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**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**[CIVIL DIVISION]**

**MISC. CAUSE NO. 328 OF 2020**

**ST. BALIKUDDEMBE MARKET STALLS,**

10 **SPACE AND LOCKUP SHOPS OWNERS**

**ASSOCIATION LIMITED (SSLOA).....APPLICANT**

**VERSUS**

**KAMPALA CAPITAL CITY AUTHORITY.....RESPONDENT**

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**BEFORE: HON. JUSTICE ESTA NAMBAYO**

**RULING**

This application was brought under **Rule 3 and 3A of the Judicature (Judicial Review) (Amendment) Rules, 2019, Section 98 of the Civil Procedure Act, Sections 33, 36 and 37 of the Judicature Act and Order 52 Rule 1 of the Civil Procedure Rules, seeking for orders and declarations of this Court that: -**

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1. **St. Balikuddembe Market is a privately owned market, currently owned and managed by the Applicant and is not subject to regulation and sanction by the Respondent.**
2. **An Order of Certiorari to quash the decision of the Executive Director of the Respondent to take charge and or assume the management of St. Balikuddembe Market be issued.**
3. **An Order of Certiorari to quash the decision of the Respondent to cause the election of leaders of St. Balikuddembe Market be issued.**
4. **An order of Prohibition forbidding the Respondent from enforcing its actions of assuming management of St. Balikuddembe Market and**

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causing the election of leaders thereof, such actions being premised on an illegal and ultra vires decision.

**5. Costs of this Application be provided for.**

The grounds upon which this application is brought are contained in the affidavit of Kayongo Godfrey, the Chairman of the Board of Directors of the Applicant company but briefly are: -

1. That the Applicant is a public limited liability company duly incorporated in Uganda and it owns and runs St. Balikudembe Market as a private property.
2. That St. Balikuddembe Market is managed and regulated under a legal regime comprised in its Memorandum and Articles of Association including the issues of its leadership and management under the sanction of the company's general meeting.
3. That the Applicant and St. Balikuddembe Market are not subject to the sanction and management of the Respondent.
4. That the Respondent's decision to interfere in the business and operations of the Applicant and St. Balikuddembe Market be quashed and any further intended actions by the Respondent are prohibited and forbidden.
5. That it is in the interest of justice that this Application be granted.

The Respondent opposes the application.

**Background to this application.**

The brief background to this application is that the Applicant is the registered proprietor of all the land comprised in LRV 4500 Folio 10 Plot M.34 Kampala, LRV 4500 Folio 11 Plot 20A Nakivubo Place Kampala, LRV 4514 Folio 10 Plot 24 Nakivubo Place Kampala, LRV KCCA377 Folio 3 Plot M77A Kafumbe

**Mukasa Road and LRV KCCA 377 Folio 7 Plot M77B Kafumbe Mukasa Road,** upon which St. Balikuddembe Market sits and it is responsible for its management. On the 3<sup>rd</sup> November, 2020, the Executive Director of the Respondent wrote to the Applicant notifying it that the Respondent had assumed the management of Kampala markets and directed that the affairs and operations of the Applicant be handed over to the officials of the Respondent Authority. It is the Applicant's contention that the Respondent's decision to take over the affairs of the Applicant and the management of the Applicant's property is a violation of the Applicant's right to own and utilize its property which is enshrined in Article 26 of the Constitution of the Republic of Uganda, hence this application.

### **Representation**

Learned Counsel Richard Latigo is for the Applicant while Denis Byaruhanga together with Mike Mukwana are for the Respondent. Written submissions have been filed for the parties.

