

UGANDA / JUDGMENT

Birus Property Services Ltd Vs The Commissioner Land Registration & Anor (Misc. Cause No. 001 of 2015) [2015] UGHCCD 155 (26 August 2015)

[2015] UGHCCD 155

COURT

HC: Civil Division (Uganda)

BEFORE

Namundi, J

CASE / FILE NUMBER

Misc. Cause No. 001 of 2015

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

MISC. CAUSE NO. 001 OF 2015

BIRUS PROPERTY SERVICES LTD. :.....APPLICANT

VERSUS

1. THE COMMISSIONER LAND REGISTRATION
2. INSPECTORATE GENERAL OF GOVERNMENT:.....RESPONDENTS

BEFORE: THE HON. JUSTICE GODFREY NAMUNDI

RULING

This is an application for Judicial Review brought under provisions of Section 33 and 38 of the Judicature Act as amended, Sections 98 of the Civil Procedure Act and rules 3, 6 and 7 of the Judicature (Judicial Review) Rules 2009 and Order 52 Rules 1 and 3 of the Civil Procedure Rules.

It seeks prerogative reliefs as follows:

1. A Declaration that the 1st Respondent's decision to cancel the Applicant's Certificate of Title for the property comprised in LRV 4232 Folio 15, Plot 60-62 Aldina road Jinja, is ultra vires, illegal and irrational.

2. A Declaration that the 2nd Respondent's Report dated February 2013 on which the 1st Respondent based her decision was irrational, irregular, null and void as the Inspectorate of Government was at the time not duly constituted.
3. A writ of Certiorari quashing the decision of the 1st Respondent to withdraw/cancel the Title to the suit property.
4. A writ of Certiorari quashing the Report of the 2nd Respondent and/or the directions and/or recommendations made to the 1st Respondent to cancel the Applicant's Certificate of Title of the suit property.
5. An order to maintain/reinstate the Applicant's Certificate of Title to the suit property.
6. An Order for a permanent injunction restraining the 1st Respondent from effecting changes to the Register for the suit property and recalling the Applicant's Certificate of Title to the property.
7. An Order of Mandamus directing the 1st Respondent to desist from acting outside her jurisdiction and exercising the powers she does not have in respect of the Applicant's Certificate of Title to the suit property.
8. Costs of the Application.

Prayers (a), (c), (e), (f), (g) and (h) are directed at Respondent No. 1 while (b) and (d) are directed at Respondent No. 2.

The grounds are contained in the application and also an affidavit deposed by Simpson Birungi, the Applicant's Managing Director whose contents largely reiterate the prayers in the application. The salient points therein are that the Applicant was duly offered a five year lease by the Uganda Land Commission and the Applicant duly paid all the dues and levies required. (Paragraphs 2 and 3).

The Applicant had the lease registered and a Certificate of Title was issued after the Applicants had carried out due diligence to establish that the property was available and as to the ownership of the said property. This involved obtaining a Certificate of no objection from the line Ministry. (Paragraphs 5, 6 and 7).

According to Paragraphs 8-14, the tenants through their Association complained to the 2nd Respondent and also filed a suit in Court seeking a permanent injunction restraining the Applicant from evicting them, alleging that they had a proprietary interest in the suit property.

That suit was dismissed on grounds that the said tenants had no locus or capacity to challenge the Applicant's Title to the property.

The Applicants then learnt that the 1st Respondent had withdrawn the Applicant's Title to the suit property following an alleged public hearing allegedly held on 14/10/2014.

The Applicant also learnt from the Jinja Land office of a communication from the 1st Respondent of the said Notice of a public hearing which had never been served on the Applicants. (Paragraph 15-17).

The Applicant also learnt then that the 1st Respondent had received a Report and recommendations from the IGG (2nd Respondent) that the Applicant's Title be withdrawn as its acquisition together with the lease were tainted with fraud.

The Applicant faults the IGG's Report which they claim was not served on the Applicant.

Further that the IGG at the time was not duly constituted and hence had no capacity to carry out investigations. (Paragraphs 20 (a) – (b)).

The Applicant further faults the procedure followed by Respondent No. 1 in withdrawing the Certificate of Title of the Applicant, e.g. the service of Notice, the **public hearing** as well as the pendency of a matter in the High Court. (Paragraphs 20 (e) - (h)).

That the said procedure contravened the provisions of Section 91 of the Land Act as amended.

