

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS CAUSE No. 0097 OF 2016

UNZI GODFREY LICHU **APPLICANT**

VERSUS

1. MOYO DISTRICT LOCAL GOVERNMENT }
2. MOYO DISTRICT LAND BOARD } **RESPONDENTS**

Before: Hon Justice Stephen Mubiru.

RULING

This is an application for judicial review seeking an order of mandamus compelling the second respondent to procure a report from the Area Land Committee of Moyo Town Council and an injunction restraining the first respondent from interfering with the applicant’s quiet possession of land situate at Moyo Central village in Moyo Town, an award of damages and costs. It is made under the provisions of rule 6 (1) and (2) of *The Judicature (Judicial Review) Rules, S.I 11 of 2009* and section 36 of *The Judicature Act*.

It is supported by the affidavit the applicant in which he states that he is the holder of land under customary tenure, situate at Moyo Central village in Moyo Town. On 26th February 2014, he lodged an application with the Area land Committee for the conversion of his holding into leasehold. The Area Land Committee duly inspected the land on or about 14th March 2014 but has since then, despite several reminders and requests of the applicant and his advocate, failed, refused and or neglected to forward its report to the second respondent. Instead, on or about 26th June 2014 and subsequently on 24th August 2014, the applicant received copies of letters from the Area Land Committee and the first respondent respectively, indicating that the first respondent had instead allocated the land in question to three other people. The applicant contends that the conduct of the respondents is prejudicial to his interests in the land in issue hence this application.

By an affidavit in reply sworn by a one Vita Betty Leo, the first respondent's Land Officer and the second respondent's Secretary, the application is opposed. The first respondent contends that it has no interest in the land in issue and has never allocated it to anyone. The second respondent contends that it has no supervisory powers over the Area Land Committee, which Committee as well is not its agent and therefore it is not under any obligation to compel the production of the report as demanded by the applicant. The Area Land Committee on or about 23rd June 2014 required the applicant to produce a copy of his father's tenancy agreement and receipts for payment of rent which he failed to. The respondents therefore pray that the application be dismissed with costs.

When the application came up for hearing, counsel for the applicant Mr. John Matovu submitted that the two respondents are accused of inaction. They have duties to perform in respect of ordering the area Land Committee to submit a report of recommendations on whether or not the applicant who applied for a freehold title for his customary land is entitled to it. Looking at the affidavit in reply, it is not in issue that the Area Land Committee has refused to send a report, the committee inspected the land. It held a meeting. It sat back. The applicant has complained to the second respondent and the second responded has not replied. In paragraphs 3, 4 and 5 and 8 of the affidavit in reply they contend they have no such duty but under section 64 (1) of *The Land Act*, the District Council appoints the Area Land Committees and under sub section 4 the same section the District Council can dismiss any member of the committee for failure to perform their duties. The Committee therefore is an agent of the first respondent. It is not autonomous. The inspection was done 21st March 2014. Under sections 59 (1) (g) and section 60 (2) (d) of *The Land Act*, their main function is to allocate land and register complaints of this nature. The Area Land Committee has met, fees were paid, hearing of the parties done, complaints have been written about the failure of the Land Committee to furnish a report and yet no action has been taken. He submitted therefore that it is incumbent upon the second respondent to move the committee. The section cited give the respondents it wide powers to do so. In the meantime the two respondents have no interest in the land yet they are trying to allocate it. They should therefore be retrained. He prayed that the application be allowed with costs.

In response, Counsel for the respondents Ms. Mudoola Diana, State Attorney, submitted that according to section 64 of *The Land Act*, the powers of supervision of Area Land Committees are

with the sub-county. The duty therefore lies with Moyo Town Council and not the respondents. Paragraphs 8 10, 13 of the affidavit in support of the application reveal that letters were written directed to Moyo Town Council. This is land within the Town Council. Section 6 of *The Local Government Act* grants corporate existence to the sub-county Local Governments and therefore the acts complained of are acts of the Town Council.