**The issues set out for trial are: -**

- 1. Whether this is a fit and proper case for judicial review**
- 2. Whether the Respondent's decision and intended actions are ultra vires, irregular and illegal**
- 3. Whether the actions of the Respondent contravene the Applicant's right to property**
- 4. Whether the Applicants are entitled to the remedies sought.**

### **Submissions**

**Issue No.1: Whether this is a fit and proper case of judicial review**

80 Counsel for the Applicant submitted that the Applicant has shown in its affidavits that it owns and is in management and control of St. Balikuddembe Market. That the evidence adduced by Mr. Godfrey H. Kayongo in his affidavit in support of the application and particularly, annexure Da, Db, Dc, Dd, and De to his affidavit show the various certificates of title for the land upon which the market sits which  
85 is also under the Applicant's management and control. That annexure J2 to Mr. Kayongo's affidavit is the opinion of the Attorney General advising the Inspector General of Government and the Respondent on the affairs of St. Balikudembe market. Counsel explained that there are several Court decisions between the Applicant and the Respondent over St. Balikudembe market, including **St.**  
90 **Balikuddembe Market Stalls, Space and Lock-Up Shops Owners Association Limited (SSLOA) -v- Kampala Capital City Authority, HCCS No. 353 of 2018**, where the Respondent was ordered to refund the money it received from the Applicant over St. Balikudembe Market. Counsel referred this Court to a copy of the judgment and submitted that under S. 36(1) of the judicature Act, Rule 3 (1)  
95 and (2) of the Judicature (Judicial Review) Rules of 2009, Rule 3A and Rule 7A of the Judicature (Judicial Review) (Amendment) Rules, 2019, the Applicant has shown that it has sufficient interest in this matter, that this application is amenable for Judicial Review, that the Applicant is aggrieved by the Respondent's decision and its intended actions. He prayed that this issue should be answered in the  
100 affirmative.

In reply, Counsel for the Respondent submitted that judicial review involves an assessment of the manner in which a decision is made. That Courts examine the circumstances under which the impugned act was done in order to determine whether it was fair, rational and/or arrived at in accordance with the rules of  
105 natural justice. He relied on the case of **Attorney General –v-. Yustus Tinkasimire & Others, Court of Appeal Civil Appeal No.208 of 2013** and explained that in

110 this case, the decision being challenged was not made by the Respondent. That  
the Respondent was merely implementing a cabinet decision and if this court is  
to find that a decision was indeed made by the Respondent, then the nature of  
the alleged decision and the remedies being sought by the Applicant would point  
to enforcement of private law rights in a judicial review application. That the first  
remedy sought in this application is a declaration that St. Balikuddembe Market  
Stalls, Space and Lock Up Owners Association is a privately owned market which  
is also managed by the Applicant. He relied on Paragraph 17 of the affidavit in  
115 support of the application, where it is stated that "...the Respondent's actions are  
intended to usurp the property of the Applicant and the affairs of the market...".  
Referring to the case of **Arua Kubala Park Operators and Market Vendors'  
Cooperative Society Limited -v- Arua Municipal Council MC No. 0003 Of 2016**,  
Counsel explained that the dispute in this Court doesn't concern the public at  
120 large, it is a dispute based on private ownership rights and control/management  
of St. Balikuddembe Market. He submitted that the issues in the instant case are  
not those that are amenable for judicial review. That they should be subject to a  
civil suit for determination of ownership and management rights. Counsel  
emphasized that in the **Arua Kubala Park** case (*supra*), Court noted that there  
125 must be a public dimension to justify having recourse to reliefs by way of judicial  
review and where a transaction is not related to public interest, an aggrieved party  
has a remedy in private law. He prayed that this application be dismissed for not  
being amenable to Judicial Review.

### **Analysis**

130 ***Rule 3 of the Judicature (Judicial Review) (Amendment) Rules, 2019 defines  
Judicial Review as the process by which the High Court exercises its  
supervisory jurisdiction over proceedings and decisions of subordinate courts,***

*tribunals and other bodies or persons who carry out quasi – judicial functions or who are charged with the performance of public acts and duties.*

135 *Under Rule 7A (1) of the Judicature (Judicial Review) (Amendment) Rules, 2019, the Court shall in considering an application for judicial review satisfy itself of the following: -*

*(a) that the application is amenable for judicial review*

140 *(b) that the aggrieved person has exhausted the existing remedies available within the public body or under the law and;*

*(c) that the matter involves an administrative public body or official among others.*

145 *A public body within the meaning of Rule 3 of the Judicature (Judicial Review) (Amendment) Rules, 2019 includes the Government, any Department, Services or undertaking of the Government.*

Under the KCCA Act, 2010, one of the duties of the KCCA is to provide for the administration of Kampala by the Central Government. This means that the Respondent is a public body.

