

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

MISCELLANEOUS CAUSE NO. 105 OF 2021

NATIONAL INFORMATION TECHNOLOGY

AUTHORITY,UGANDA:..... APPLICANT

VERSUS

1. UGANDA INVESTMENT AUTHORITY

2. RAINBOW DIARY UGANDA LTD:..... RESPONDENTS

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for Judicial Review under Article 26, 28, 42 & 45 of the Constitution , Section 33, 36 and 38 of the Judicature Act as amended, Rules 3, 6, 7 and 8 of the Judicature (Judicial Review) Rules, 2009 for the following orders;

1. A declaration that the 1st respondent exercised its authority wrongfully and acted contrary to the rules of fairness and natural justice when it illegally and irregularly allocated the applicant's land comprised in **Leasehold Register, Volume MKO1176, Folio 11, Plot No. 1230, Kyaggwe Block 113, Namanve, Mukono District** to the 2nd respondent.

2. An order of certiorari be issued quashing the 1st respondent's Board decision to allocate the applicant's land comprised in **Leasehold**

Register, Volume MKO1176, Folio 11, Plot No. 1230, Kyaggwe Block 113, Namanve, Mukono District,to the 2nd respondent.

3. A permanent injunction do issue restraining the 1st respondent from withdrawing the applicant's land comprised in **Leasehold Register, Volume MKO1176, Folio 11, Plot No. 1230, Kyaggwe Block 113, Namanve, Mukono District**, allocating it to any other person, alienating or in any way dealing with the applicant's land.
4. A permanent injunction do issue against the 2nd respondent, its contractors, agents and/or servants preventing them from trespassing, selling, transferring, alienating, and making any developments on or in any other way dealing with the land on the said land.
5. Provision be made for the costs of this application.

The grounds in support of this application are that:

1. The applicant was established under the National Information Technology Authority, Uganda Act, 2009, Act 4 of 2009. Some of its functions are listed in paragraph 2 of the affidavit in support of this application.
2. The Ministry of Finance, Planning and Economic Development in its letter Ref: EDP/313/138/01 dated 20th July 2015 communicated to the 1st respondent the President's directive to allocate land to the applicant for the development of a BPO Park.
3. By letter dated 11th July, 2016, the 1st respondent informed the applicant that the Uganda Investment Authority (UIA) Board had evaluated the applicant's application based on the established criteria

for allocation of investment land and accordingly decided to allocate to the applicant 5 (five) acres of fully subsidised land in the Kampala Industrial Business Park for the establishment of a BPO Park.

4. On 27th January 2018, the applicant and the respondent executed a lease agreement for a term of 5 years. The applicant was subsequently registered as proprietor of the land comprised in Leasehold Register, Volume MKO1176, Folio 11, Plot No. 1230, Kyaggwe Block 113, Namanve, Mukono District.
5. On 9 February 2021, the applicant's staff found that contractors, agents and/or servants of the 2nd respondent had trespassed on the land and were clearing the land for the purpose of erecting structures. By letter dated 18 February 2021, the applicant made a complaint to the 1st respondent about the 2nd respondent's trespass and activities on the land. The applicant also informed the 1st respondent that it still intended to develop the land.

The 2nd respondents opposed this application and they filed an affidavit in reply through its Managing Director-Kareem Jassani stating briefly as follows:

1. The 2nd Defendant contends that on 5th December 2019, it made an application to the 1st Respondent for land in Kampala Industrial Business Park (KIBP) for erecting a dairy and agro-processing plant. By a letter dated **5th May 2020** it accepted the 2nd Respondent's application and made an offer to the latter of **2 acres** of land comprised in Block 113 Kyaggwe, Mukono.
2. The 2nd Respondent made another application for additional land. By a letter dated **15th June 2020** accepted the said application and made

another offer to the 2nd Respondent of **3 acres** of land comprised in Plot 1230, Block 113, Kyaggwe, Mukono. That made the total of land acreage **5 acres**.