It is the Local Government at that level that has failed to act and not the first respondent. The issue was never brought to the attention of the first respondent. Although the first respondent has a duty to supervise the lower levels of government, the supervision of the lower levels is through minutes and reports. They never have had an opportunity to act because no such minutes and reports have been forwarded to them. Since the filing of the application, they have not taken steps to inquire into the complaint because they have no duty to do so. Section 7 of *The Land Act* stipulates the duties of the Land Boards. Their duty is to receive recommendation from the Area Land Committee. Land in urban areas does not require these reports. The function of the board and those of the committees are independent. The board has no obligation to supervise the Area Land Committees. The land board has not tried to allocate the land. The affidavit in support of the application in its paragraph 10 refers to Annexure “G”. The letter was from Moyo Town Council and not by the Land Board or Moyo District Local Government. She therefore prayed that the application be dismissed with costs.

According to rule 3 of *The Judicature (Judicial Review) Rules, 2009, S.I. 11 of 2009*, applications may be made under section 38 (2) of *The Judicature Act*, for orders of mandamus, prohibition, certiorari or an injunction (by way of judicial review). Judicial review of administrative action is a procedure by which a person who has been affected by a particular administrative decision, action or failure to act of a public authority, may make an application to the High Court, which may provide a remedy if it decides that the authority has acted unlawfully. While it has been said that the grounds of judicial review “defy precise definition,” most, if not all, are concerned either with the processes by which a decision was made or the scope of the power of the decision-maker. A public authority will be found to have acted unlawfully if it has made a decision or done something: without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of reasonableness); or without

observing the rules of natural justice (unlawful on the grounds of procedural impropriety or fairness). Failure to observe natural justice includes: denial of the right to be heard, the rule against actual and apprehended bias; and the probative evidence rule (a decision may be held to be invalid on this ground on the basis that there is no evidence to support the decision or that no reasonable person could have reached the decision on the available facts i.e. there is insufficient evidence to justify the decision taken).

Decisions made without the legal power (*ultra vires* which may be narrow or extended. The first form is that a public authority may not act beyond its statutory power: the second covers abuse of power and defects in its exercise) include; decisions which are not authorised, decisions taken with no substantive power or where there has been a failure to comply with procedure; decisions taken in abuse of power including, bad faith (where the power has been exercised for an ulterior purpose, that is, for a purpose other than a purpose for which the power was conferred), where power not exercised for purpose given (the purpose of the discretion may be determined from the terms and subject matter of the legislation or the scope of the instrument conferring it), where the decision is tainted with unreasonableness including duty to inquire (no reasonable person could ever have arrived at it) and taking into account irrelevant considerations in the exercise of a discretion or failing to take account of relevant considerations. It may also be as a result of failure to exercise discretion, including acting under dictation (where an official exercises a discretionary power on direction or at the behest of some other person or body. An official may have regard to government policy but must apply their mind to the question and the decision must be their decision).

It may as well arise where there has been an excess of jurisdiction, including: error of law (in arriving at their decision, a decision-maker must not misinterpret the legislation under which they are acting or in any way indicate a misunderstanding of the law. Like *ultra vires* therefore, this ground involves persons or bodies acting beyond their lawful authority. Historically though, the term was applied to non-judicial bodies exercising legislative or administrative powers, whereas jurisdictional error was used in relation to inferior courts or tribunals exercising judicial or quasi-judicial powers) or jurisdictional error (under this ground, a decision-maker must have legal authority to deal with the matter upon which they propose to make a decision) and fraud (In most cases, the sort of fraud which occurs is the falsification or suppression of evidence).

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

The court ought to proceed with due regard to the limits within which it may review the exercise of administrative discretion when interfering with an administrative function of an establishment or an employer as stated in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1947] 2 ALL ER 680: [1948] 1 KB 223, thus; - (i) illegality: which means the decision-maker must understand correctly the law that regulates his decision making power and must give effect to it. (ii) Irrationality: which means particularly extreme behaviour, such as acting in bad faith, or a decision which is "perverse" or "absurd" that implies the decision-maker has taken leave of his senses. Taking 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 and (iii) Procedural impropriety: which encompasses four basic concepts; (1) the need to comply with the adopted (and usually statutory) rules for the decision making process; (2) The common law requirement of fair hearing; (3) the common law requirement that the decision is made without an appearance of bias; (4) the requirement to comply with any procedural legitimate expectations created by the decision maker.

