespondent acted in error under the law when she made a decision to re-visit a complaint which was already investigated and a decision made by her office. That the complaint was heard by the Ag. Commissioner first, by halting the issuance of titles with respect to the suit land to the applicants and then, taking individual testimonies from each party and considering a survey report from an independent surveyor. Having done so, he made and communicated his decision to the complainant and the applicants with the advice that

the former refers the matter to a court of law. He also authorized the issuance of the titles he had earlier halted to the applicants. They also argued that the actions of the 1st respondent were a procedural error because she should instead of continuing with handling the complaint have allowed her decision to go to appeal. That her actions were in contradiction of Section 91 (1) of the Land Act.

For the better understanding of the commissioner's powers, section 91 (1) of the Land Act provides as follows:-

Subject to the Registration of Titles Act, the Commissioner shall, without referring a matter to a court or a district land tribunal, have power to take such steps as are necessary to give effect to this Act, whether by endorsement or alteration or cancellation of certificates of title, the issue of fresh certificates of title or otherwise.

In my view, the section permits the Commissioner to give effect to the Act through investigations and a series of remedies which are well defined therein. The same section even opens up that mandate to any other remedy appropriate in the circumstances. According to his communication, Mr. Nyombi came to that conclusion after considering the complaint and a survey report/audit provided by the responsible office that the office of the Commissioner could not solve the matter, and advised the complainant to refer the matter to court. This to my mind was his final decision on the matter. It must be noted that the Land Act does not give a particular format in which the Registrar's decision is to be communicated and therefore, I am not prepared to read into that document that by its language, content and scope it did not disclose a decision of the Commissioner Land Registration.

In fact, in the context of the complaint and the way it was investigated, if there was any doubt as to the fact that the Ag. Commissioner had made his decision, his conduct afterwards was a demonstration of an intention to end the intervention of his office. According to the evidence of Mwebe and Senteza which was not controverted, the Ag. Commissioner went ahead to lift the ban on the issuance of the titles in respect of the suit land to the applicants. This could even be interpreted that he was satisfied that the titles were not issued in error.

The 1st respondent also argued that Mr. Nyombi never heard the complaint. This probably could be that there is no evidence that he conducted a 'public' hearing. He may have chosen not to do so, and restricted himself to making inquiries of each party individually. In any case, under S.91(1) (2a) he was not bound to comply with rules of evidence that are applicable in a court of law.

Further, in an attempt to justify her actions, the 1st respondent claims that after Mr. Nyombi's communication, she obtained new information that was important to the complaint. That may be so, but she also did mention that the alleged new matters concerned fraudulent transactions. With due respect, neither the Land Act nor the RTA gives the commissioner powers to adjudicate in matters where fraud is alleged. However, if I was not to hold so, the discovery of new matters did not entitle the 1st respondent to re-open the proceedings of her office, especially where one party was opposed to it and explicitly communicated that they were not prepared to be party to any proceedings before her. I agree with counsel for the applicants that the Land Act confers no jurisdiction on the Commissioner to review or continue the dispute which her office has concluded and given its decision. The authority quoted by counsel on that point, is apt; jurisdiction is a creature of statute and where a judicial or quasi judicial body or public officer exercises jurisdiction not vested in them, then the proceedings that are subject to those proceedings are a nullity. See **Baku Raphael Obura & Anor Vs the Ag. General (SCCA No.1/2005)**.

I accordingly find that any proceedings conducted by the Commissioner after the decision of her office of 9/7/12 were a nullity and can be quashed by this court. She should have heeded the request of the applicant's counsel to halt the proceedings, and give the aggrieved party an opportunity to proceed to the High Court on appeal. I therefore also find this issue in favour of the applicants.

ISSUE THREE

Whether the 1st respondent was acting *ultra vires* her powers in hearing and insisting to hear a dispute which had already been handled and concluded by her predecessor

The court in **Re De Souza Vs Tanga Town Council (1961) EA 377** provided general principles which should guide statutory or administrative entities sitting in a quasi judicial capacity, i.e. If a statute prescribes, or statutory rules or regulations binding on a domestic tribunal prescribe, the procedure to be followed, that procedure must be followed. I have already found that the 1st applicant failed to adhere to the procedure laid down in Section 91 Land Act. It follows therefore that the 1st respondent by insisting to have the mandate to continue with hearing of the complaint in respect of the suit land, for which her counterpart had already made a decision, acted contrary to the procedure set out under Section 91 of the Land Act. Such an act was beyond her powers and hence *ultra vires*. I accordingly also find this issue in favour of the applicants.