150 **In the case of Nazarali Punjwani -v- Kampala District Land Board & Anor, HCCS No. 07 of 2005 Justice Kasule (as he then was), observed that: -**

**“judicial review is a legal process of subjecting to judicial control, the exercise of powers affecting people’s rights and obligations enforceable at law by those in public office and that judicial review controls administrative action under three heads of illegality, irrationality and procedural impropriety.”**

155 See also *Grace Namulondo & 3 Ors –v- Jone Johns Serwanga Salongo & 2 Ors MC No. 1 of 2019.*

In this case, the Executive Director of the Respondent wrote to the Applicant on the 3rd November, 2020, notifying it that the Respondent had assumed the management of Kampala Markets and directed that the affairs and operations of the Applicant in respect of St. Balikudembe Market be handed over to the officials of the Respondent. It is the Applicant's claim that it is aggrieved by the decision of the Respondent's Executive Director for coming up with such a directive without giving them an opportunity to be heard. Having established that the Respondent is a public body, its administrative actions or actions of its officers where the proper procedure is said not to have been followed or where the action is said to be ultra vires or where the principles of natural justice are said not to have been followed in the process of making the decision thereby affecting people's rights and obligations enforceable at law, qualifies the matter to be subjected to Judicial Review. In this case, my finding is that this case is amenable for judicial review. Therefore, this issue is answered in the affirmative.

**Issue No. 2: Whether the Respondent's decision and intended actions are illegal, irrational and procedurally improper.**

**Submissions**

Counsel for the Applicant relied on the certificates of title (already referred to in the 1<sup>st</sup> issue). He explained that the issues to do with the management of the Market were dealt with at length by this Court in the case of *Katuntu Ibrahim - v- St. Balikuddembe Market Stalls, Space and Lock-Up Shops Owners Association Limited (SSLOA), HCCS No. 211 of 2013* which is annexure J1 to the Affidavit in support of the application. That the threatened take-over of management of the market by KCCA would therefore be unconstitutional and unlawful. Referring to Paragraphs 6, 7 and 8 of the affidavit in reply, Counsel explained that much as the Executive Director states that she is implementing a

cabinet decision and a Ministerial directive, no such Ministerial directive is attached. He explained that it is ascertainable from the Letter of HE the President  
185 dated 25<sup>th</sup> September, 2020 that the reference is on Government markets, which the Applicant's business is not and therefore, the intended actions of the Respondent are misguided and ultra vires. Counsel relied on the case of **Attorney General –v- Yustus Tinkasimiire & Others (supra)** where the Court of Appeal observed at Page 14 that: -

190 *".... The Government, because it has the power and the coercive machinery of the state at its disposal, issued a ministerial order of eviction against its citizens who have a claim over the same land. We find as the Judge, that such an order was irrational, unfair and offended all the rules of natural justice...."*

Counsel prayed that the Respondent be prohibited from enforcing the alleged  
195 Ministerial decision as it is irrational, unfair and offends all the rules of natural justice.

Counsel for the Respondent made no submissions on this issue but only prayed to Court to find this issue in the negative.

### **Analysis**

200 **Under rule 7A (2), of the Judicature (Judicial Review) (Amendment) Rules, 2019, it is provided that the Court shall grant an order for Judicial Review where it is satisfied that the decision making body or its officer did not follow due process in reaching a decision and that, as a result, there was unfair and unjust treatment.**

205 **In Fuelex Uganda Ltd -v- The Attorney General & Others, HCMC No. 48 of 2014 cited in Dr. Daniel K.N. Semambo -v- National Animal Genetic Resource Centre HCMC No. 30 of 2017; Musota J, (as he then was) held, inter alia, that**

in order to succeed in an application for judicial review, the Applicant has to show that the decision or act complained of is tainted with illegality, 210 irrationality and procedural impropriety.