It is trite that administrative systems which employ discretion vest the primary decision-making responsibility with the agencies, not the courts. As a result, the judicial attitude when reviewing an exercise of discretion must be one of restraint, often extreme restraint, only intervening when the decision is shown to have been unfair and irrational. The principle in matters of judicial review of administrative action is that to invalidate or nullify any act or order, would only be justified if there is a charge of bad faith or abuse or misuse by the authority of its power and in matters of administrative decision making in exercise of discretion, the challenge ought to be over the decision making process and not the decision itself. The jurisdiction to decide the substantive issues is that of the authority and the Court does not sit as a Court of Appeal, since it

has no expertise to correct the administrative decision, but merely reviews the manner in which the decision is made. It is elsewhere said that, if a review of administrative decision is permitted, the court will be substituting its own decision without the necessary expertise, which itself may not be infallible.

It follows from this that there will be circumstances in which although a decision is not the correct or preferable decision on the facts, it will not be open to judicial review. Conversely, there may be situations where a decision is the correct or preferable one, but may be set aside because it is subject to legal error. As noted earlier, the results or outcomes of the decision-making process are not primary concerns of judicial review. In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*: (1986) 162 CLR 24, 40-41 citing *Wednesbury Corporation [1948] 1 KB, 228* the court opined;

The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion, which the legislator has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.

Similarly in *Ridge v. Baldwin and Others [1963] 2 All ER 66 at 91, [1964] AC 40 at 96*, it was observed;

a danger of usurpation of power on the part of the courts ... under the pretext of having regard to the principles of natural justice ... I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party dismissed an opportunity for putting his case.

Lord Brightman came to the same conclusion when in his holding at page 154 where he said: Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

Mandamus is a writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, to correct a prior action or failure to act. It directs a lower court or a government officer to perform mandatory or purely ministerial duties correctly. It is used to compel the public statutory authorities to discharge their duties and to act within the

bounds of their authority. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. Mandamus lies against authorities whose duty is to perform certain acts and they have failed to do so. According to *Black's law dictionary, Fourth Edition* at p 1113, mandamus is defined in the following terms;

The action of mandamus is one, brought in a court of competent jurisdiction, to obtain an order of such court commanding an inferior tribunal, board, corporation, or person to do or not to do an act the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station. Where discretion is left to the inferior tribunal or person, the mandamus, can only compel it to act, but cannot control such discretion.

Therefore, for mandamus to issue, the applicant must have a legal right to the performance of a legal duty or a matter of administrative decision affecting his rights and freedoms. It will not issue where to do or not to do an act is left to the discretion of the authority. The applicant must show that there has been an unequivocal demand to perform a duty, that a specific public duty lays within the mandate of the authority concerned and that it should be performed.

It is contended by the applicant that the *Local government Act* and *The Land Act* impose on the respondents respectively supervisory obligations over the Areal Land Committee of Moyo Town Council and that they have a duty to compel it to submit to the second respondent the report of its inspection of land relating to the application filed by the applicant to the second respondent for conversion of his customary land holding into freehold.

The preamble to *The Local Governments Act* states that it is an enactment intended, among other objectives, to “give effect to the decentralisation and devolution of functions, powers and services; to provide for decentralisation at all levels of local governments.” Decentralisation is usually referred to as the transfer of powers from central government to lower levels in a political-administrative and territorial hierarchy. The Act in essence effects administrative decentralisation by way of transfer of powers from the central government to lower-level governments or local authorities which are upwardly accountable to the central government. Under the arrangement, different levels of local governments administer resources and matters that have been delegated to them by the Central government. The arrangement also involves the devolution of some governance responsibility for specified functions.