ISSUE FOUR

What was the proper procedure for the complainant to take after being dissatisfied with the decision of the Commissioner, Land Registration?

Having found that a decision with regard to the status of proprietorship of the suit land was made on 9/7/12 by Robert V. Nyombi, the Ag. Commissioner, under Section 91(10) Land Act, the only option open to the complainant was to appeal that decision to this court. Such an appeal could have conversed any misgivings or dissatisfaction he would have had against Mr. Nyombi's decision and even permitted him (after seeking leave) to present any new evidence obtained after Mr. Nyombi's decision was relayed. I therefore again agree with the applicant on this issue.

ISSUE FIVE

Whether the respondent is biased

Much has been said by counsel for the applicants on this issue and in fact it appears to have been introduced in these proceedings by way of an amendment. However, this court is not prepared to make a decision on this point on whether or not the 1st respondent is conducting the hearing with respect to the suit land with bias. This is because, I have already found that those proceedings are illegal and therefore a nullity and liable to be quashed. Any actions of the 1st respondent with respect to those proceedings are now of no legal consequence. In any case, that is an issue that can only be raised in the event that I had agreed that the proceedings are still lawfully on-going, but even then, It would be an issue to be raised only after the 1st applicant has communicated

her final decision in the entire dispute which as I have already stated, she cannot do. I accordingly decline to make a finding on this issue.

ISSUE SIX

Whether the applicants are entitled to the reliefs sought?

The applicants prayed for an order of judicial review, declarations, an injunction, general damages and costs of the application. It is trite law that damages must be proved. General damages are meant to place the successful party back to his/her original position before the injury. Although no strict proof is required, the court should at least be informed of the nature and extent of the injury for which such damages are being claimed as this will guide the court on the commensurate compensation to be awarded. No such evidence was placed before the court in this case, and I therefore decline to award any general damages to the applicants.

The above notwithstanding, the applicants have substantially succeeded on their claim and I accordingly allow the prayers for judicial review and grant the following orders:-

1. A writ of certiorari doeth issue quashing the decision of the 1st respondent communicated to the applicants by a letter dated the 19th day August 2012 stating that the 1st respondent still had the mandate to handle the dispute in respect of land comprised in Mawokota Block 124 plots 302, 303 and 304 at Namutamala, Mpigi District.
2. A writ of certiorari doeth issue quashing the decision of the 1st respondent communicated to the applicants by a letter dated the 19th of August 2012 inviting them for a further hearing of the dispute in respect of land comprised in Mawokota Block 124 Plots 302, 303 and 304 at Namutamala, Mpigi District.
3. An order of prohibition doeth issue restraining the 1st respondent from proceeding with the hearing of the dispute in respect of land comprised in Mawokota Block 124 Plots 302, 303 and 304 at Namutamala, Mpigi District.

4. A writ of certiorari doeth issue quashing the decision of the 1st respondent stopping any further subdivisions or surveying of the land comprised in Mawokota Block 124 Plots 302, 303 and 304 at Namutamala, Mpigi District.

 5. An order of mandamus directing the 1st respondent to close the file of the complaint file in respect of land comprised in Mawokota Block 124 Plots 302, 303 and 304 at Namutamala, Mpigi district as the dispute concerning the said land has already been handled and resolved by her office.

 6. An order directing the 1st respondent and the 2nd respondent to produce before this court the proceedings with respect to land comprised in Mawokota Block 124 Plots 302, 303 and 304 for quashing.

 7. An injunction restraining the respondents from hearing or making any further orders of directives relating to and affecting proprietorship and propriety of the applicants' land comprised in Mawokota Block 124 Plots 302, 303 and 304 at Namutamala, Mpigi District.
- The respondents shall meet the costs of the application.

I so order.

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EVA LUSWATA K.
JUDGE
16/6/14