

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS CAUSE NO. 303 OF 2018**

- 1. YOSIYA B. ETUUSA
- 2. SETH MAGAMBO (ADMINISTRATORS OF THE ESTATE OF THE LATE NIMROD ETUUSA :.....: APPLICANTS

VERSUS

- 1. THE COMMISSIONER LAND REGISTRATION
- 2. THE DISTRICT STAFF SURVEYOR, WAKISO DISTRICT
- 3. KYASOOKA HOSEA :.....: RESPONDENTS
- 4. KANOONYA MOSES
- 5. KYABALIBAFUMA SUZAN (ADMINISTRATORS TO THE ESTATE OF THE LATE S. KITAKA NANKERE)

AND

- 1. KYAZZE HUSSEIN
- 2. LUGUMIRA ROBERT
- 3. KITYO STANLEY
- 4. KUSSIMA SARAH :.....: INTERESTED PARTIES

BEFORE: LADY JUSTICE LYDIA MUGAMBE

RULING

a) Introduction

- 1. This judicial review application was brought under section 36(1) of the Judicature Act and Rules 3 and 6 of the Judicature (Judicial Review) Rules, 2009 seeking:

- i. Certiorari quashing the decision of the Commissioner land registration (herein after the Commissioner) that canceled the certificate of title for land comprised in block 154 plot 9 (formerly plot 1) land at Bukelele, Wakiso.
 - ii. Certiorari quashing the decision of the Commissioner to issue a special certificate of title to Hosea Kyasooka, Kawooya Moses and Kyebalibafima Suzan (as administrators to the estate of the Late S. Kitaka Nankere).
 - iii. Prohibition of the district staff surveyor, Wakiso district from carrying out the boundary opening of the Applicant's land comprised in block 154 plot 9 (formerly plot 1) land at Bukelele, Wakiso.
 - iv. Mandamus directing the Commissioner to cancel the special certificate of title issued in respect of the suit land.
 - v. An order that the Respondents jointly and severally pay the Applicants general and exemplary damages.
 - vi. Costs of this application.
2. Mr. Rashid Ssemambo of M/s. Ssemambo & Ssemambo Advocates represented the Applicants, Mr. Sekitto Moses represented the first Respondent, Ms. Nakasagga Rashida of M/s. Nakasagga & Co. Advocates represented the second Respondent, Mr. Sseguya Samuel of M/s. Sseguya & Co. Advocates represented the third, fourth and fifth Respondents and Mr. Bemanyisa Adonijah represented the first, second and third interested parties.
3. The application was supported by the affidavit of the first Applicant. The grounds for the application are that the decision by the Commissioner to cancel the Applicants certificate of title for the suit land was reached arbitrarily and through procedural impropriety. The decision to issue a special certificate of title for the suit land was reached arbitrarily and in

total disregard of the rules of natural justice. The Applicants were never given the right to be heard by the Respondents before cancellation of their certificate of title to the suit land and before the Respondents unilaterally decided to open the boundaries of the suit land. Further that the issuing of a special certificate of title and the subsequent decision to open boundaries for the same without following the due process of the law was illegal, irrational and unreasonable.

4. The application was opposed by the Respondents. The first Respondent did not file a reply to this application. Mr. Joseph K. Batume the second Respondent filed an affidavit in reply. He averred that under the law, a district officer or employee cannot be victimized or discriminated against for having performed his/her duties faithfully and in accordance with the law. While in performance of his official duties as the district surveyor, he cannot sue or be sued in that capacity as the said office is not dressed with corporate legal identity. That on 28th September 2018, he received an application with an annexure of a special certificate from Kanoonya Moses Nankere as the administrator of the estate of the late Ssimeon Kitaka Nankere to open up boundaries of the suit land. He ordered Kanoonya to pay the boundary opening fees which he did on 23rd October 2018 and he authorized the opening of the same. There is no legal obligation placed on him to first investigate the validity of the certificate of title and after which conduct a hearing of the affected parties before authorizing a boundary opening. Where the certificate of title appears to be regular and the Applicants have paid the requisite fees, he is obliged to authorize the boundary opening over a given piece of land.
5. The third, fourth and fifth Respondents opposed the application through the affidavit in reply of Ms. Kyebalibafuma Suzan, one of the three administrators of the estate of the late Simeon Kitaka Nankere. She averred that there was an imposter holding out to be the third Respondent who generated the forged court order. The second Respondent was not involved in the process which led to the procuring of the forged court order. The fourth Respondent informed her and the third Respondent that he had consulted and instructed some people to follow up the land issue and they had engaged a lawyer. When the special certificates came, they did not suspect any fraud until after this matter and HCCS No. 945/2018 came up.