Under section 6 of *The Local Governments Act*, every local government council is a body corporate with perpetual succession and a common seal, capable of suing or being sued in its corporate name. The Act created a system in which government or public administration is divided among many tiers. Each of these levels has a sizeable component of its activities funded from the public budget; each has authority to administer a range of public services, and has a territorial jurisdiction. The various levels of local governments are therefore semi-autonomous entities within that system each of which responds to the next tier in the hierarchy up to the central government but are not totally controlled by it. It is a system designed to ensure that decisions are made at the level at which officials have the appropriate competences.

Because of the mix between devolution and decentralisation, in the performance some functions, for example local revenue collection, the local governments have decision-making autonomy while in others, for example healthcare, they are essentially administrative agents of higher level governments. On some issues, for example some aspects of administration of registered land, the authority to decide is not assigned to one tier in toto, but shared between actors from several tiers. It therefore is not entirely correct to state, as counsel for the respondent argued, that each local government is entirely autonomous as a corporate entity. Be that as it may, I have not found any legal provisions that cast a duty upon the first respondent, or a role in the management and administration of land under the mandate of the second respondent. Regulation 93 of *The Land Regulations, 2004* provides for delegation of powers of the second respondent but none are delegated to the first respondent.

However, in matters of administration of land that is under the mandate of the second respondent, *The Land Act* does not allocate different policy areas to different tiers of local governments; rather, it allocates to them roles and procedural duties in the decision-making process. For example, under section 64 (1) and (2) of the Act, Area Land Committees are appointed by the District Council on the recommendation of the Sub-county Council, while those in urban areas are appointed on the recommendation of the urban council, and those in the city, on the recommendation of the City Division Council. Under section 64 (5) of the Act, it is the District Council which has authority to terminate the appointment of a member of the committee for his or her inability to perform the functions of his or her office or for any good cause. Under

section 66 (2) of the Act, all expenses incurred by or on behalf of the Area Land Committee are charged on the district administration funds.

According to section 64 (5) of *The Land Act*, the major function of an Area Land Committee is to assist the District Land Board in an advisory capacity on matters relating to land, “including ascertaining rights in land,” but it may also perform any other function conferred on it by or under the Act or any other law. Upon conducting a public hearing intended to ascertain rights in land, regulation 21 (1) (t) and (v) of *The Land Regulations, 2004* requires the Committee, subject to sections 6 (6) (c) of the Act (where the application is for a certificate of customary ownership) and 66 (2) of the Act (regarding remuneration and expenses of the Committee), to submit its reports to the Board once a month.

The centrality of a report of the Area Land Committee to decisions relating to applications for leaseholds is evident in section 13 of *The Land Act*. Under that section, the Board, although not bound by the recommendations of the Committee, requires the report of the Committee to guide its decisions which may include; confirming the recommendations of the Committee, varying the recommendation of the Committee, returning the report to the Committee with directions as to what action, including any further investigations or hearings, the Committee is to undertake, or rejecting the report of the Committee.

The first respondent may not contest its legal obligation to supervise the Area Land Committees within its territorial jurisdiction since it is responsible for their appointment, discipline and funding. On the other hand, a significant portion of the mandate of the second respondent cannot be implemented successfully without the right information coming from the Area Land Committees which exist principally to provide it with advisory services. It is for that reason that *The Land Regulations* provide a mechanism of regular reporting on the results of Committees’ activities to the second respondent. It is the duty therefore of the second respondent to ensure compliance with Regulation 21 (1) (t) and (v) of *The Land Regulations, 2004* by the Area Land Committees.

In the instant case, the Area Land Committee of Moyo Town Council inspected the land on or about 14th March 2014 but has since then, despite several reminders and requests of the applicant and his advocate, failed, refused and or neglected to forward its report to the second respondent. Both respondents have capacity and duty in law to compel the Area Land Committee of Moyo Town Council to submit to the second respondent the report of its inspection of land relating to the application filed by the applicant to the second respondent for conversion of his customary land holding into leasehold, which duty they have failed to perform. The applicant has proved that he made unequivocal demands for performance of that duty, that this specific public duty is within the mandate of the two respondents and that it should be performed. I therefore find this to be a proper case for the issuance of an order of mandamus against the two respondents.

