

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**[CIVIL DIVISION]**  
**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**  
**AND**  
**IN THE MATTER OF THE JUDICATURE (JUDICIAL REVIEW) RULES,**  
**2009**  
**MISCELLANEOUS CAUSE NO. 145 OF 2019**

**MUTUMBA ISMAEL=====APPLICANT**

**VERSUS**

**THE COMMISSIONER LAND REGISTRATION=====RESPONDENT**

**BEFORE HON. JUSTICE SSEKAANA MUSA**

**RULING**

The Applicant filed an application for judicial review by way of Notice of Motion under Sections 33 and 38 of the Judicature Act, Cap.13, Rules 3 (1), (2), 6 (1) and 8 of the Judicature (Judicial Review) Rules, S.I. No.11 of 2009, seeking that;

1. The prerogative order of certiorari doth issue quashing the decision of the Respondent communicated by a memorandum dated 29<sup>th</sup> April, 2019 ordering the cancellation of the Applicant's title.
2. An order of prohibition doth issue restraining the Respondent and all its agents, servants, agencies, departments, authorities and officials from implementing the findings and orders of the Respondent in so far as they affect the Applicant.
3. A permanent injunction doth issue restraining the Respondent and all its agents, servants, and officials from implementing the findings and orders of the Respondent in so far as they affect the Applicants.
4. The Respondent pays the costs of the application.

The grounds upon which the application is set are laid out briefly in the Notice of Motion, and expounded upon in the affidavit of Mutumba Ismael, the Applicant. Those grounds being;

1. The decision of the Respondent in handling the dispute and the issuance of a cancellation order in respect of land comprised in Gomba Block 47 plot 10 at Lusasa is irregular, procedurally improper, irrational, unconscionable, malafide, unjustifiable and illegal.
2. The decision of the Respondent in requiring the Applicant to appear for the hearing of the dispute in respect of land comprised in Gomba Block 47 plot 10 at Lusasa is irregular, ultra vires, procedurally improper, irrational, unconscionable, malafide, unjustifiable and illegal.
3. That the Respondent is acting ultra vires in his power.
4. That the Respondent is functus officio, the matter involving the complainant having been fully determined by his predecessor.
5. The Applicant has no effective alternative remedy, and
6. The orders being necessary for the ends of justice to be met.

## **ISSUES**

The court admits the following as the relevant issues coming up for determination;

1. **Whether the Respondent acted illegally, irregular, and improperly in coming to the decision to cancel the Applicant's certificate of title for land comprised in Gomba Block 47 Plot 2 at Lusasa.**
2. **What remedies are available to the parties.**

The Applicant was represented by Mulindwa Ian, whilst Ssekito Moses represented the Respondent.

## **RESOLUTION OF ISSUES**

**ISSUE 1: Whether the Respondent acted illegally, irregular, and improperly in coming to the decision to cancel the Applicant's certificate of title for land comprised in Gomba Block 47 Plot 2 at Lusasa.**

The Applicant submitted in assertion of being the registered proprietor of the land subject to the proceedings, comprised in Gomba Block 47 Plot 10 at Lusasa, having bought the same from a one Ssozi Kirwana, the then rightful and

registered proprietor. A copy of the Certificate of Title was annexed to the affidavit of the Applicant to prove the assertion.

He further asserts that a one Apollo Mushabe had once been registered as proprietor, which title was cancelled by the Respondent after having conducted a public hearing following a complaint from Ssozi Kirwana and thereafter come to a decision that Apollo Mushabe's entry had been made illegally; a 2016 letter from the Respondent to Apollo Mushabe was referred to.

That after the said Certificate of Title of Apollo Mushabe was cancelled and different entries made thereon including that of the Applicant. Apollo Mushabe then lodged a complaint on the same Title indicating that it was created illegally. The Respondent then went on to consider the second complaint and expressed an intention to cancel the Applicant's title, inviting him for a public hearing to that end; as evidenced in a 1<sup>st</sup> March, 2019 letter to the Applicant.

That the said public hearing to which the Applicant was invited to on the 27<sup>th</sup> day of April 2019 was hastily conducted in the absence of the Applicant and an order granted by the Respondent to the effect of cancelling the Applicants Title was made on the 29<sup>th</sup> of April 2019.

The Respondent, in his affidavit in reply deposed by a one Golooba Haruna, a Senior Registrar of Titles with the Respondent; however argues that the court order arising from Miscellaneous Cause No. 38 of 2016 which directed the vacation of a previous order from Miscellaneous Application No. 707 of 2016 (order hereto attached as annexure "B"), restraining the Respondent from cancelling the title of land comprised in Gomba Block 7 Plot 2 at Buyanja Busasa registered in the names of Apollo Mushabe had been misinterpreted by the Respondent's office to mean a directive to cancel the said title and thus was done in error.