Under Paragraph 23, the Applicant challenges the mandate of the 2nd Respondent as not including imposition of directives against another constitutional body.

The Applicant also argues under Paragraph 26 that the irregularities pointed out by the IGG were not committed by the Applicant Company but by the Uganda Land Commission.

That the acts of the 1st Respondent are oppressive and has caused loss to the Applicants.

The Respondents filed affidavits in reply to the application. The 1st Respondent through an affidavit filed by Ms. Sarah Kulata Basangwa averred that the application is bad in law frivolous, vexatious and an abuse of court process.

Further that the Commissioner is mandated under the law to cancel Certificates of Title illegally, erroneously and or wrongfully obtained and retained.

Paragraphs 6 -10 then narrate the procedure the Respondent followed provided under Section 91 of the Land Act as amended.

That if the Applicant was aggrieved then they should have appealed against the said decision.

The 2nd Respondent also filed an affidavit in reply plus an additional affidavit deposed by the Inspector General of Government in person. The affidavit then narrates the origin of the involvement of the IGG in this dispute and the process of investigation which finally led to the findings that the Title of the Applicant was illegally/irregularly procured and recommended its cancellation.

For purposes of this application, it is the capacity of the IGG to investigate the complaints that is being challenged and the consequent recommendations which are being challenged as an imposition over another constitutional body with its own mandate.

The relevant averments would accordingly be Paragraph 3 of the affidavit wherein it is deponed that the IGG acted within the provisions of Articles 225 (1) (a), (b), (c) and (e), 226, 227 and Sections 8 (1) (a), (b), (c), (e), (h), (i) of the Inspectorate of Government Act.

The import of the said provisions is that the IGG is mandated to carry out the activities that include investigation of the complaints and recommending appropriate action.

The additional affidavit was filed without leave of court and beyond the prescribed time limits.

It however raises pertinent issues in that it is claimed the principles of natural justice were followed during the investigation as is required under Section 25 of the Inspectorate of Government Act.

Paragraphs 7, 8, 9, 10, 11 and 12 are matters that should have been left to the 1st Respondent.

Counsel for both parties made submissions to support the averments in the application and replies.

Resolution:

It is not in dispute that Judicial Review is a process through which Court supervises tribunals and public bodies or persons that execute public duties by pointing out illegalities, irregularities and procedural improprieties in the decision making process.

The complaints against the IGG are summarized as having no mandate at the time for not being constituted, and for having no mandate to direct another body with its own constitutional mandate to act on the IGG's directives as both the IGG and the Commissioner for Land Registration are independent bodies.

Finally that the Report dealt with matters that were deep rooted in fraud that only a competent Court of Law can handle. Reference was made to **C. R. Patel Vrs. Commissioner for Land Registration & others - Civil Suit No. 87/2009** in respect of the powers of the Commissioner under the powers of the Commissioner under Section 91 as opposed to adjudication of cases before Courts of Law. **Liver Cot Impex Vrs. A. G- Misc. Cause 173/2010** was cited in respect of the IGG's mandate vis a vis other bodies with constitutional mandate.

Finally **Sam Kutesa & others Vrs. AG Constitutional Petition No. 46/2011 & 54/2011** were cited in respect of the composition of the IGG.

One fact is clear. The IGG is a duly mandated body with powers and mandate clearly outlined under the provisions of law referred to in the affidavit of the IGG. Secondly, at the time of the commencement of investigations, by the IGG in 2012, there was no case pending in the Courts so the IGG cannot be accused of venturing into matters pending before Court.

Thirdly, the findings of the IGG contained in the Report are wide ranging and this Court is not concerned with their correctness in a matter of Judicial Review.

The IGG carried out investigations which included engaging Mr. Birungi of BIRUS properties. He was given opportunity to explain himself.

The findings were then translated into recommendations which were sent to concerned authorities to implement if they so wished.

If the IGG cannot make recommendations resulting from an investigation that the said body is so mandated to do then the office of the IGG would be no more than a white elephant.

It is my find that the IGG duly carried out their mandate and took the relevant or required action under their mandate.

Turning to the issue of the IGG not being duly constituted, the Applicants cited the authority of **Kutesa & others Vrs. AG (supra)** out of context.

That authority dealt with the IGG's specific mandate provided by certain provisions of law as opposed to the General mandate of the said office.

