

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

MISCELLANEOUS CAUSE NO.293 OF 2018

1. BEXUS INTERNATIONAL LIMITED=====APPLICANT

VERSUS

1. THE DEPARTED ASIAN PROPERTY CUSTODIAN BOARD

2. KIKONYOGO INVESTMENT LIMITED===== RESPONDENTS

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant brought this application under Sections 33, 36 & 7 of the Judicature Act as amended, Rules 3,5, 6 & 7 of the Judicature (Judicial Review) Rules, 2009 for the following declarations and orders;

1. A **declaration** that the decision and or act of the Executive Secretary of the 1st Respondent, to cancel the Applicant's allocation of land comprised in Block 270 Plot 2, Kajjansi Volume 135, Folio 17, Wakiso District is null and void for being *ultra vires* and illegal and void *ab initio* and for violation of the Applicant's *non-derogable* right to be heard. Those rights are enshrined in Articles 26, 28, 42 and 44 of the Constitution of the Republic of Uganda, and protected by sections 33, 36 and 38 of the Judicature Act, Cap, 13 as amended, section 98 of the Civil Procedure Act, Cap. 71 and Rules 6, 7, 8 and 9 of the Judicature (Judicial Review) Rules, 2009.

2. An order of **certiorari** quashing the decision of the Executive Secretary of the 1st Respondent, of cancelling the Applicant's allocation of land comprised in Block 270 Plot 2, Kajjansi Volume 135, Folio 17, Wakiso District from the 3rd day of July, 2017 for being *ultra vires* and void *ab initio* and for violation of the Applicant's *non-derogable right to be heard*.
3. An order of **Mandamus** against the 1st Respondent compelling her to immediately reinstate the Applicant's allocation of land comprised in Block 270 Plot 2, Kajjansi Volume 135, Folio 17, Wakiso District into the names of the Applicant.
4. An order of **Prohibition and Injunction** against the 1st Respondent, her agents and servants not to further tamper with the Applicant's allocation and or proprietorship of land comprised in Block 270 Plot 2, Kajjansi Volume 135, Folio 17, Wakiso District unless ordered by court.
5. An order of **Prohibition and Injunction** against the 2nd Respondent, her agents and servants not to make or assert any claims on the disputed land adverse to the Applicant's interest on in any way interfere with the Applicant's quiet possession or proprietorship of land comprised in Block 270 Plot 2, Kajjansi Volume 135, Folio 17, Wakiso District unless ordered by court.
6. An Order for survey of Kyadondo Block 270 at Kajjansi *vis-a-vis* Busiro Block 537 which are 16 Kilometers apart near Semunya swamp at Lake Victoria, to establish the physical location of the 2nd Respondent's Certificates of Title comprised in FRV 432 Folio 23 and known as Busiro Plot 102 Block 537, and FRV 429 Folio 5 and known as Busiro Plot 103 Block 537.

7. An order of cancellation of the 2nd Respondent's Certificates of Title comprised in FRV 432 Folio 23 and known as Busiro Plot 102 Block 537, and FRV 429 Folio 5 and known as Busiro Plot 103 Block 537, both Titles having been processed and purportedly super imposed on Kyadondo Block 270 at Kajjansi and acquired by the 2nd Respondent pursuant to the impugned decision of the Executive Secretary of the 1st Respondent, illegally.
8. An order for General Damages.
9. An order for costs of the suit.

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavit in support of **BYENSI JAMESON** but generally and briefly state that;

- 1) The applicant lawfully allocated land comprised in Block 270 Plot 2 Kajjansi Volume 135, Folio 17 Wakiso District.
- 2) The 1st respondent made a decision and cancelled the allocation of the land in question, that belonged to the applicant, without a hearing, which is *ultra vires*, null and void *ab initio*.
- 3) The 1st respondent's decision of cancelling the applicant's allocation of land at Kajjansi is irrational and unreasonable in the Wednesbury's sense.
- 4) After taking and acting through the impugned decision, the Respondents concertedly, illegally and fraudulently processed from the disputed land and caused to be issued to the 2nd respondent, Certificates of Title comprised in FRV 432 Folio 23 and known as Busiro

Plot 102 Block 537, and FRV 429 Folio 5 and known as Plot 103 Block 537.