6. The first, second and third interested parties deponed affidavits opposing the application. They averred that it was their constitutional right to be heard in a matter where their personal property was gravely affected by wild claims of the Applicants. There were serious issues of ownership between the Applicants and themselves and that the application was incompetent, incurably defective and should be dismissed with costs.
7. In rejoinder the first Applicant averred that the first interested party had not shown any proof of purchase of the land, he acquired the title through fraudulent connivance with the officers of the first and second Respondents and therefore cannot claim to be a bonafide purchaser for value without notice. While the newspaper advertisement notifying the Applicants to surrender their title ran on 8th October 2018, the first interested party purports to have acquired a certificate of title on 24th September 2018. Further that while the search report attached by the first interested party provides 15th October 2018 at 1:19pm as the date and time of registration, the certificate of title indicates 24th September 2018 at 9:06am which points to fraud orchestrated by the Respondents in cohorts with the first interested party.
8. Mr. Kato Absolom an advocate of the High Court practicing with the law firm representing the Applicants in further rejoinder averred that he inquired from the Chief Registrar of the Courts of Judicature whether Mr. Augustine Ssemakula, who commissioned the second Respondent's affidavit in reply had been restored to the Roll of Advocates and whether he had a valid practicing certificate. He found out that Mr. Ssemakula last renewed his practicing certificate on 25th March 2014 and he was not restored to the roll of advocates by the time he commissioned the second Respondent's affidavit. In reply to this affidavit, the second Respondent averred that where a lawyer holds out to be a practicing advocate as well as a commissioner of oaths, while duping innocent Ugandans, this could only amount to a mistake of counsel that cannot be visited on the client. Further that he was advised by his lawyers that in such circumstances, courts take a liberal approach by way of severance.
9. On 22nd January 2019, Mr. Sekitto informed court that the first Respondent conducted a hearing of all the parties in respect of the suit land and a decision was reached to cancel all certificates of title and restore the Applicants as the registered proprietors. Further that the

subdivisions of the land in Kalamazo were also cancelled. Mr. Ssemambo confirmed this as the true position and as such this court will only determine general and exemplary damages, interest and costs.

10. Issues for determination are; (1) whether the Respondents' actions forming the basis of this application are amenable to judicial review; (2) whether there are any remedies available to the Applicants. Put differently, the issue for resolution is whether the Applicants are entitled to the general and exemplary damages, interest and costs as sought.

b) Law

11. Rule 8 of the judicial review rules provides for claims for damages. Sub rule 1 provides that “on an application for judicial review the court may, subject to sub rule (2), award damages to the applicant, if— (a) he or she has included in the motion in support of his or her application a claim for damages arising from any matter to which the application relates; and (b) the court is satisfied that, if the claim 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. (2) Rules 1 to 5 of Order VI of the Civil Procedure Rules shall be applied to a statement relating to a claim for damages as they apply to a pleading.”

12. General damages are the direct natural or probable consequence of the wrongful act complained of and include damages for pain, suffering, inconvenience and anticipated future loss (see *Storms v. Hutchinson* [1905] AC 515; *Kabona Brothers Agencies v. Uganda Metal Products & Enamelling Co Ltd* [1981-1982] HCB 74 and *Kiwanuka Godfrey T/a Tasumi Auto Spares and Class mart v. Arua District Local Government* H. C. Civil Suit No. 186 of 2006).

13. In the assessment of general damages, the court should be mainly guided by the value of the subject matter, the economic inconvenience that the Plaintiff may have been put through and the nature and extent of the injury suffered (See *Uganda Commercial bank v. Kigozi* [2002]1 EA 305). Furthermore a Plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been if she or he had not suffered the wrong (See *Hadley v. Baxendale* (1894) 9 Exch 341; *Charles Acire v. M. Engola*, H. C.

Civil Suit No. 143 of 1993 and *Kibimba Rice Ltd v. Umar Salim*, S. C. Civil Appeal No. 17 of 1992).

