

UGANDA / JUDGMENT

**Kibuuka & Another v Commissioner
Land Registration & Another
(MISCELLANEOUS CAUSE NO. 60 OF
2019) [2020] UGHCCD 63 (23 April 2020)
[2020] UGHCCD 63**

COURT

HC: Civil Division (Uganda)

BEFORE

Musa Ssekaana, J

CASE / FILE NUMBER

MISCELLANEOUS CAUSE NO. 60 OF 2019

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THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA (CIVIL DIVISION) MISC. CAUSE NO.
60 OF 2019**

1. FRANCIS LOUIS KIBUUKA ::::::::::::::: APPLICANTS
2. JOSEPH KATABIRA KIBIRANGO

VERSUS

- 1. THE COMMISSIONER LAND REGISTRATION
- 2. KIKONGO JUSTINE (AS ADMINISTRATOR TO ::::::::::::::: RESPONDENTS THE ESTATE
OF THE LATE DISAN KALEEBU)

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicants filed an application under Section 98 of the Civil Procedure Act and Rules 3(1) and 3 (2) of the Judicature (Judicial Review) Rules for orders that;

- a) *An order of certiorari to call for and quash the decision of the 1st Respondent cancelling the Applicants' proprietorship over the property comprised in Block 34 Plot 77 land at Mutundwe (hereinafter "Suit Property") on the basis that*;

- (i) *The process and acts of the 1st Respondent in cancelling the Applicant's proprietorship were in contravention of Section 91 of the Land Act and Sections 176 and 177 of the Registration of Titles Act, and amounted to usurping the powers of the High Court*;
- (ii) *The acts of the 1st Respondent were in violation of Section 5 of the Limitation Act*;
- b) *A consequential Order doth issue reinstating the Applicants as the registered proprietors of the Suit Property*;
- c) *An injunction doth issue restraining the 1st Respondent from registering any instrument adversely affecting the Applicants' proprietorship over the Suit Property, save for, in strict accordance with the law, and further an injunction doth issue restraining the 2nd Respondent from evicting or in any way interfering, whether by herself, or her servants or agents, with the Applicants' use and enjoyment of the Suit Property*.
- d) *General damages*;
- e) *Costs of this Application be provided for*

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavit in support of the application by Francis Louis Kibuuka but generally and briefly state that;

- i) The Applicants were until the 17th December 2018 the joint registered proprietors of the property comprised in Block 34 Plot 77 Land at Mutundwe, having been registered as proprietors of the same on **10th October 2010**, the same having been transferred to them by their late mother Jane Nalule, and have since its acquisition been in possession and use thereof to date and hold the certificate of title thereto.
- ii) The property was on **22nd May 1991** registered in the names of Amosi Jemba Kalule and Esawo Wasswa Senkungu who transferred to Le Frajoj which was then registered a proprietor on **10th August 1993**. Le Frajoj transferred the land to Ms Jane Nalule who then transferred it to the Applicants who got registered as proprietors on **21st October 2010**.
- iii) The Applicants enjoyed undisturbed possession and use of the property until **19th July 2017** when they received a letter from Rwakafuuzi & Co Advocates (copy attached) acting on behalf of Justine Kigongo, Patricia Nawajje and Gloria Nambatya making various allegations against them, Lefrajoj, Amosi Jjemba Kalule and Esawo Wasswa Senkungu. This letter was responded to by Sebalu & Lule's letter of 25th July 2017.
- iv) On 16th May 2018 the 1st Plaintiff received a Notice of Intention to Effect Changes in the Register from the 1st Respondent requiring the Applicants to attend before the 1st Respondent on 3rd July 2018 to tender objections to the intention to entertain a complaint lodged by the 2nd Respondent.