- 5) That it is in the interest of justice that the application for Judicial review be granted.

The 1st respondent opposed this application and filed an affidavit in reply through Mr Bizibu George William-Executive Secretary of 1st respondent while the 2nd respondent filed an affidavit in the names of the 3rd respondent-Jamada Musisi and Kwesiga Nelson.

1. The 1st respondent contended that the applicant was granted a temporary allocation of land on land comprised in Block 270, Plot 2, LRV 135, Folio 17 in 2014 by the then Executive Secretary Departed Asian Property Custodian Board.
2. That on 27th day of July, 2016, one Twebaze Dickson an Associate director of the Applicant filed a complaint against the 2nd Respondent for trespass and forcible detainer on land comprised in kyadondo Block 270, Plot 2, LRV 135, Folio 17 vide CID/HDTRS GEF 633/2016 at criminal Investigation directorate at Kibuli-Kampala.
3. That during the course of investigations, the 1st respondent was contacted by detectives from CID headquarters during which it was discovered that the land comprised in LRV 135, Folio 17 Kajjansi had earlier on been repossessed by MANJULABEN w/o RAMANBHAI HARMANBHAI PATEL vide Certificate Authorising repossession No. 1259 in 1992 and has since been transferred and owned by different persons, the current owner being the 2nd respondent.

4. That the investigations revealed that the then Executive Secretary of Departed Property Custodian Board relied on wrong information supplied to him by the applicant's Director and erroneously issued the applicant a temporary allocation letter and thereby had to cancel it.
5. That the directors of the applicant were at all material times aware of the proceedings that led to the cancellation of the temporary allocation of land comprised in LRV 135 Folio 17 that was granted by the 1st respondent. the alleged applicants repossession of the suit property by virtue of the consent Judgement is misconceived, illegal, unlawful, null and void.
6. That the material of the matter is that the Applicant had been erroneously allocated land that had long been repossessed and was therefore not available for allocation to the applicant.

The 2nd respondent in his affidavit repeated some of the content of the Mr Bizibu's affidavit and added that; all the parties were summoned before the criminal investigations Directorate and during investigations, it was discovered that the information that was adduced to 1st respondent by the applicant was false and contradictory to the earlier available information; thus cancelling the temporary allocation

That further, during the same investigations, it was discovered and established that Kyadondo Block 270, Plot 2 the land which the applicant purports to have been temporarily allocated does not exist.

That this application for Judicial review is directly touching the ownership and proprietorship of the 2nd respondent's land comprised in FRV 432, Folio 23, Busiro Block 537, Plot 103 at Wakiso which land is the subject in HCCS No. 43 of 2017 (Bexus International Ltd vs Kikonyogo Investments Ltd & 2

others) pending hearing in high Court of Uganda at kampala (Land Division)

That the remedies sought in the application are not maintainable in judicial review proceedings and do not disclose grounds fit for judicial review and the remedies attainable in Judicial review proceedings.

That in the interest of justice, law and equity the application be dismissed and the applicant be directed to prosecute its pending suit before the high Court i.e HCCS No. 43 of 2017 (Bexus Intenational Ltd vs Kikonyongo Investments Ltd & 2 Others) as any determination of the allegations contained herein which are also directly in issue in the pending suit, shall bring the administration of justice in Uganda in disrepute.

The applicant raised two issues for determination and the resultant issue of remedies.

- 1. Whether the impugned decision and actions of the respondents can be challenged in a court of Law by judicial review?*
- 2. Whether the 1st respondent acted legally, rationally and properly in cancelling the allocation of the suit property to the applicant?*
- 3. Whether the applicant is entitled to the remedies sought?*

The applicants were represented by *Mr Okello Oryem Alfred* whereas the 1st respondent was represented by *Mr Oburu Odoi J and Mr Mwebesa Obed* represented the 2nd respondent.

