

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

MISCELLANEOUS CAUSE NO. 348 OF 2020

**NAKASERO MARKET SITTING VENDORS
& TRADERS LIMITED----- APPLICANT**

VERSUS

**1. KAMPALA CAPITAL CITY AUTHORITY
2. MINISTER FOR KAMPALA CAPITAL CITY
AND METROPOLITAN AFFAIRS----- RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for Judicial Review under Article 2(1), 26, 28, 40(2), 42 & 44 of the Constitution , Section 36(1)(b)(c),(e)(3),(4)(5) and (7), 33, 38 of the Judicature Act as amended, Rules 3(1),2, 4, 6 and 8 of the Judicature (Judicial Review) Rules, 2009 and 3(A) of the Judicature (Judicial Review) Rules 2019 for the following of Judicial review reliefs;

- 1.) That an order of certiorari be issued against the 1st and 2nd Respondents to quash their decision of ejecting the leadership of the applicant from managing Nakasero Market and repossess it under a new management presided over by Kampala Capital City Authority for being procedurally improper, arbitrary, unlawful, irrational, illegal and in contempt of court orders.

- 2.) A declaration that the Respondents' actions of breaking into the applicant's office, ejecting the applicant's officials and workers from managing Nakasero Market are in contempt of lawful court orders, irrational, unlawful, illegal, unreasonable and procedurally improper.
- 3.) An Order for re-instatement of the Applicant's management structure to run the day to day activities of Nakasero Market.
- 4.) An Order of prohibition to issue prohibiting the Respondents, their agents assignees, or any other person claiming their authority from interfering with the applicant's activities, leadership portfolio and management operations in Nakasero Market.
- 5.) That a permanent injunction be issued to restrain the Respondents, there agents, assignees, or any other public bodies, institutions and personalities from implementing and enforcing the impugned orders and decision of the respondents to eject the applicant and its official from Nakasero Market.
- 6.) An order of general damages, exemplary damages and aggravated damages.
- 7.) That an order for payment of costs of this application issues against the respondents.

The grounds in support of this application were stated briefly in the Notice of Motion and in the accompanying affidavit of Kakooza Godfrey, the Chairperson of the applicant generally and briefly state that;

1. That the Applicant is a duly incorporated company under the laws of the Republic of Uganda with its headquarters situated at

Kampala and it was incorporated as an umbrella organisation bringing together over 5,000 tenants, vendors and traders of Nakasero Market to enable them manage their affairs, redevelop the market and give opportunity to its members to grow in business and trade in accordance with the Government Policy and Presidential directives.

2. That the said policy encouraged market sitting tenants, vendors and traders to organise themselves into a legal entity and bid for the land and management of their affairs in the market.
3. That in 2009, considering the organisational structure of the Applicant the City Council of Kampala, the predecessor of the 1st Respondent granted the Applicant authority to collect market dues and fares on its behalf.
4. That on 2nd December, 2009 the Applicant applied for a lease for **Plot 4B & 7B Market street**, Nakasero Market and it was granted a sub-lease by the 1st Respondent upon payment of premium of **UGX 1,800,000,000/=** (One billion eight hundred million shillings) ground rent of **UGX 45,000,000/=** (Forty five million shillings) and compilation of the register of all individuals working in the market which were conditions precedent to the grant.
5. That upon the 1st Respondent's delay to execute the lease documents, the Applicant sought legal redress vide **Misc. Cause No. 32 of 2012; Nakasero Market Sitting Vendors and Traders ltd vs. Kampala Capital City Authority** whereupon the parties executed a consent judgement in favour of the Applicant.

6. That in its communication dated 10th September, 2015 the 1st Respondent made further commitment and reaffirmation of the Applicants exclusive rights of ownership and management of Nakasero Market.
7. That the Respondents were alive to the fact that the main purpose and main objective of the Applicant's incorporation was to own and manage Nakasero Market in conformity with the Central government's policy for sitting vendors to own their markets in Kampala.
8. That the Respondents are also aware that, the property and management of the entire market comprised in **Plots 4B & 7B Market Street** was lawfully vested unto the Applicant upon its fulfilment of all conditions and payment of all rates and premium set by the 2nd Respondent.
9. That the Respondents are aware that there are two Court Orders maintaining the status quo of the market in favour of M/s Nakasero Market Sitting Vendors and Traders Ltd as against attempts by the Respondents to repossess or take over its management.
10. That on Sunday 15th November 2020, without due process and in blatant disregard of the Applicant's rights and court orders, the Respondents broke into the Applicant's offices and seized management of Nakasero Market and also closed the Applicant's members Savings and Credit Co-operative scheme (SACCO) and removed all books of accounts, members savings ledgers, members cash deposits using the force of armed state security forces, paramilitary groups and private strangers.