- v) By MMAKS Advocates letter of 28th May 2018, the Applicants objected to the 1st Respondents intended actions contending *inter alia* that they lawfully obtained registration over the above property and that Le Frajoj from whom Jane Nalule derives and interest, and from whom they in turn derive an interest in the Suit Property having been registered as proprietor 24 years ago, any claim seeking to impeach their title (even if it had merit) was time barred under the Limitation Act.
- vi) On 12th July 2018, the 2nd Respondent appeared before the 1st Respondent on which day 2nd Respondent clearly stated that the Suit Property belonged to her late husband (Disan Kaleebu) and that Esawo Wasswa Senkungu and Amos Jemba were her relatives (brothers to her husband) who had forged letters of administration to his estate and further that she had not been on the land for over twenty (20) years. The said Amosi Jjemba Kalule and Esawo Wasswa Senkungu did not appear before the 1st Respondent. No other substantive presentation was made by the 2nd Respondent to the 1st Respondent and no allegations of fraudulent conduct were made against the Applicants or Le Frajoj Limited.
- vii) The said Esawo Wasswa Senkungu and Amosi Jemba Kalule did not appear before the 1st Respondent in spite of the fundamental complaint by the 2nd Respondent having been against them.
- viii) On 26th December 2018, the 1st Plaintiff received a copy of a letter purportedly issued by the 2nd Respondent, addressed to the LC1 Chairman Mutundwe, informing him that she intended to come onto the Suit Property and reopen the boundaries on 3rd January 2019 and further informing him that the 1st Respondent had cancelled the Applicants proprietorship of the Suit Property;
- ix) Upon being served with this letter, the Applicants conducted a search with the Lands Registry and the search report indicated that the 1st Respondent

had on 17th December 2018 cancelled their proprietorship of the land and restored the name of Disan Kaleebu (under disability as a minor until 1971).

- x) The Applicants still hold the certificate of title to the Suit Property to-date which title is conclusive evidence of ownership of land and are in possession and use of the same. The 1st Respondent has to-date not notified the Applicants of its decision to cancel their proprietorship over the Suit Property and on the basis for that decision.
- xi) The 2nd Respondent has through her servants and/or agents attempted to get onto the land purportedly to open up boundaries and there is every threat that they intend to dispose it off and or evict the Applicants therefrom.
- xii) The decision of the 1st Respondent to cancel the Applicants' Title was irrational and unreasonable as no reasonable person addressing his mind to the facts and the law can make such a decision.

The 2nd respondents opposed this application and filed an affidavit in reply while the 1st respondent did not file any affidavit in reply; She contended that;

- (1) The suit land belongs to the estate of the Late Disan Kaleebu who left it upon demise and she has been cultivating matooke on the same land until the applicants fenced it off to her detriment and started to claim that they are the owners of the same.
- (2) That she searched the land office at Kampala and learnt that the same land had been transferred to other persons who are not beneficiaries of the estate of my late husband through fraud.
- (3) That she was granted letters of administration in respect of the estate of her late husband DISAN KALEBU and she lodged a complaint in the office of the 1st respondent who upon hearing decided to cancel the certificate of title and reinstate it back into her names of DISAN KALEBU.
- (4) The 1st respondent made a decision to cancel the applicants' certificate of title in land comprised in Block 34 Plot 77 Mutundwe after thorough

investigations which included but not limited to inquiring from the High Court Family division in regard to authenticity of the letters of Administration and it was discovered that the said letters belonged to another estate of Yokana Rwahabire (Deceased) and not estate of late husband Disan Kalebu.

- (5) That it was proper to cancel the applicant's certificate of title since they were registered on the same through fraud. The status quo is that the certificate of title was reinstated back into the names of her later husband Disan Kalebu.

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.

The court came up with this issue for determination;

1. *Whether the decision of the 1st respondent was irrational, ultra-vires and was made in contravention of the law?*

2. *What remedies are available to the parties?*

The applicants were jointly represented by *Mr. Ssembatya Ernest* while the 2nd respondent was represented by *Mr. Nalukoola Luyimbazi* whereas the 2nd respondent was represented by *Mr Ssekitto Moses .*

Whether the decision of the 1 st respondent was irrational, ultra-vires and was made in contravention of the law?

The applicants' counsel submitted that the decision of the 1st Respondent to cancel the Applicants' Title was irrational and unreasonable as no reasonable person addressing his mind to the facts and the law can make such a decision.