In Uganda, the principles governing Judicial Review are well settled. Judicial review is not concerned with the decision in issue but with the decision making process through which the decision was made. It is rather concerned with the courts' supervisory jurisdiction to check and control the exercise of

power by those in Public offices or person/bodies exercising quasi-judicial functions by the granting of Prerogative orders as the case may fall. It is pertinent to note that the orders sought under Judicial Review do not determine private rights. The said orders are discretionary in nature and court is at liberty to grant them depending on the circumstances of the case where there has been violation of the principles of natural Justice. The purpose is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected to. *See; John Jet Tumwebaze vs Makerere University Council & 2 Others Misc Cause No. 353 of 2005, DOTT Services Ltd vs Attorney General Misc Cause No.125 of 2009, Balondemu David vs The Law Development Centre Misc Cause No.61 of 2016.*

For one to succeed under Judicial Review it is trite law that he must prove that the decision made was tainted either by; illegality, irrationality or procedural impropriety.

The respondent as a public body is subject to judicial review to test the legality of its decisions if they affect the public. In the case of *Commissioner of Land v Kunste Hotel Ltd [1995-1998] 1 EA (CAK)*, Court noted that;

“Judicial review is concerned not with the private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he is being subjected.”

ISSUE ONE

Whether the impugned decision and actions of the respondents can be challenged in a court of Law by judicial review?

The applicant’s counsel submitted that the argument that the impugned decision is already the subject of Civil Suit No. 43 of 2017, which is pending

in this Court. JAMADA MUSISI, the 2nd respondent's Director attached the pleadings in that case as annexures "G" and "H" to his affidavit in reply.

They argue that therefore this Hon. Court should not entertain this application. First of all the 1st respondent is not a party to that suit. Secondly, the impugned decision is not the subject of that suit. Thirdly, the applicant did not sue the 2nd respondent in this application until the 2nd respondent insisted on being made a party, and until the Court itself directed that the 2nd respondent be added to this application. It is upon those events that the applicant added the 2nd respondent and maintained its grievance as it is in Civil Suit No. 43 of 2017, against the 2nd respondent, basing on its cause of action, which of course does not change, except with regard to the impugned decision.

Fourthly, the impugned decision was apparently made in March of 2017, two months after Civil Suit No. 043 of 2017 was filed in January of 2017. It cannot therefore be true that the impugned decision is the subject of Civil Suit No. 43 of 2017. The argument of the respondents is therefore not based on any fact or Law.

In the circumstances, counsel prayed that the Court finds that the applicant is entitled to seek Judicial Review of the impugned decision of the 1st respondent and the consequent actions of the respondents, and is entitled to the remedies sought in this Application.

The 1st respondent's counsel submitted that the issuance of temporary allocation by the 1st respondent's executive secretary is not a statutory duty but merely an administrative measure initiated by the 1st respondent. It is upon such administrative measures of issuing temporary allocation which does not create any legally recognised rights in land that the former Executive Secretary upon consultations and report from the police cancelled

the temporary allocation with the full knowledge and involvement of the applicant.

The Applicant's said argument/submission brings out the question of land which is subject to section 59 of the Registration of Titles Act which provides that a Certificate of title is conclusive proof of ownership. Such title can only be cancelled by the courts of law through duly established procedure under section 177 of the Registration of Titles Act.

That the land comprised in LRV 135, Folio 17 at Kajjansi was repossessed by Majulaben w/o Ramanbhai Haramanbhai Patel, and departed Asian/Registered Proprietor under a certificate Authorising Repossession No. 1295 dated 16/11/1992.

The 2nd respondent submitted that the applicant has convenient, more beneficial, more applicable and very effective alternative remedy to address its concerns and claims raised in the instant application. The said alternative remedy is *HCCS No. 43 of 2017 (Bexus International Limited vs Kikonyongo Investments Limited & Others)* which is pending hearing before the High Court of Uganda at Kampala (Land Division).

