

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
IN THE MATTER OF THE LAND JUDICATURE (JUDICIAL REVIEW) RULES
MISC. CAUSE NO. 040 OF 2014**

- 1. PAULO SAKU BUSAGWA**
2. NDIKOLA SEKAMWA APPLICANTS
- VERSUS**
- 1. COMMISSIONER LAND REGISTRATION**
2. KIRYOWA HARUNA RESPONDENTS

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

This application was presented by notice of motion under the Judicature Act and Judicial Review Rules seeking judicial reliefs for the writs of certiorari and mandamus calling for, and quashing a decision of the Commissioner Land Registration (hereinafter referred to as Commissioner) with respect to land comprised in Gomba Block 55 Plot 3 at Lwabitosi (hereinafter called the suit land). At the hearing, a preliminary objection was raised for 1st the respondent on the ground that the applicant had used the wrong procedure to pursue their remedy.

Sekitto Moses counsel for the 1st respondent argued that the tenements of bringing applications for judicial review have it in principle that the remedies are available only if the aggrieved party does not have any other alternative. That in the circumstances of this case, there was an available remedy of appeal under Section 91 (10) Land Act. That in fact, the applicants had at one time lodged a notice of appeal through their previous advocates which they did not pursue but instead filed this application. Counsel relied on the ruling of Justice Madrama in **HCCS. No. 05/09 Uganda Crop Industries Ltd Vs URA**. They further relied on *Re: MUSTAPHA RAMATHAN C.A.C.A. No. 29 of 1996 (reported in 1999) KALR p.517* where J.P. Berko stated that; “..... S.34 (6) of the Judicature Act enjoins a litigant who wishes to apply for a writ of certiorari, first to exhaust his right of appeal before being eligible to apply for the writ of certiorari.....”

Counsel Dennis Nseerko for the 2nd respondent generally agreed with the submissions of Sekitto and added that judicial review is not an appeal. It was then submitted that the application is an abuse of court process and should be struck off with costs.

In response, counsel Katabalwa for the 1st applicant argued that the Commissioner proceeded under S.165 of the Registration of Titles Act by summoning the parties to produce certain documents which were annexed to the application. That S.165 RTA is not connected to S.91 Land Act and does not give an aggrieved party the right to an appeal. That the Commissioner was therefore bound to confine herself to S.165 RTA. Secondly that, jurisdiction of the High Court in judicial review is a supervisory and discretionary remedy.

In rejoinder, it was argued for the respondent that the parties received the summons from the Commissioner through their advocates. That S.165 RTA simply gives the Commissioner powers to summon any person and/or require documents in a bid to exercise her powers and that in that respect, the applicants were summoned and availed the documents as requested and thereafter, the Commissioner arrived at a decision which was communicated to the parties. That the complaint, upon which this decision was based, was in fact brought under S.91 (1) Land Act not S.165 RTA. That S.91 Land Act gives a clear procedure of what is done if the Commissioner finds an irregularity on the register or receives a complaint from any aggrieved party.

The respondents without attacking the merits of the main application contend that the applicant should have proceeded by appeal and not judicial review. They also argue that the procedure followed is only open to the applicant upon satisfaction that the right of appeal is not available to them. In response, the applicant provided authorities to show that appeals are creatures of statute. See for example, **Baku Raphael Obura & Anor Vs AG SCCA No. 41/05**. That the Commissioner summoned and made her decision under S. 165 RTA which gives no right of appeal. They also provided several authorities in which it was held that a court is allowed to invoke its inherent powers even where a special remedy is provided. That even where a right of appeal exists, judicial review can apply since the High Court exercises similar jurisdiction both under appeal and review.

I have noted that the complaint in the application is that the Commissioner wrongfully and irrationally cancelled the applicants' title in respect of the suit land. Through the affidavit of Saku Paul Busagwa, they admit being summoned before the Commissioner by a summons issued under S. 165 RTA on 25/11/13. They did not attend the hearing but sent a communication explaining their position. That notwithstanding, the Commissioner made the decision to cancel their title and notified them of the cancellation by her communication of 15/5/14. It is that decision that they seek in the main application to call forward before this court to be quashed.

S.91 (1) RTA gives special powers to the Commissioner whereby:-

“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 title the issue of fresh certificates of title or otherwise”.

The better part of that section then proceeds to provide the steps that the Commissioner should take before exercising her mandate above, including conducting hearings and communicating her decision. S.91 (10) then provides that

“Any party aggrieved by a decision or action of the Commissioner under this section may appeal to the District Land Tribunal within sixty days after the decision was communicated to the party”.