The 2nd Respondent's Affidavit in Reply is however instructive on the grounds on which this application is based as she states in paragraphs 6, 8 and 9 that the Applicants were registered as proprietors of the Suit Property **through fraud** and that was the basis on which the 1st Respondent cancelled their proprietorship;

The 1st Respondent in cancelling the Applicants proprietorship of the property purportedly acted pursuant to Section 90 of the Land Act, which states;

"*Section 91 Special Powers of Registrar*

- (1) **Subject to the Registration of Titles Act, the Commissioner shall, without referring a matter to a Court or a district land tribunal, have power to take such steps as are necessary to give effect to this Act, whether by endorsement or alteration or cancellation of Certificate of title, the issue of fresh Certificates of Title or otherwise.**
- (2) **The Registrar shall, where a certificate of title or instrument;**
 - **(a) Is issued in error;**
 - **(b) Contains a wrong description of land or boundaries;**
 - **(c) Contains an entry or endorsement made in error;**
 - **(d) Contains an illegal endorsement;**
 - **(e) Is illegally or wrongfully obtained; or**
 - **(f) Illegally or wrongfully retained,**

***call for the duplicate Certificate of Title or instrument for cancellation or correction or delivery to proper party*.**

It is clear from Section 91(1) of the Land Act that the 1st Respondent in exercising its power is supposed to do so **SUBJECT TO** the Registration of Titles Act.

It is clear from the above provisions of the RTA that the 1st Respondent is not vested with the power and/or jurisdiction to cancel Certificates of Title on allegations of fraud as these powers and jurisdiction are the preserve of the High Court. The 1st Respondent can therefore only exercise powers of cancellation upon being presented with an Order from the High Court sanctioning the cancellation. It therefore follows that the 1st Respondent in cancelling the Applicants Certificate of Title acted without powers, authority and jurisdiction and accordingly

its actions ought to be cancelled and reversed by issuance of an Order of **certorari**. See **Hilda Wilson Namusoke & 3 Others Vs. Owalla's Home Investment Trust(EA) Limited, SCCA No. 15 of 2017**,

The matter having been settled by the Supreme Court, it was counsel's submission that the 1st Respondent in cancelling the Applicant's proprietorship of the Suit Property purportedly under Section 91 of the Land Act acted without jurisdiction for issuance of the following Orders.

The applicant also argued 1 st Respondents action was also time barred under **Section 5 of the Limitation Act**.

The applicant also sought damages of 100,000,000/= since Rule 8 of the **Judicature (Judicial Review) Rules 2009** empowers the Court to make an award of damages.

The 2 nd respondent's counsel submitted that Section 73, 74 and 75 of the Registration of Titles Act (RTA) together with section 91 of the Land Act accord special powers to the Registrar of Titles. In particular, Sections 73 of the RTA and 90 of the Land Act empower the registrar of Titles to call in duplicate certificates of Title for purposes of, among other things rectifying or cancellation as the case requires.

In the instant case, it is clear that the Registrar of Titles was exercising the statutory special powers accorded to him/her in cancelling the Applicants' from the title in respect of land comprised in Block 34 Plot 77 Land at Mutundwe.

According to counsel it is clear from the record that the Registrar had received a complaint from the administrator of the estate of the late **DASAN KALEBU** herein the 2nd Respondent that the Applicants had illegally transferred the land into their names where forged Letters of Administration was applied.

Section 77 of the Registration of Titles Act (RTA) Cap 230 is to the effect that any entry or title procured by fraud is void as against all parties. Further Section 190 of the RTA is to the effect that false statements or declarations made to the office of Titles in attempt to secure registration shall be an offence and any certificate of Title so procured shall be void against all parties.

Determination

It can be deduced from the pleadings and evidence that the 2 nd respondent moved the 1 st respondent to rectify the title because according to her the applicants' registration was procured fraudulently based on non-existing letters of

administration of the Estate of the Late Disani. The 1st respondent accordingly cancelled the applicants registration and reinstated the land title in the names of Disan Kalebu (Under disability as a minor until 1971).