That the application for judicial review is directly touching on ownership and proprietorship of the 2nd respondent's land comprised in FRV 432, Folio 23, Grant 537, Plot 102 at Wakiso and FRV 429, Folio 5, Grant 537, Plot 103 at Wakiso (erroneously described as FRV 432 Folio 23, Busiro block 537, Plot 102 at Wakiso and FRV 429 429, Folio 5, Busiro Block 537, Plot 103 at Wakiso which land is subject for determination in *HCCS No. 43 of 2017 (Bexus International Ltd vs Kikonyogo Investments Ltd & 2 Others)*

The applicant's claim in the said suit is for a declaration that the applicant is the equitable/legal owner of land comprised LRV 135, Folio 17 block 270 at Kajjansi, the respondent's title and alleged ownership of the same land, if

acquired , was acquired by fraud and is thus null and void and cancellation of the 2nd respondent's land title.

The applicant also seeks for eviction of the defendants from the suit land and a permanent injunction restraining the defendants from trespassing on the suit land or interfering with the plaintiff's ownership and quiet possession of the disputed land.

Determination

The nature of the application can indeed be challenged by way of judicial review since it involves questioning of the decision of a public official- Executive Secretary.

However, the circumstances of the case clearly show that there is a big land dispute between the private persons, i.e the applicant and 2nd respondent.

It is also undisputed that the dispute was early on filed in court where the parties want to vindicate their rights vide *HCCS No. 43 of 2017 (Bexus International Ltd vs Kikonyogo Investments Ltd & 2 Others)*.

The determination of this application for judicial review about the cancellation of the temporary allocation cannot determine the major underlying dispute over the same land; whether the land in dispute is the same as the land the 2nd respondent is in possession.

The nature of the remedies sought by the applicant equally point to this deep dispute that cannot be resolved by this application for judicial review;

- a) *For the survey of kyadondo block 270 at Kajjansi vis-à-vis Busiro Block which are 16 kilometers apart near Sumanya Swamp at lake Victoria, to establish the physical location of the 2nd respondent's title.*
- b) *For cancellation of the respondent's certificates of title comprised in FRV 432, Folio 23, Busiro Block 537 plot 102 at Wakiso and FRV 429, Folio 5 Busiro Block 537 plot 103 at Wakiso, both titles having been processed and purportedly superimposed on Kyadondo Block 20 at Kajjansi and*

acquired by the 2nd respondent pursuant to the impugned decision of the respondent's impugned decision.

The courts are unlikely to strike out private law proceedings as an abuse of process where a private law right is at stake, particularly where it dominates the proceedings, whether or not the actual challenge focuses on an act or decision of a public body which is said to be ultra vires.

Therefore, it is possible to raise public law issues concerning the validity of the act in the ordinary private law claim intended to vindicate the private law rights just like in this present case. This is not an abuse of court process to raise public law issues in a private law matter. See *Wandsworth LBC v Winder [1985] A.C 461*

The court in private law proceedings ought to entertain any public law issues that may arise in order to deal with the dispute decisively rather than public law proceedings being used to determine private law rights.

Since the applicant had already commenced an ordinary suit to vindicate his private law rights it would not be possible to now raise the same or similar private law rights as public law rights in order to vindicate his rights independently of the original civil suit. The ordinary claim or plaint in the land matter should be sufficient to determine those public law rights that arose out of the same facts.

Where a person asserts a private law right, whether by way of claim or defence, he could proceed by an ordinary private law proceeding notwithstanding that the proceeding might involve the examination of a public law issue. See *Roy v Chelsea Family Practitioner Committee [1992] 1 A.C. 624. Trustees of Denis Rye Pension Fund v Sheffield City Council [1998] 1 W.L.R 840*

The public law claims could proceed in the same ordinary action as private law issues since they arose from the same facts and “were inextricably linked with private law issues. However a party is at liberty to first pursue public law claims and later file an ordinary claim for the private law right but not the other way round. See *Ann Bord Baine Co-operative (Irish Dairy Board)*

v Milk Marketing Board [1984] 2 C.M.L.R 584. Mercury Communications Ltd vs Director General of Telecommunications [1996] 1 W.L.R 48 at 57

This application is disallowed for the above reasons and the applicant can vindicate the public law issues in *HCCS No. 43 of 2017 (Bexus International Ltd vs Kikonyogo Investments Ltd & 2 Others)* filed earlier in time. Each party shall bear its costs.

I so Order.

SSEKAANA MUSA
JUDGE
16th /08/2019