On the other hand, S.165 RTA gives the Commissioner powers to issue a summons under her hand to require a proprietor or any other person interested in any land in respect of which any dealing is proposed to be transacted or to be registered to appear before her to give an explanation concerning such land or produce any document affecting it. The Commissioner may examine upon oath such person. And if such person refuses or neglects to attend the Commissioner for the purpose of being examined, or to produce any such document required or neglects or refuses to offer explanation, and where in the opinion of the Commissioner such information or, document withheld is material, the commissioner shall not be bound to proceed with the transaction.

I do agree with counsel for the applicant that S. 165 RTA does not give the aggrieved party a right of appeal. Indeed, a cursory reading of that section will show that it is merely a procedural section that provides the method through which the Commissioner can invite parties to a dispute before her to assist her in any investigations with regard to any land. She may in her discretion hold a public hearing before making a decision. Indeed, I find no section in the RTA that gives a direct provision for appeal against the decisions of the Commissioner. A possible provision to question the actions of the Commissioner would be S. 182 RTA under which an aggrieved party may apply to the High Court to summon her to show cause why she has declined to carry any of her duties under the RTA. This would not be applicable in this case, as she did in fact execute her duty.

In the absence of an express provision in the RTA, one would then turn to the Land Act which in law is another piece of legislation that makes provision for the administration of land in Uganda and the powers of the Commissioner generally. I decline to take the argument of the applicant that the provisions of the Land Act cannot cross reference to the RTA and vice versa or that the decisions of the Commissioner made under the RTA cannot be appealed against using the Land Act. I do agree that the RTA is the earlier Act and that its provisions do take precedence over the Land Act. However, in the present circumstances, the action by the Commissioner to cancel the applicants' title was done while exercising her powers under S. 91(1) of the Land Act. It follows therefore that any remedy against her decision could only be sought under the provisions of that section which in this case would be an appeal to the High Court.

At the hearing, the applicant did not appear to have serious contest against the principle that the remedy of judicial review is only available after all other remedies are absent or exhausted. Their argument only being that the appeal was not an available option under S. 165 RTA. However, their counsel appeared to shift his position he availed authorities in which the courts were of the view that the existence of a specific procedure provided or remedy cannot operate to restrict or exclude the courts inherent jurisdiction under S.101 (now S.98 CPA) of the statute. (See for example **National Union of Clerical, Commercial & Technical employees Vs NIC SCCA.No17/1993** (reported) IV KALR 60. They also sought to rely on the ruling of Justice Mulyagonja in **Twine Amor Vs Tamusuza James (C/R 11/09)** where she held that the High Court can revise a decision under S.83 CPA even where an appeal would lie.

I have also previously held that the provisions of S.91 (10) Land Act by their wording are not mandatory and an aggrieved party may proceed by plaint if aggrieved by proceedings of the Commissioner which may result into a decision that is prejudicial to them (see **Deo Semakula Vs Bayogera Valentine Kayungo & Ors HCCS No.422/13**). I stress however that in case that the suit was filed before the Commissioner's decision was made. The above notwithstanding, it appears to be the strong view of the High Court that judicial review cannot be available where alternative procedures are available and more convenient see for example **Uganda Crop Industries Ltd Vs URA (supra)**. Justice Bamwite holding the same view in **Micro Case Insurance Ltd Vs Uganda Insurance Commission (Misc. Application No.31/09) held the view** that review orders will be available only if there is no alternative remedy or where it exists as (in this case by way of appeal), it is shown to be inconvenient, less beneficial, less effective or totally ineffective. The applicants did not show by their pleadings why they chose to ignore the remedy of appeal and how it would be prejudicial to their clients if they used it. Further, my understanding of the finding in **National Union of Clerical, Commercial & Technical Employees Vs NIC (supra)** is that, it remains a question of court's discretion whether or not to invoke court's inherent jurisdiction to disregard a specific provision or procedure provided by the law. Certainly such discretion is to be exercised judiciously after the court is satisfied that there is no other available remedy. Therein, the Learned Justices while quoting the trial Judge stated that

“How much greater is the argument in favour of the exercise of this inherent power in a case in which appeal, review and revision are not available nor is there any specific provision for any remedy and the aggrieved party can only fall back on discretionary writs”

I see nothing of the sort in this application.

Therefore, in the face of clear provisions of S.38 (.....) of the judicature Act, and previous judgments of my brother and sister judges of this and the Higher Courts, in the circumstances of this case, the applicants were bound to first exhaust the available remedy of appeal with the

respondents' counsel that the application is incompetent and move to uphold the preliminary objections under S.91 (10) Land Act which they did not do. I therefore do agree.

The application is accordingly dismissed with costs to the respondents.

I so order.

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EVA LUSWATA K.
JUDGE
14/7/14