11. **THAT** on the 20th November 2020, the 1st Respondent's Directorate of Gender, community services and production confirmed the mayhem that prevailed during the 1st Respondent's takeover of the management of the Applicant's market and closure of the Applicant's SACCO.
12. That the diabolical actions of the Respondents are in contravention of the Markets Act and the Constitution of the Republic of Uganda and thus illegal, unlawful, ultra vires and unconstitutional.
13. That the Applicant's economic rights and rights to own property have been wrongfully affected by the actions of the Respondents.
14. That the actions of the Respondents also amount to detinue, conversion and trespass by the Respondents and their agents for which the Applicants are entitled to general damages.
15. That the Respondents' acts were high handed, oppressive, unconstitutional and tortuous in nature, they were done in abuse of court orders, they have caused business loss, anxiety and uncertainty, loss of confidence, untold suffering, and mental anguish to the detriment of the Applicant, all for which the Respondents are liable to pay exemplary and aggravated damages.

The respondents opposed this application and they filed two affidavits in reply through the Acting Director Gender, Community Services and Production in Kampala Capital City Authority-Esau Galukande and Hajj Kakande Yunus, Secretary, Office of the President and the Accounting Officer in charge of the 2nd respondent's affairs.

1. The 1st respondent is a statutory body charged with administering the City of Kampala on behalf of the central Government and part of the

legal mandate of the 1st respondent is the establishment and maintenance of markets in Kampala Pursuant to the Markets Act Cap 94.

2. The applicant a private limited company, in contravention of the Market's Act maintained and/ or managed Nakasero Market to the detriment of market vendors. Sometime in November 2020 Market vendors accused the applicant of mismanaging their market revolted against the leadership of the applicant in the market, arrested the applicant's market leaders and took them to police.
3. That on 15th November 2020 the 1st respondent in an effort to fill the vacuum created by revolting vendors, to ensure continuity of business and keep order sent a team of technical officials to take charge of Nakasero market.
4. The team of the 1st respondent's technical officers taking charge of Nakasero market was witnessed by the 2nd respondent, other officials from KCCA, Police, Resident City Commissioner of Kampala and area LC 1 Chairperson. The team agreed with the vendors to nominate one person amongst themselves to be part of the team of KCCA Technical officers to manage the market.
5. That following the application for sub lease by the applicant, the Minister of Lands, Housing and Urban Development advised that the grant of the lease be conditioned on redevelopment of the market by the applicant. The lease was awarded for the redevelopment of the market for an initial conditional period of 5 years commencing on the 20th September, 2016.

6. The applicant agreed to the terms of the offer in the lease agreement where they agreed under clause 1.4 to construct a Modern market in accordance with approved building plans. That clause 5.4 of the lease agreement provides for re-entry in case the sub-lessee refuses, omits or neglects to perform the development obligations set out in the approved plan. The applicant has never carried out any development on the suit land in accordance with the lease agreement.
7. That in a letter dated 28th April 2010, His Excellency the President issued a directive that the land for the common user facilities within Kampala Capital City should be managed by and leased to the vendors operating in it.
8. That the Cabinet decided to reverse the policy on common user facilities that were initially to be managed by sitting tenants and decided that the Government should repossess all public common user facilities.
9. That His Excellency the President in a letter dated 14th April 2017 noted that it was a mistake to privatize the markets and expressed the need to reverse the Policy.
10. That during the Cabinet Sitting at Entebbe on 4th November, 2019 Cabinet decided that Kampala Capital City Authority should refund the premium and ground rent paid by Nakasero Market Sitting Vendors and Traders Limited with interest and take over possession of the property for the proper management of all common user facilities.