14. The award of exemplary damages was considered by the House of Lords in the landmark case of **Rookes v. Barnard** [1964] AC 1129. Lord Devlin stated that in his view there are only three categories of cases in which exemplary damages are awarded, namely; (a) where there has been oppressive, arbitrary, or un constitutional action by the servants of a government; (b) where the defendant's conduct has been calculated by him to make a profit which may well exceed the compensation payable to the Plaintiff; and (c) that some law for the time being in force authorises the award of exemplary damages. Furthermore when considering the making of an award of exemplary damages, three matters should be borne in mind; (a) Plaintiff cannot recover exemplary damages unless he or she is the victim of the punishable behaviour; (b) the power to award exemplary damages should be used with restraint; and (c) the means of the parties are material in the assessment of exemplary damages.

15. In **HCCS NO. 397 of 2015 Transtel Ltd & Anor v. Mahi Computers & Appliances Ltd**, it was held that “aggravated damages carry a punitive aim at both retribution and deterrence for the wrongdoer and others who might be considering the same or similar conduct.” Exemplary damages was considered by the Court of Appeal sitting at Nairobi in the case of **Obongo and another vs. Municipal Council of Kisumu** [1971] 1 EA 91 per Spry VP at page 94 as being awarded for torts such as: “... oppressive, arbitrary or unconstitutional action by the servants of the government and, secondly, where the Defendant’s conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the Plaintiff. As regards the actual award, the Plaintiff must have suffered as a result of the punishable behavior; the punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings if the conduct were criminal; and the means of the parties and everything which aggravates or mitigates the Defendant’s conduct is to be taken into account.”

c) Analysis

16. In their affidavits, the first, second and third interested parties as well as the Respondents opposed this judicial review procedure saying that this was not a proper case for judicial review. They argue that the Applicants should have filed an ordinary suit to prove fraud. After carefully looking at all the submissions of the parties, it has been demonstrated to this court that the Applicants were aggrieved by the decision of the first Respondent transferring their title to the suit land to the Respondents without hearing from them. It is this decision that they challenged in this judicial review application. I find that this is a proper case for judicial review within the meaning of regulation 3¹ of the Judicial Review Rules.

17. The issue of fraud only became apparent after the Applicants filed their application, when the first Respondent verified and confirmed with the Land Division of the High Court that it had never heard the third, fourth and fifth Respondents in civil suit 133 of 2009. It is in this non-existent civil suit that the three obtained a fraudulent decree which was presented to the first Respondent office and based on which the Applicants suit land was transferred from them to the three. It is the Land Division's verification that established this fraud. The Applicants did not come to court to contest the fraud but to challenge the Registrar's decision.

¹ (1) An application for— (a) an order of mandamus, prohibition or certiorari; or (b) an injunction under section 38(2) of the Judicature Act restraining a person from acting in any office in which the person is not entitled to act, shall be made by way of an application for judicial review in accordance with these Rules. (2) An application for a declaration or an injunction (not being an injunction mentioned in sub rule (1)(b) may be made by way of application for judicial review, and on such an application, the High Court may grant the declaration or injunction claimed if it considers that, having regard to— (a) the nature of the matter in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari; (b) the nature of the persons and bodies against whom relief may be granted by way of such an order; and (c) all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

18. It is well demonstrated and I am satisfied that the Applicants in whose names the suit land was rightfully registered and illegally, unfairly and irrationally transferred to the third to fifth Respondents through the administrative decision of the first Respondent properly filed for judicial review. Having done so, nothing under the judicial review rules bars the first Applicant to depone an affidavit on behalf of all the Applicants in the same course of action. I therefore find the interested parties claim that he could not, baseless and is rejected accordingly.
19. Some of the Respondents and interested parties also contended that since the Applicants have been reinstated on the suit land title, they are not entitled to damages. However under regulation 8² of the Judicial Review Rules, the Applicants in judicial review are entitled to damages within the discretion of court. Based on the above, issues 1 and 2 are resolved in the affirmative. What is left is a determination of who is liable for the costs and damages for the Applicants.
20. In this case, it became apparent after hearing from all the parties that the title of the Applicants was fraudulently transferred by officers of the first and second Respondents. These officers are government officials. However these government officials acted on a fake or fraudulent court order allegedly presented by the third, fourth and fifth Respondents. In determining who is liable to pay damages to the Applicants, the first direction is to the beneficiaries of the court decree dated 20th January 2012. These are the third, fourth and fifth Respondents. Of these only the fifth filed an affidavit in reply to the judicial review

² 8 (1) On an application for judicial review the court may, subject to sub rule (2), award damages to the applicant, if— (a) he or she has included in the motion in support of his or her application a claim for damages arising from any matter to which the application relates; and (b) the court is satisfied that, if the claim 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.(2) Rules 1 to 5 of Order VI of the Civil Procedure Rules shall be applied to a statement relating to a claim for damages as they apply to a pleading.

application. By the time of the oral hearing regarding the damages, the three were jointly represented by Mr. Sseguya Samuel.