This case now revolves around the exercise of power by the 1 st respondent to purportedly rectify the register because they have believe the applicants were fraudulently registered on the certificate of title. This exercise of power is derived from section 91 of the Land Act.

The purpose of administrative law is to identify the excesses of power and endeavours to combat them. Power may be exercised for purposes other than those for which it has been conferred by the Constitution or the law.

The will of the power-holder becomes the sole justification for the exercise of power. This is the essence of arbitrariness.

The 1 st respondent appears to have been acting within his powers and jurisdiction but in reality he was acting outside it. He was acting within his powers and jurisdiction but was predisposed towards the 2nd respondent who had moved his office about the fraudulent registration of the applicants due to forged or non existing letters of administration.

Where a public authority or decision maker has directed itself correctly in law, the court on judicial review will not interfere, unless it considers the decision was irrational. The court will however only quash a decision if the error of law was relevant to the decision making process. This could be ascertained where there is ulterior purpose or motive.

Powers given to a public body for one purpose cannot be used for ulterior purposes which are not contemplated at the time the powers are conferred. If a court finds that powers have been used for unauthorised purposes, or purposes 'not contemplated at the time when the powers were conferred', it will hold that the decision or action is unlawful. In this case the title was cancelled for fraud and yet the highest court on the land has pronounced itself on cancellation of certificates of title.

In the case of **Hilda Wilson Namusoke & 3 Others Vs. Owalla's Home Investment Trust(EA) Limited, SCCA No. 15 of 2017**, the Supreme Court held that;

"*I am inclined to believe that the absence of fraud in the "new" provision was deliberate. It therefore follows that the enactors of the Land Amendment Act of 2004 took away the authority of the Commissioner to cancel a certificate of title on the basis of fraud without referring the matter to a Court. The Commissioner's action is rightly limited to actions for "errors" or "illegalities" that do not require the rigors of a full trial where fraud would be established before a title is impeached. The Commissioner who may exercise quasi-judicial powers would not have the capacity to hear a matter involving fraud and make findings without calling evidence including cross-examination of the witnesses alleging fraud*.

Consequently, the power to cancel certificates of title where fraud is alleged is vested in the High Court. Indeed, Section 177 of the RTA vests powers in the High Court to direct the Commissioner to effect any order of cancellation of a certificate of title made by the High Court. An aggrieved party complaining of fraud should straightaway file a suit for adjudication on the issue.

In the instance, the Commissioner cancelled the Appellant's special certificate of title on 7th October 2008. This was after the Land Amendment Act had come into force. The Commissioner would therefore have had no power to cancel the certificate of title on the basis of fraud. Consequently, the learned Justices of Appeal erred in law when they based their reasoning and decision on the case of Edward Rurangaranga(supra), an authority which expounded a statutory provision (Section 69 RTA) which was no longer law at the time the matter before us came before the learned justices.

I must also emphasise that the decision of the legislature to omit fraud in Section 91(2) of the Land Act is in line with the well-known judicial principle that allegations of fraud are so serious in nature that they require to be specifically pleaded and strictly proved before a Court of law. And because of its gravity, even in a civil matter, the standard of proof is above a mere balance of probabilities though not necessarily beyond reasonable doubt. Indeed, it has also been held that even a Court of law is not at liberty to come to a finding that fraud has been prove by implication where fraud has not been framed as an issue for determination by the Court (A. K Detergents Vs. G. M Combined (U) Ltd)."

Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely- that is to say, it can validly be used only in the right and proper way which Parliament conferring it is presumed to have intended.

The powers conferred under Section 91 of the Land Act where never intended to be exercised in such a way that would involve the cancellation of land titles whose registration was obtained by fraud as the supreme court has rightly pronounced.

It is a requirement of the rule of law that exercise of public power by the executive and other functionaries should not be unlawful or arbitrary. Decisions must be rationally justified to the purpose for which the power was given, otherwise they are in effect, arbitrary and inconsistent with this requirement. See *Pharmaceutical Manufacturers Association of SA In Re:Ex Parte Application of President of the RSA 2000 (3) BCLR 241(CC)*

The sum effect of the 1st respondent cancellation of a certificate of title for fraud is an exercise of power without jurisdiction or in excess of authority. It is a fundamental principle of administrative law that anybody vested with adjudicatory function, must keep within the confines of its jurisdiction. Anything done by it in excess of its jurisdiction is void. A decision without jurisdiction is inoperative in the eyes of the law. If a public body entertains a dispute without jurisdiction and erroneously proceeds to determine the rights of the parties, the decision will be of no effect.