In the case of Attorney General & Anor-v- Yustus Tinkasimire & 18 Others CA NO. 208 OF 2013) Court observed that: -

(a) Illegality arises when a decision making authority commits an error of law in the process of making a decision, for instance where an authority 215 exercises power that is not vested in it or has acted without jurisdiction or in an ultra vires manner. It is also an illegality if a decision maker incorrectly informs himself/herself as to the law or acts contrary to the principle of the law.

(b) Irrationality refers to a situation when the decision made is outrageous 220 in defiance of logic or acceptable moral standards that no reasonable person could have arrived at that decision. It refers to a situation when a decision making authority acts unreasonably that in the eyes of court, no reasonable authority addressing itself to the facts and law before it would have made such a decision.

(c) Procedural impropriety occurs when a decision making authority fails 225 to act fairly in the process of its decision making process. It includes failure to observe the rules of natural justice towards the one to be affected by the decision. It also involves failure by an administrative authority or tribunal to adhere and observe procedural rules expressly 230 laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.

There are two Presidential directives on the Court record. The 1<sup>st</sup> directive dated January, 9<sup>th</sup> 2009, which is annexure "H" to the affidavit in support of the

application is in respect of leasing of St. Balikudembe market. In this directive, HE  
235 the President directed the Minister of Local Government to liaise with the Attorney  
General to ensure that the Association is a legal entity and that all people in the  
market should be taken care of before the lease for the market is offered to them.  
This was done and lease titles (referred to herein above) upon which St.  
Balikudembe market sits were issued in the names of the Applicant.

240 The 2<sup>nd</sup> Presidential directive is dated 25<sup>th</sup> September, 2020, addressed to the  
Minister of Kampala Capital City and Metropolitan Affairs on the issue of hijacking  
markets and rufulas in Kampala. St. Balikudembe (Owino) market is mentioned as  
one of the affected markets. In the last paragraph, the President's directive is that;

245 ***"...the government should repossess its markets and the private people that  
had tried to grab the markets should be compensated for the little they put  
in if at all..."***

The Minister referred the matter to the Executive Director of the Respondent who  
then wrote to the Applicant on the 3<sup>rd</sup> November, 2020, requiring the Applicant  
to hand over management affairs of St. Balikudembe market to the Respondent.  
250 (See annexure "G" to the affidavit in support of the application). In paragraph 5  
of her affidavit in reply the Executive Director states that the Applicant has in  
contravention of the Market Act maintained and or managed St. Balikudembe  
Market. It is the Applicant's contention under paragraph 17 of the affidavit in  
support of the application that the Respondent intends to usurp the property of  
255 the Applicant and the affairs of the market which matters are not in the purview  
of the Respondent and or its officials and this, according to the Applicant, is an  
illegality.

***S.1 (1) of the Market Act, 1942 provides that no person or authority other  
than the administration of a district, a municipal council or a town council  
260 shall establish or maintain a market.***

265 *Under S.1(2) of the Market Act, 1942, the administration of a district may establish and maintain markets within the area of its jurisdiction and shall control and manage such markets or shall vest their control and management in such person or authority as it may deem fit; except that in the urban areas mentioned in the Schedule to this Act, markets shall be established, maintained, controlled and managed by the municipal council or town council, as the case may be, established in the area.* (I have underlined for emphasis).

270 Under *S.5 (4) of the KCCA Act, 2010, any enactment that applies to a district shall, subject to this Act and with the necessary modifications, apply to the Authority.*

From the above provisions of the law, it means that sections of the Market Act, 1942 which apply to districts apply to Kampala Capital City Authority (the Respondent) and therefore, the Respondent has authority to establish and control the management of markets within Kampala Capital City or in the alternative, 275 KCCA can vest its control and management of any market in its area of jurisdiction, in such person or authority as it may deem fit.