In defining the parameters of judicial review, the Applicant cites, inter alia, the case of **Yustus Tinkasimire & 18 Others v Attorney General and Dr. Malinga Stephen Miscellaneous Cause No. 35 of 2012**, wherein the learned Justice Eldad Mwangusya quoted the decision of **Council of Civil Service Unions v Minister of Civil Service [1985] AC 2**, in holding 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."

## **Illegality**

In arguing illegality, the Applicant further cites Justice Mwangusya in the abovementioned case, being of the view that; "Illegality is when the decision-making authority commits an error of law in the process of taking a decision." The Applicant further adds that the learned Justice gave examples of illegality to include acting without jurisdiction or ultra vires.

Counsel further submitted that the evidence adduced in the application clearly indicates that the Respondent acted in error under the law when he made a decision to revisit a complaint which was already investigated a decision made by his office. There was a complaint by Ssozi Kirwana and others in respect to Apollo Mushabe's title which was heard by Sarah Kulata, the then Commissioner, Land Registration. She made findings that Apollo Mushabe had his entry on the land title made illegally. Having done so, Apollo Mushabe's title was cancelled by the Respondent; Ssozi Kirwana got registered thereon and transferred the same to the Applicant.

Under paragraph 7 of the Respondent's affidavit in reply, the deponent clearly avers that the Respondent received a court order in Miscellaneous Cause No. 38 of 2016 vacating an order restraining the Respondent from cancelling Apollo Mushabe's title. A copy of the said court order was attached as "Annexure B". The Applicant argues that this clearly indicates that the Respondent had previously found illegalities, set out to cancel Apollo Mushabe's title but was hindered by a court order, which was eventually vacated; and the Respondent given a go ahead to cancel the title, an act that was eventually done.

That the Respondent received a complaint from Apollo Mushabe in respect to the same land and chose to entertain the same, heard it ex parte in the absence of the Applicant and thereafter cancelled the Applicant's title. That the actions of the Respondent were a procedural error because he should instead of continuing with handling the complaint have allowed the decision of the previous Commissioner to go on appeal or advised Apollo Mushabe to refer the matter to the High Court.

That the Respondent's receipt of another dispute involving similar parties over the same land amounted to a contradiction of Section 91 (1) of the Land Act, which provides for the special powers of the Respondent which include endorsement or alteration or cancellation of certificates of title, plus issue of fresh certificates. That nowhere is it provides that the Respondent can review his or her decision or handle a matter which has been previously entertained by the same authority.

The Applicant, in asserting that the decision to handle a complaint from Apollo Mushabe was illegal, relying on the case of **Fr. Francis Bahikirwe Muntu & 15 Others v Kyambogo University, Miscellaneous Application No. 643 of 2005**, wherein Remmy Kasule, Ag. J. (as he then was) described what constitutes illegality in the following terms:

“Illegality is when the decision-making authority commits an error of law in the process of taking a decision. An exercise of power that is not vested in the decision-making authority is such an instance. Acting without jurisdiction or ultra vires are instances of illegality. A decision maker who incorrectly inform him/herself as to the law or who acts contrary to the principles of the law is guilty of an illegality.”

In rebuttal, the Respondent submits that there was no illegality occasioned and arguing that the certificate of title registered in the names of Apollo Mushabe was erroneously cancelled due to a misinterpretation of the court order arising from Miscellaneous Cause No. 38 of 2016.

Further arguing that the implication of Section 91 (1) of the Land Act is that the Respondent herein has the powers to cancel title and the Applicant’s allegation that it acted ultra vires is baseless. In reference to paragraph 7 and 8 of the affidavit in reply, it is clear that the court order relied on by the Respondent to cancel the title comprised in Gomba Block 47 Plot 2 in the names of Apollo Mushabe was never ordering for cancellation of the same hence the cancellation was done in error; that the office sought to rectify the error by reversing the decision to the result of cancellation of the Applicant’s title.

In view of the evidence on record and submissions of the parties, I find that in light of Article 42 of the 1995 Constitution which provides that any person shall have the right to apply to a court of law in respect of any administrative decision taken against him/her. And in further consideration of one the three pillars that constitute a cause under judicial review: illegality, to which the learned **Lady Justice Lydia Mugambe in Cecil David Edward Hugh v The Attorney General, Miscellaneous Application N0. 266 of 2013**, wherein she held that;

“illegality is when the decision-making authority commits and error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of the law or its principles are instances of illegality.”