It is a vital function of the courts to ensure all public authorities act within the limits of their powers. Such bodies not only have powers expressly conferred on them by the relevant statute but also such incidental and ancillary powers as a necessary to make fully effective the express grant of statutory powers.

The decision of the 1st respondent was therefore illegal or unlawful and in contravention of the law.

This issue is resolved in the affirmative

What remedies are available to the parties?

The ever-widening scope given to judicial review by the courts has caused a shift in the traditional understanding of what the prerogative writs were designed for. For example, whereas **certiorari** was designed to quash a decision founded on excess of power, the courts may now refuse a remedy if to grant one would be

detrimental to good administration, thus recognising greater or wider discretion than before or would affect innocent third parties.

The grant of judicial review remedies remains discretionary and it does not automatically follow that if there are grounds of review to question any decision or action or omission, then the court should issue any remedies available. The court may not grant any such remedies even where the applicant may have a strong case on the merits, so the courts would weigh various factors to determine whether they should lie in any particular case. See **R vs Aston University Senate ex p Roffey [1969] 2 QB 558, R vs Secretary of State for Health ex p Furneaux [1994] 2 All ER 652**

Declaration

This court issues a declaratory order that the actions and decision of the 1st respondent that resulted in cancellation of the certificate title registered in the names of the applicants comprised in Block 34 Plot 77 land at Mutundwe was illegal, unlawful, ultra vires and irregularly made in contravention of the law.

Certiorari

The applicant has sought an order of certiorari to quash and reverse the decision of the 3rd respondent.

Certiorari is one of the most powerful public law remedies available to an applicant. It lies to quash a decision of a public authority that is unlawful for one or more reasons. It is mainly designed to prevent abuse of power or unlawful exercise of power by a public authority. See **Public in East Africa by Ssekaana Musa page 229**

Certiorari is simply concerned with the decision-making process and only issues when the court is convinced that the decision challenged was reached without or in excess of jurisdiction, in breach of rules of natural justice or contrary to the law.

The effect of the order of certiorari is to restore **status quo ante**. Accordingly, when issued, an order of certiorari restores the situation that existed before the decision quashed was made.

This court therefore issues An order of certiorari doth issue to call for and quash the decision of the 1st Respondent cancelling the Applicants' proprietorship over the property comprised in Block 34 Plot 77 land at Mutundwe.

General damages

The applicant prayed for general damages in the notice of motion. However, in his submissions he asked court to award general damages which he never pleaded for.

In judicial review court does not award those categories of damages but rather in deserving circumstances where there is justification may award damages.

The habit of seeking damages as if it is an automatic right in every application for judicial review should be discouraged. Judicial review is more concerned with correcting public wrongs and not a way to demand or seek to recover damages.

An individual may seek compensation against public bodies for harm caused by the wrongful acts of such bodies. Such claims may arise out of the exercise of statutory or other public powers by statutory bodies.

The fact that an act is **ultra vires** does not of itself entitle the individuals for any loss suffered. An individual must establish that the unlawful action also constitutes a recognizable tort or involves a breach of contract. See **Public Law in East Africa by Ssekaana Musa pg 245-249**

The nature of damage envisaged is not necessarily categorized as special or general or punitive/exemplary damage. But such damage is awarded for misfeasance or nonfeasance for failure to perform a duty imposed by law.

The tort of misfeasance in public office includes malicious abuse of power, deliberate maladministration and perhaps also other unlawful acts causing injury.

The applicant has not made out any case for award of damages. No damages are awarded.

Costs

The applicants are granted costs of the application against the 1st respondent only.

I so Order.

Dated, signed and delivered be email at Kampala this 23 rd day of April 2020

SSEKAANA MUSA JUDGE

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