In this case, it would appear basing on the Court decisions in *Civil Suit No. 947 of 2001, MA No. 618 of 2012 arising from CS No. 947 of 2001, MA No. 586 & 587 of 2014 arising from CS No. 947 of 2001 all attached to the affidavit in* 280 *support of the application, Civil suit No. 353 of 2018 St. Balikudembe Market Stalls, Space and Lock up shops owners Association Ltd (SSLOA) –v- Kampala Capital City Authority, ( supra)* and a letter to the Inspectorate of Government (IGG) dated 18th July, 2012 by the Solicitor General which was copied to the Respondent (see annexure J2 to the affidavit in support of the application), confirm 285 the position that the Respondent exercised its option of vesting the control and management of St. Balikudembe (Owino) market to the Applicant.

Now, the issue that this Court has to address is whether the Respondent can take over the management of St. Balikudembe Market from the Applicant by her letter dated 3<sup>rd</sup> November, 2020.

290 **Article 26 of the Constitution states that;**

**1. Every person has a right to own property either individually or in association with others.**

**2. No person shall be compulsory deprived of property or any interest in or right over the property of any description except where the following conditions are satisfied: -**

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**(b)(i) Prompt payment of fair and adequate compensation, prior to taking of possession or acquisition of the property.**

In **the case of Uganda National Roads Authority –v- Irumba Asumani & Peter Magelah, SCCA No.2 of 2014**, the Government of Uganda commissioned a project to upgrade the Hoima-Kaiso-Tonya road, leading to Uganda’s oil fields in the Albertine Graben. Acting under the Land Acquisition Act, the Government compulsorily acquired the project land with Uganda National Roads Authority (UNRA) taking possession before payment of compensation to the owners of the land under the Land Acquisition Act that permitted the Government to compulsorily acquire land before payment of compensation. The land owners challenged the constitutionality of UNRA’s action.

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The Constitutional Court found that the Land Acquisition Act was unconstitutional to the extent of its inconsistency with Article 26(2) of the Constitution in so far as it did not provide for the prompt payment of a fair and adequate compensation to the land owners prior to the taking of possession or acquisition of any property by the State. UNRA appealed to the Supreme Court. The Supreme Court held that; **"Article 26 does not give powers to Government to compulsorily acquire people’s land without prior payment. ..."**

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The above position of the law applies to this case. I have already established that St. Balikudembe (Owino) Market, which sits on land registered in the names of

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the Applicant, belongs to the Applicant. This means that should the Respondent decide to withdraw St. Balikudembe Market from the Applicant under S.1(2) of the Market Act, 1942, then it should make prompt fair and adequate compensation to the Applicant prior to taking over possession and or management of the property. I also find this to be in tandem with the presidential directive where in the last paragraph it is stated that: -

***“the private people that had tried to grab the markets should be compensated for the little they put in if at all”***

In view of the above, it is my finding that the Respondent cannot just withdraw the management of St. Balikudembe (Owino) Market from the Applicant by letter of its Executive Director requiring the Applicant to immediately hand over the management affairs and office of St. Balikudembe Market to the Respondent without compensation. The Applicant should be adequately compensated for their interest.

Therefore, the communication of the Executive Director of the Respondent in her letter dated 3<sup>rd</sup> November, 2020 requiring the Applicant to hand over the management affairs and office of the St. Balikudembe Market without prior adequate compensation was ultra vires, irrational and procedurally improper and I therefore make a declaration and orders as follows: -

- 1. St Balikudembe (Owino) Market is currently privately owned and managed by the Applicant.**
- 2. An order of certiorari is hereby issued quashing the directive of the Executive Director of the Respondent to the Respondent to take charge and assume the management of St. Balikudembe (Owino) Market.**
- 3. An order of prohibition is hereby issued restraining the Respondent from enforcing the directive of its Executive Director to assume the**

management of St. Balikudembe (Owino) Market and to cause the elections of the leaders.

345 **4. The Respondent pays costs of this application**

I so order.

**Dated, signed and delivered at Kampala this 2<sup>nd</sup> day of June, 2021.**

350 **Esta Nambayo**

**JUDGE**

**2/6/2021**