In the said case, the powers to investigate and prosecute were being challenged. The Constitutional Court duly clarified that position that the IGG could only prosecute when duly constituted. That finding is accordingly not applicable to the instant application.

The prayers for reliefs outlined in Paragraphs (b) and (d) of the Application fail accordingly.

I now turn to the complaints against the 1st Respondent.

As stated previously, Judicial Review is concerned with adherence to proper adherence to procedures by those in authority in reaching their decisions rather than the correctness of the decision itself. There is no dispute that the Commissioner's powers under Section 91 of the Land Act are well laid out.

In this application it is the exercise of those powers that are being challenged. The said Commissioner is being faulted for overzealously and illegally being unduly influenced by the recommendations of the IGG which she then proceeded to purport to implement without following the proper procedures or even attempting to carry out any independent investigations.

Further that the Commissioner indulged in matters of fraud over which she had no jurisdiction, and dubbing into matters that were already pending before the Courts of Law.

It is also averred that the 1st Respondent did not comply with the provisions of Section 91 of the Land Act that require an elaborate procedure of Notice, public hearing and communication of decision. The procedure followed was accordingly illegal and a procedural impropriety.

The service of the Notice of the purported public hearing was not served on the Applicant, the same way it was on other stakeholders e.g. Aldina Twegaise Traders Association and the Privatization Unit who were served at their known address. That instead, the Applicant were served through the mail and yet its physical address is known.

The Applicants never received the said Notice (Paragraphs 2 (g) and (h)).

In Paragraph 24 it is averred that the 1st Respondent lacked the jurisdiction and mandate to decide matters relating to fraud as envisaged under Section 91 of the Land Act as amended.

That because of the lack of mandate, and the irregular procedures, the actions of the Commissioner Land Registration were illegal and irrational. (Paragraph 22).

It is also averred that the purported decision to withdraw the Applicant's Certificate of Title contravened Section 9 (8) of the Land Act as ammended.

It requires that a Notice of 21 days of the decision be made to the affected party. (Paragraph 27).

Under Paragraph 28 the 1st Respondent is faulted for having taken her decision during the pendency of a suit in the Courts of Law, challenging the Applicant's Title to the suit property.

The 1st Respondent filed an affidavit in reply deponed by Ms. Sarah Kulata Basangwa.

Therein she avers that the Commissioner of Land Registration is mandated to cancel Certificates of Title illegally, erroneously and wrongfully obtained and retained. (Paragraph 4 and 5).

It is also averred that the requisite Notice to affect ammendments in the Register was duly served on the Applicant's postal address by Registered mail. (Paragraph 7).

That the Applicant was invited for a public hearing which duly took place on 14/10/2014 and the Applicant never turned up. The said public hearing was attended by officials from the Privatization Unit and Ministry of Finance and Economic Development. (Paragraph 8). The decision was taken and the cancellation was duly communicated to the Applicant on 1/12/2014.

The Applicant should have preferred an appeal within the provisions of Section 91 of the Land Act. (Paragraph 9 and 10).

For the Applicant, reference as made to **Allan Mugisha Nyirikindi Vrs. Commissioner for Land Registration & another - Misc. Application No. 45/2011**. Therein it was held inter alia that it was irrational for the Registrar to have commenced proceedings when there is a pending suit in respect of the same property.

In the instant case, just like in the cited authority above, there was a suit filed much earlier (2013) than the purported cancellation proceedings.

The Plaintiffs in this suit. Had variously complained to the IGG, the Commissioner Land Registration among others. They actively participated in the cancellation proceedings as demonstrated by the Applicant's affidavit. It is clear that the 1st Respondent was aware of the Court proceedings which she should have left to take their due course or sought to join as a party if she so wished.

The Respondent No. 1 did not respond to the above either in the affidavit in reply or in the submissions. This alone would be enough to impeach the decisions taken by the 1st Respondent.

The special powers of the Registrar are contained in Section 91 of the Land Act which both Applicant and 1st Respondent have cited.

Under **Section 91 (8) of the Land Act as ammended:**

In exercise of any powers under this Section, the Registrar **shall**;

1. Give not less than 21 days' Notice in the prescribed form to any party likely to be affected by any decision made under this Section.
2. Provide an opportunity to be heard to any such party to whom a Notice under Paragraph (a) has been given.
3. Conduct any such hearing in accordance with the rules of natural justice but subject to that duty shall not be bound to comply with the rules of evidence applicable in a Court of Law.
4. Give reasons for any decision that he/she may make.
5. The Registrar **shall** communicate his or her decision in writing to the parties and the committee.