21. In paragraphs 5,8,10 and 12 of the fifth Respondent's affidavit in reply and during counsel's submissions at the oral hearing, the third to fifth Respondent's case was presented candidly. Their case is that the third and fifth Respondents were not aware of the fraudulent court order, instruments which created the subdivisions and subsequent transfers from the Applicants to the third to fifth Respondents. Further they clarified that the Memorandum of understanding between the third, fourth and fifth Respondents and Kyazze Hussein and others marked MM was also fraudulent and the work of the fourth Respondent. They categorically explained that these transactions were the work of the fourth Respondent who worked with the interested parties and officials from the first Respondent office.
22. Counsel pointed out that none of these fraudulent transactions was with the knowledge, blessing or consent of the third and fifth Respondents. He insisted that the third and fifth Respondents should not be held liable in damages and costs but only the fourth Respondent should be held liable if court so finds. With these unrebutted explanations, after exercising caution, I am convinced that of the third to fifth Respondents were not party to the fraudulent scheme in issue and are not liable. Only the fourth Respondent is liable to the damages and costs in issue.
23. The fifth Respondent explained that the fourth Respondent worked with officials from the first Respondent in the scheme leading up to the administrative decision in issue. In determining who in the first Respondent's office should be sanctioned in costs and damages in issue, this court considers that none of the officers can hide under the shield of official immunity in the course of their work.
24. It is clearly demonstrated from mutation forms for the two fraudulent transactions in respect of the suit land and annexure B2 to the second Respondent's affidavit in reply that the fourth Respondent dealt with Joseph K. Batume (the second Respondent) in the scheme leading up to the administrative decision of the first Respondent. This makes Joseph K. Batume (the second Respondent) equally liable in damages and costs in this judicial review application.

The second Respondent's liability is well articulated at page 11 of the Applicants written submission as "the second Respondent too, while instructing Grid consult to open up the boundaries of the land in dispute was clear in requiring any complainant to raise issue with its office in case of the existence of a valid claim against the intended process. This is shown in his letter marked annexure H to the first Applicant's affidavit in support of the notice of motion and dated 23rd October 2018. In spite of the Applicant's writing to the second Respondent on the 29th October 2018 as per annexure J to the first Applicant's affidavit in support of the notice of motion disputing the said boundary opening, no intervention was done as the second Respondent who received the communication on 30th October 2018 only furthered their fraudulent alienation of the Applicants land by attempting to create bonafide third purchasers for value. The second Respondent too, denied the Applicant the right to be heard before this fraudulent parceling of their land was carried out."

25. The Applicant counsel also explained at the oral hearing that "when you look at the mutation form and the area schedule, the suit land was subdivided in July 2018 on personal authority of the second Respondent, then ironically the second Respondent in October 2018 authorized the boundary opening of block 154 plot 3 which was no longer in existence due to the subdivisions in July. All this make the second Respondent liable for the costs and damages in issue.
26. I find it unnecessary in the circumstances of this case to sanction the interested parties when the Applicants did not file the application against them. I also find no demonstration making the first Respondent liable.
27. The Applicants seek general and exemplary damages, interest at a commercial rate of 25% per annum from the date of first payment till payment in full and costs of the application. For the pain, suffering, psychological torture suffered by the Applicants, they are entitled to general damages. However I find the amount of Ug. Shs. 550,000,000/= assigned by the Applicants to be too high and unnecessary. In my discretion, I am awarding them general damages of Ug. Shs.150, 000,000/= (Uganda shillings one hundred fifty million). In reaching this figure, I have also considered the advanced age of the Applicants.

28. While I rarely give exemplary damages, considering the deliberate misuse of processes of court and the land office and setting up the first Respondent to illegally and erroneously make the impugned administrative decision, in my discretion this is a worthy case for the award of exemplary damages. This award is also necessitated to send out a strong message that misuse of court processes and public authority is wrong and must not be tolerated. I therefore award the Applicants exemplary damages of Ug. Shs. 80,000,000/= (Uganda shillings eighty million). Interest on the general and exemplary damages is awarded at 10% per annum from the date of judgment till payment in full and costs of the application. All the above awards are to be paid by the fourth and second Respondents.

I so order.

Lydia Mugambe
Judge
5th July 2019