3. A lease agreement was executed on the 2nd day of October 2020 between the 2nd Respondent and the 1st Respondent. A Certificate of Title was issued to the 2nd Respondent on 11th November 2020 making the 2nd Respondent the duly registered lessee of the land comprised Block 113, Kyaggwe, Mukono District hereinafter referred to as the suit land.
4. Subsequent to the acquisition of the suit property, the 2nd Respondent took over the possession, use and occupation of the suit property and began developing the same by erecting the said plant and has so far sunk in a whopping **US\$ 2,000,000** and equipment and machinery worth US\$ 5,000,000 was ordered and is on high seas.
5. That the 2nd respondent did not at all trespass on the suit land but is occupying the same legally, regularly acquired the same from the 1st respondent. The applicant was never aware of any adverse interest including that of the applicant and acted in good faith and was not a party to and had no notice of any fraud, illegality or irregularity in the acquisition of the suit property.

The 1st respondent filed an affidavit in reply through Hamza Galiwango Director Industrial Parks Development Division briefly stating that;

1. The applicant on 4th January, 2016 through the Executive Director applied to be allocated 30 acres of land at Kampala Industrial and Business Park, Namanve for establishment of Business Process Outsourcing (BPO).

2. That on 11th July 2016, the 1st respondent offered the applicant an initial lease for a period of 5 years subject to renewal for a full term of 49 years upon satisfaction of the development conditions in the lease agreement and observance of all other terms and conditions of the lease agreement.
3. That the applicant and 1st respondent on 29th January 2018 entered into a contractual relationship/lease agreement and a certificate of title was issued by the Lands Office to the applicant on 7th March 2018 in respect of land situate and known as Namanve, Mukono described as LRV MKO1176, Folio 11, Plot No. 1230 Kyaggwe 113 measuring approximately 2.0110 hectares for a lease running from 29th January, 2018.
4. That the applicant and 1st respondent entered into a further lease agreement on 14th November, 2020 for a further parcel of land measuring 5.12 Acres comprised in Kyaggwe Block 113 Plot 828 known as Namanve Mukono for a two year lease running from 18th September, 2020. The applicant has not fulfilled the development covenant to date.
5. That the applicant is by the present application seeking to enforce individual rights exclusively under the domain of private law. The said rights derive from a lease agreement and the remedy of judicial review is thus not available.
6. That the applicant's grievances can be remedied and the rights can be enforced by ordinary action for damages or injunctions and it is important parties are held to their contractual obligations through ordinary suits and not by invoking public law remedies.

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

Two issues proposed for court's resolution;

1. *Whether this is a proper case for judicial review?*
2. *Whether the application raises any ground for judicial review.*

The applicant was represented by *Counsel Albert Byamugisha* whereas the 1st respondent was represented by *Jeffery Madette (SA)* while *Counsel Sam Bitangaro & Senior Counsel John Mary Mugisha* assisted by *Richard Shibale* represented the 2nd respondent.

Whether this is a proper case for judicial review?

The applicant submitted that the 2nd respondent's submission that the dispute between the two parties who has a better title is misconceived because the application is not concerned with who has a better title. Determination of that issue does not require a fully-fledged trial in an ordinary suit. The can Commissioner Land Registration determine it without the rigors of a full trial.

However, cancellation of the certificate of title would leave the 1st respondent's impugned decisions intact. The 1st respondent is a statutory authority whose decisions in the exercise of its statutory functions have the force of law.

The applicant's counsel further argued that judicial review is available as a remedy of last resort. An applicant is required to demonstrate that they have exhausted the existing remedies available within the public body or under the law. This does not necessarily mean that an aggrieved party must file an ordinary suit first.

The 1st respondent was required to give the applicant a hearing and take a decision after the hearing. A hearing on a complaint concerning the decision is not a hearing envisaged under Article 28 of the Constitution. The hearing must take place before the decision is made. In this case, only one meeting was held. The 1st respondent upheld its decisions.