11. That KCCA held elections for the new market management of Nakasero Market by KCCA was as a result of a Presidential directive that was based on the need to prevent exploitation of the vendors from self-serving association leaders.

12. That the management of Nakasero market and other markets is in line with the Markets Act, Cap 94

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 were proposed for court's resolution;

1. Whether the decision of ejecting the leadership of the Applicant from managing Nakasero Market and to repossess it under a new management presided over by Kampala Capital City Authority was illegal, procedurally improper, arbitrary, irrational and unlawful?

2. Whether the Applicant is entitled to any remedies?

The applicant was represented by *Mulindwa Samuel Muyizzi and Kakande Kenneth Paul* whereas the respondent was represented by *Oyo David* represented the 1st Respondent and *Nabaasa Charity* represented the 2nd respondent.

The 1st respondent counsel raised two preliminary objections (issues);

1. Whether the suit offends the *lis pendens* rule?
2. Whether this is a proper case for judicial review?

Whether the suit offends the lis pendens rule?

The 1st respondent submitted that the present suit is directly and substantially founded on the same subject matter and seeks the same remedies as in HCCS No. 1141 of 2019, Nakasero Market Vendors & Traders Limited v Kampala Capital City Authority which is at the mediation stage at the Land Division before mediator Aphra Mpungu.

The subject matter and remedies prayed for in the matters are substantially the same and they are that, the Plaintiff/Applicant is;

1. Challenging the Government's decision to repossess Nakasero Market.
2. Seeking a declaration that the decision to repossess and take over management of Nakasero Market is a breach of the Kampala Capital City Authority contractual sub-lease with the plaintiff/applicant and contravenes the plaintiffs/applicants right to property.
3. Seeking declarations that the Government's decision directing the repossession and management of Nakasero Market is procedurally improper, unjustified, illegal, unlawful and unconstitutional.
4. Seeking re-instatement of the plaintiff/applicant's management structure in the running of Nakasero market.
5. Seeking an order restraining the defendants/respondents from interfering with the plaintiff/applicant activities and management of Nakasero Market.
6. Seeking a permanent injunction against the defendants/respondents.
7. Seeking declaration that the defendants/respondent are in contempt of court orders.

The 1st respondent counsel contended that this court has jurisdiction to grant relief sought under Section 33 of the Judicature Act to grant such remedies sought in this application.

The parties are the same in the two suits save for the current suit where the Minister for Kampala Capital City and Metropolitan Affairs is the second party instead of Attorney General. It was the submission of the 1st respondent counsel that the Minister and Attorney General are one and the same person by virtue of Article 119(4)(c) of the Constitution and Section 10 of the Government Proceedings Act.

The applicant's counsel submitted that the preliminary objection on *lis pendens* is baseless since the earlier suit is about a cabinet minute/ directive contained in a letter dated 25th September, 2020 while the instant application is challenging Respondents decision of 15th November, 2020 exercised as an overseer of the government Policy and the law on management of markets under the Market Act & KCCA Act.

Secondly, that the earlier suit is about Property rights under Article 26 of the Constitution of the Republic of Uganda 1995 as Amended, that's is why its in the Land Division-High Court while the instant application is about the right to be heard and the process by which a body exercising quasi-judicial powers made the impugned decision affecting the Applicant.

Thirdly, the Minister for Kampala Capital City is not a party to the earlier suit in the Land division.

It was further their submission that the nature of the reliefs sought, the matters in issue and the parties in each of the suit differs. That "matters is issue" [under S. 6 of CPA] does not mean any matter in issue but the entire subject in controversy.

In the instant Application this Court is not invited to determine proprietary rights in land **comprised in Plots 4B & 7B Market Street** nor the breach of a lease agreement as prayed for in the earlier suit but is about the decision of the 1st Respondent as a public body to take over control without due process. The case of *Springs International Hotel Ltd vs Hotel Diplomat Ltd & Boney M. Katatumba HCCS NO. 227 OF 2011* is distinguishable as all the multiple

cases in question were about property rights whereas instant application is about decision making process which is a proper case for judicial review as opposed to one which seeks to determine property rights in Land Division.