It was argued by counsel for the respondent, that the first respondent has never had an opportunity to act because no minutes and reports have been forwarded to it from the lower levels of the local government tiers. When challenged as to why no action has been taken since the filing of this application on 14th December 2016, her response was that the first applicant has not taken steps to inquire into the complaint because it does not have a duty to do so. Statutory decision-makers have a positive duty, in cases such as this, to make inquiries as to an issue that has come before them. I would like in this regard to adopt the concept of a “model litigant” as applied in Australia where it is viewed by the High Court as a “truism” that statutory bodies, Governments and their emanations, should be model litigants (see *Roads and Traffic Authority of NSW v. Dederer* (2007) 234 CLR 330; [2007] HCA 42 at 298 per Heydon J; also see *Commissioner of Main Roads v Jones* (2005) 79 ALJR 1104; [2005] HCA 27 at 84 per Callinan J). The nature of obligations imposed by the concept is as follows:

- a. The obligation to act as a model litigant requires more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations. Essentially it requires that the State and its agencies act with complete propriety, fairly and in accordance with the highest professional standards. The obligation requires that the State and its agencies, act honestly and fairly in handling claims and litigation by:
 - i. dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation;

- ii. paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid;
- iii. acting consistently in the handling of claims and litigation;
- iv. Endeavouring to avoid litigation, wherever possible. In particular regard should be had to use of Alternative Dispute Resolution.
- v. where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:
 - not requiring the other party to prove a matter which the State or an agency knows to be true; and
 - not contesting liability if the State or an agency knows that the dispute is really about quantum;
- vi. not taking advantage of a claimant who lacks the resources to litigate a legitimate claim;
- vii. Not relying on technical defences unless the interests of the State or an agency would be prejudiced by the failure to comply with a particular requirement.
- viii. Not undertaking and pursuing appeals unless the State or an agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interest of the State or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable; and
- ix. Apologising where the State or an agency is aware that it or its lawyers have acted wrongfully or improperly.

The principles as to the proper role of the executive government were succinctly stated by Mahoney J, in *P & C Cantarella Pty Ltd v. Egg Marketing Board (NSW)* [1973] 2 NSWLR 366 at 383 in the following terms:

The duty of the executive branch of government is to ascertain the law and obey it. If there is any difficulty in ascertaining what the law is, as applicable to the particular case, it is open to the executive to approach the court, or afford the citizen the opportunity of approaching the court, to clarify the matter. Where the matter is before the court it is the duty of the executive to assist the court to arrive at the proper and just result.

The approach adopted by the respondents in this application in seeking to abdicate their statutory roles, duties and obligations to guarantee efficient decision-making in land administration within the geographical area of their jurisdiction is a far cry from the standard expected of them as model litigants. Of local governments and statutory bodies is expected the highest standards in dealing with the citizens of this country. It was grossly inappropriate for the respondents to stand by and in effect require the applicant to seek these prerogative remedies, thereby imposing on him an unnecessary burden.

Rule 8 of *The Judicature (Judicial Review) Rules, 2009* empowers the court to make an award of damages in addition to grant of a prerogative order where there has been an unlawful administrative act, breach of statutory duty, breach of contract or other cause of action, provided such a claim was included in the application and is one which if it 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. The applicant has had to endure three years of inaction on the part of the respondents. Unfortunately though, the court has not been furnished with any material upon which an assessment of damages, other than nominal ones, can be made. I award the applicant shs.5,000,000/= as general damages.

I consider an injunctive relief inappropriate in the circumstances of this application because such an order will prevent a proper inquiry into the applicant's claim of customary ownership of the land in respect of which he applied for a freehold. In the final result, an order of mandamus hereby issues against the Chief Administrative Officer of the first appellant and the Secretary of the second appellant requiring them to compel and ensure that the Areal Land Committee of Moyo Town Council submits to the second respondent, within one month from today, the report of its inspection of land relating to the application filed by the applicant to the second respondent for conversion of his customary land holding into freehold. The costs of the application are as well awarded to the applicant.

Delivered at Arua this 27th day of April 2017.

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Stephen Mubiru
Judge
27th April 2017.