Instead, emphasis was placed on the “enforcement of private law rights arising out of the lease agreement between it and the 1st respondent.” The applicant’s pleadings do not refer to the terms of the lease agreement or breach thereof.

Concerning the policy of the statute, Schedule 2 to the Investment Code Act provides for **PRIORITY AREAS FOR INVESTMENT**. Information technology is number 10 on the list. Dairy plants are not listed.

The applicant is a statutory body. It must conform to the Constitution. The land is public land. Private rights do not arise.

The 1st respondent counsel submitted that the applicant by the present application seeking to enforce individual rights exclusively under the domain of private law. The said rights derive from a lease agreement and consequently the application does not raise any grounds for judicial review.

The 1st respondent further submitted that the present application is thus misconceived and not amenable to judicial review as it seeks to enforce private rights governed by private law through an application for judicial review. This is an abuse of court process and ought to be discouraged.

The 2nd respondent’s counsel submitted that the Applicant’s Application is utterly incompetent in as much as it is not amenable for judicial review in so far as the current *impasse* could be adequately resolved **by invoking an alternative remedy** under the law, viz, **an ordinary suit**.

It is not disputed that a close perusal of the Application and its supportive affidavit and the annexures thereto reveals that the facts of the Application are nothing but a disguised way of asking this Honourable Court to **vindicate** the Applicant's private **law rights** under the said contract with the 1st Respondent and investigation of the private law rights of the Applicant *viz-a-viz* those of the 2nd Respondent; which of the two has a better or superior title.

The 2nd respondent's counsel further submitted that the facts of this matter succinctly show that it goes well beyond the scope of Judicial Review where this honourable Court's jurisdiction is exercised in a supervisory manner and not to **vindicate** the private law rights of the party seeking Judicial Review. It is an established principle of law that Judicial Review is available **as a remedy of last resort** and is not to be invoked as an automatic recourse for an aggrieved party.

The Applicant's application herein is nothing but a disguised claim for enforcement of private law rights arising out of the lease agreement between it and the 1st Respondent and determination of similar rights arising out of competing rights in the suit land under land law in respect of the 2nd Respondent. Clearly, this puts the instant matter out of the realm or purview of judicial review. See *Uganda Taxi Operators And Drivers Association -vs- KCCA & Another H.C. Civil Division C.S. Misc. Applic. No. 137 & 2011*

It was further contended that in the instant application the applicant is asking this honourable Court to vindicate the Applicant's private law rights under the **lease agreement** between it and the 1st Respondent. In the same vein, it will entail this Court to investigate the root of both the Applicant's and 2nd Respondent's respective titles so as to determine whether the Applicant's title is superior or whether the 2nd Respondent's title is **null and**

void (sic) as is contended by the Applicant. It is trite law that a party's title is amenable for cancellation where Court unearths fraud or illegality or both. See *CACA No. 110 OF 2014 VICTORIA BEST LTD -VS- U.I.A & SURGIPHAM (U)LTD* which is **on all fours** with the instant matter. In that case, the 1st Respondent which happens to be the 1st Respondent herein brought its claim for the vindication of its private law rights by **an ordinary suit** culminating in the cancellation of the Appellant's Certificate of Title after a fully-fledged trial which was subsequently upheld by the Court of Appeal. It was not by way of Judicial Review.

Analysis

Rule 5 of the Judicature (Judicial Review) (Amendment) Rules, SI No.32 of 2019 which introduces **Rule 7A** provides:

"7A. Factors to consider in handling applications for judicial review.

(1) *"The Court shall in handling applications for Judicial Review satisfy itself of the following;*

a) *THAT the Application is amenable for Judicial Review.*

It should be noted that public bodies perform private law acts all the time in respect of which they can sue or be sued in private law proceedings: Breaches of contract and covenants in leases and tenancies and negligence, employment of staff, personal injury etc.