In view of the trite law principle of *functus officio*, as was expounded on by Justice Stephen Musota in **Joseph Bamwebehire & Anor v Nareeba Dan and 6 Others, Miscellaneous Application No. 373 of 2017**, wherein he cited the case of **Goodman Agencies Ltd v Attorney General and Another, Constitutional Petition No. 03 of 2008**, that defined *functus officio* to mean "...without further authority of legal competence because the duties of the original commission have been fully accomplished."

I therefore find that indeed the Respondent acted illegally and ultra vires as they clothed themselves with a power of revision as to their own decision that should have been adjudged *functus officio*. The attempt by the present commissioner to entertain the complaint was a blatant abuse of authority coupled with corrupt motive or intentions.

### **Procedural impropriety**

The Respondent contends that the Respondent as a quasi-judicial body was obliged to accord the Applicant a fair hearing during the course of conducting the public hearing. This is a mandatory obligation under Article 28(1) and 42 of the Constitution, and a non-derogable right under Article 44(c). The Applicant asserts that this violation was done by way of beginning the hearing at 7:30 a.m., an hour earlier than the communicated 8:30 a.m. scheduled time; and that by the time he arrived the meeting was already concluded.

Quoting **Yustus Tinkasimire & 18 Others v Attorney General and Dr. Malinga Stephen (Miscellaneous Cause No. 35 of 2012**, wherein the learned Justice Eldad Mwangusya quoted the decision of the *locus classicus* case of **Council of Civil Service Unions v Minister of Civil Service (1985) AC 375** that it was found that;

"Procedural illegality is when the decision-making authority fails to act fairly in the process of its decision making. Which would include...failure 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."

The Respondent however argues that there was no procedural impropriety in revisiting its decision as this was done in correction of a misinterpreted order and especially that the Applicant was offered the chance to be heard as the notice of intention to effect changes to the register was duly communicated as

evidenced with annexure "C", the notice to the Applicant, annexure "D", the proof of postage to the Applicant, and annexure "E", a copy of the newspaper advert. Especially so that the Applicant through his lawyers responded to the notice on the 28<sup>th</sup> of March 2019 which evidenced the Applicants had access to the right to be heard, which he did not exercise in absenting himself from the hearing.

Having considered the evidence on record and submissions of the parties on the issue of procedural impropriety, I find that recourse can be had to the case of **Owor Arthur and 8 Others v Gulu University, High Court Miscellaneous Cause no. 18 of 2007**, wherein court held that;

“...the overriding principle of judicial review is to ensure that the individual concerned receives fair treatment. If that lawful authority is not abused by unfair treatment...Implicit in the concept of fair treatment are the two cardinal rules that constitute natural justice; no one shall be a judge in one’s own cause and that **no one shall be condemned unheard**.

In the instant case, the Applicant argued that the hearing was started an hour earlier and thus did not get a chance to be heard, though no concrete evidence was provided to this end; and the Respondent argued that the Applicant did not enter appearance whatsoever. Despite the contradictions in assertions, it is clear that the decision to cancel the Applicant’s Certificate of Title was made without an ear being lent to the Applicant. This I find to be a gross misapplication in the dispensation of justice by the Respondent, and thus hold that the Respondent acted improperly in reaching the decision.

I thus resolve the issue in the affirmative.

### **Issue 2: What remedies are available to the parties**

The Applicant prayed for the grant of reliefs in a prerogative order of certiorari to issue, quashing the decision of the Respondent to cancel the Applicant’s Title; an order of prohibition to issue, restraining the Respondent and its agents from implementing the cancellation decision of the Respondent; a permanent injunction issue, restraining the Respondent and agents from implementing the decision aggrieved about, plus costs of the application.

**Section 36** of the **Judicature Act** provides that the High Court may make an order as the case may be of; *mandamus*, prohibition and *certiorari*.

In view of the resolution as in Issue 1 and with further consideration of the case of **Ssebudde Joseph v Inspector General of Government Miscellaneous Cause No. 0032 of 2010**, as Bamwine J. (as he then was) cited, at page 8, the decision of the Court of Appeal in **Eng. Pascal R. Gakyaro v CAA, Civil Appeal No. 6 of 2006**, wherein it was held, inter alia, that; “the overall effect of denial of natural justice to an aggrieved party renders the decision void and of no effect”.

I therefore find and do grant the following reliefs;

1. An order of certiorari doth issue quashing the decision of the Respondent to cancel the Certificate of Title to the Applicant’s land comprised in Gomba Block 47 Plot 10 at Lusasa.
2. An order of prohibition doth issue restraining the Respondent and their agents from implementing the decision of the Respondent in so far as it affects the Applicant.
3. A permanent injunction doth issue restraining the Respondent and their agents from implementing the decision of the Respondent in so far as it affects the Applicant.
4. Each party should bear their own costs.

I so order.

*Ssekaana Musa*

*Judge*

*20<sup>th</sup> December 2019*