In this case, both parties agree and disagree that there was an effective Notice. The said Notice was posted on 29/9/2014 at 12.15pm. The hearing on the other hand took place on 14/10/2014.

According to Counsel for the Respondent No. 1, the Notice runs from the time the Notice is posted up to the time of the decision and not up to the time the hearing is conducted. That in that respect the requirement for Notice was fulfilled. Reference was made to the case of **Nakku Vrs. Commissioner Land Registration - Civil Appeal No. 64/2010**.

It is argued that the Registrar's Notice amounted to their being accorded a right to fair hearing.

For the Applicant, it was argued that the authority cited was about compliance with requirements for issuance of a Notice.

In the instant case the Notice that was allegedly issued did not comply with Section 91 (8) (a) of the Land Act as ammended.

I agree with the submissions by Counsel for the Applicants. The Notice is supposed to be issued 21 clear days before the hearing. The hearing must be held and it must be a public hearing.

The Notice allegedly issued fell short of the 21 days which are mandatory.

The Applicant's complain that the way the Notice was allegedly served was even aimed at denying them a hearing since it was not received.

Suffice to say that the moment the statutory period was not complied with, the whole process of the purported hearing became irregular and flouted.

The Applicants were denied the right to a hearing and hence a chance to explain their side of the matter.

The Respondent No.1's claim if the Applicants were not satisfied with the decision, they should have exhausted the procedures for Appeal provided under Section 91 (10) – (12) of the Land Act as ammended.

The failure to comply with Section 91 (8) (a) of the Land Act as ammended rendered the whole process of the purported public hearing nurgatory.

Failure to issue the Notice in accordance with the provisions of the law therefore meant there was no hearing in accordance with the Law.

The decision thereof cannot be of any effect.

It is claimed the cancellation of the Certificate of Title was communicated to the Applicants as per the letter of Commissioner for Land Registration of 1/12/2014. The Applicants claim they never received it and this was in contravention of Section 91 (9) of the Land Act as ammended. There is no evidence on record that the said communication was ever sent or availed to the Applicants.

The Respondent No. 1 claims they sent the Notice by Registered Mail.

When it regards Notice of termination, there was no such effort made and it is possible that the Applicants only found the said termination on the record in the Land Registry.

The proceedings of the public hearing itself are to say the least perfunctory.

It is submitted that the 1st Respondent acted on her own initiative and investigations.

The proceedings show otherwise. There was no such investigation but rather an endorsement of the IGG Report.

The record shows that at the hearing, there was simply a comment that the IGG Report was not objected to and therefore should be implemented.

In summary the failure to comply with the provisions of Section 91 of the Land Act as ammended rendered the actions and decisions of the 1st Respondent illegal and nurgatory.

* Notice was not given in accordance with Section 91 (8) of the Land Act.

* As such there was no proper hearing.

* The Applicant was denied a right to a hearing which is an essential element of natural justice.

* There was no effective communication of the decision by the 1st Respondent.

* There could accordingly be no appeal against the hearing or decision that never was. The authority of **Uganda Crops Industries Ltd. Vrs. URA** accordingly becomes irrelevant in the instant case.

The actions of the 1st Respondent were accordingly fraught with illegality, irrationality and procedural impropriety.

It is the finding and decision of this Court as follows:

1. That the prayers in respect of Respondent No. 2 have not been established as pointed out earlier in this Ruling.
2. The decision of the 1st Respondent to cancel the Title of the Applicant in respect of the suit property was illegal and irrational for failure to comply with the provisions of the law and thus denied the Applicant the right to be heard.
3. It is accordingly ordered that the Applicant's Title be reinstated and whoever wishes to impeach it should follow proper procedures with all relevant stakeholders properly notified and given a fair hearing to facilitate the due process of law and or to institute ordinary civil proceedings in the Courts of Law.
4. This is a matter of public interest and it is only fair that each party bears its own costs.

Godfrey Namundi

JUDGE

26/08/2015

26/8/2015:

Benard Mutyaba for Applicant

1st Respondent represented by Mr. Oundo

2nd Respondent unrepresented

Court: Ruling read in court.

Godfrey Namundi

JUDGE

26/08/2015

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Prepared on 13 October 2026 · Esheria