It is therefore always necessary to analyse the nature of the decision or act to decide whether it is properly classified as existing in public or private law, given that judicial review to be the appropriate form of challenge, it is necessary that the decision or act exists in public law. Some statutory duties imposed on public bodies may still create private rights in favour of individuals; enforceable by way of ordinary claim. See *Cocks v Thanet*

District Council [1983] 2 AC 286; Arua Park Operators and Market Vendors Cooperative Society Limited v Arua Municipal Council High Court Misc. Cause No. 0003 of 2016

It ought to be clarified that only because one of the parties to the agreement is a statutory or public body, the contract cannot be characterised as a statutory contract. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies like private parties, have power to contract or deal with property. Such activities may not raise any issues of public law. The only exception would arise if the terms of a contract entered into by a statutory body are fixed by statute, the contract may be regarded as statutory. Statutes may impose a duty on a public body, but that duty may still create private rights in favour of the individuals enforceable by ordinary claim. See *Public Law in East Africa by Ssekaana Musa pg39 LawAfrica publishers.*

Where there is a concluded contract pure and simple, the parties are then bound by the contract. The parties can only claim rights conferred on them by the contract and bound by its terms unless some statute steps in and confers some special statutory obligations on the part of the administrative authority in the contractual field. The liability of the statutory body in contractual obligations is practically the same as that of a private person enforceable in ordinary claims and not through judicial review.

In **Uganda Taxi Operators & Drivers Association -vs- KCCA & Another H.C. Civil Division C.S. Misc. Applic. No. 137 & 2011** where the Applicant's application was arising out of a **decision relating to a breach of contractual obligations** (as is in the instant matter) **Mwangusya Eldad I** (as he then was) held, *inter alia*,

“that the application was incompetently before that Court in as much as what the Respondents were doing infringed on the Applicant's right to run the contract

hence the solution did lie in an ordinary suit where the validity of the contract would be tried and finally resolved and not in the prerogative orders of certiorari and prohibition.

He further held that the case went well beyond the scope of Judicial Review where jurisdiction is exercised in a supervisory manner and not to vindicate the rights of the party seeking Judicial Review. He further held that the Court would find it difficult granting the orders sought without vindication of the Applicant's rights under the contract. He accordingly dismissed that application with costs."

In the instant case, the applicant is actually complaining about re-allocation of land comprised in Leasehold Register, Volume MKO1176, Folio 11, Plot No. 1230, Kyaggwe Block 113, Namanve, Mukono District. Which certificate of title was created after the execution of a lease agreement between the 1st respondent and the applicant dated 29th January 2018 and another lease agreement dated 14th November 2020. The applicant's interest in the said land is derived from the two lease agreements which are strictly private rights governed under the relevant land laws in Uganda. This involves a breach of the terms of the lease agreements which involves private law not public law claims and so would not ordinarily be the subject of judicial review.

The case before this court is most likely to be resolved by asking whether the actual subject-matter of the challenge involved claims based on ordinary public law principles or whether, on analysis, the individual was claiming that some private law rights had been violated. In practice, the courts tend to regard duties imposed on public bodies alone as primarily public law duties, and the only issue is whether the duty additionally creates private law rights super-imposed on the public law duty.

It bears emphasis however, that the same land has been allocated to another innocent third party (2nd respondent) vide a lease agreement dated 2nd

October 2020 between the 1st respondent and 2nd respondent. This squarely puts the dispute of the applicant in the realm of private law that ought to be determined under land law and indeed may involve cancellation of title which this court would not grant in the present application. The said transactions are purely contractual and based on the private law rights that are derived from the said agreements. Contractual obligations should not be enforced by judicial review, unless the question is whether the contracting authority has exceeded its powers. Judicial review should be a remedy of last resort and it is inappropriate where there is another field of law governing the situation. See *Nakasero Market Sitting Vendors and Traders Ltd v KCCA & Another HCCM No. 348 of 2020*

This application was not a proper case for judicial review based on the facts and it is purely a private law matter premised on the lease agreements executed between the parties. As soon as a lease agreement is executed between the parties, they are bound by the terms of the lease agreement.

This application is dismissed with no order as to costs.

I so Order

SSEKAANA MUSA

JUDGE

6th/08/2021