Analysis

According to *Black's Law dictionary 11th Edition* by Bryan A.Garner page 1117 *lis pendens* means; *A pending suit.*

The *lis pendens* rule is provided for under **Section 6 of the Civil Procedure Act**, thus:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where that suit or proceeding is pending in the same or any other court having jurisdiction in Uganda to grant the relief claimed. “

The doctrine of *lis pendens* is only an aspect of the rule of *res judicata*. Where a conflict arises between the doctrine of *res judicata* and *lis pendens*, the former will prevail over the latter. In other words, once a judgment is duly pronounced by a competent court in regard to the subject matter of the suit in which the doctrine of *lis pendens* applies, the said decision would operate as *res judicata*. See *Centenary Rural Development Bank Limited vs Richard Ivan Nangalama T/A Survesis HCCS No. 116 of 2018*

It is not disputed that the applicant as a plaintiff sued the 1st respondent and Attorney General in HCCS No. 1141 of 2019 at the Land Division claiming property rights over the suit property acquired by way of a lease from the 1st respondent.

The respondent submitted that the same issues arise out of the same transaction and decisions being taken by the respondent. The subsequent action by the respondent which the applicant contends that was another decision was made in compliance with the cabinet decision and this makes it the same action or a series of actions that have their original root in the cabinet minute/directive that is under challenge in the land division.

The principle is that the “matters in issue” must be the same in both the cases and this does not mean any matter in issue but the entire subject in controversy. In the case of *Jadva Karsan v Harnam Singh Bhogal [1953] 20 EACA 74*, on page 75 - 76 the Supreme Court of Kenya held that;

“The authorities are clear that “Matter in issue” in section 6 of the Civil Procedure Ordinance (which corresponds with Section 10 of the Indian Civil Procedure Code) (equivalent to Section 6 of the Civil Procedure Act, Cap. 71) does not mean any matter in issue in the suit, but has reference to the entire subject matter in controversy, it is not sufficient that one or some issues are in common. The subject matter in the subsequent suit must be covered by the subsequent suit, not vice versa. These conditions were not met in the instant case and, in my view, section 6 was wrongly applied”

In this case, the entire dispute or the subject matter arises out of the Cabinet directive which has changed policy and this is supported by the affidavit of Hajj Yunus Kakande who stated that:

That in a letter dated 28th April 2010, His Excellency the President issued a directive that the land for the common user facilities within Kampala Capital City should be managed by and leased to the vendors operating in it.

That the Cabinet decided to reverse the policy on common user facilities that were initially to be managed by sitting tenants and decided that the Government should repossess all public common user facilities.

That His Excellency the President in a letter dated 14th April 2017 noted that it was a mistake to privatize the markets and expressed the need to reverse the Policy.

That during the Cabinet Sitting at Entebbe on 4th November, 2019 Cabinet decided that Kampala Capital City Authority should refund the premium and ground rent paid by Nakasero Market Sitting Vendors and Traders Limited with interest and take over possession of the property for the proper management of all common user facilities.

The decisions taken by the 1st respondent clearly arose out of the decision of the Cabinet to change its policy on ownership of markets by vendors associations and the respondents in this matter are merely implementing agencies of the same cabinet directive.

Secondly, the parties are same and this satisfies the rule of whether the parties in the previous suit are directly and substantially the same as the subsequent suit. In the Land division the applicants sued the Attorney General and in the present application they have sued the Minister for Kampala Capital City and Metropolitan Affairs. It is clear the proper party to sue in this application for actions of the Minister was supposed to be the Attorney General under Article 119(4) and 250 of the Constitution.

To this extent the subsequent filing of the instant suit by the applicant herein amounted to gross violation of the *lis pendens* rule; a fact which renders this application wholly untenable. In the case of *Springs International Hotel Ltd v Hotel Diplomate Ltd & Boney M. Katatumba HCCS No. 227 of 2011* Justice Andrew Bashaija held that; The hearing of the

same suit would set the concerned judicial officers on a collision course with the likelihood of arriving at conflicting judgements on the same facts, which would cause embarrassment and throw the doctrine of precedent into disarray and create uncertainty.

The filing of this application after filing HCCS No. 1141 of 2019 was also an abuse of court process since the same remedies are being sought. Section 33 of the Judicature Act enjoins court to curtail abuse of court process and empowers it as much as possible to avoid multiplicity of suits. In the case of *Attorney General v James Mark Kamoga & Another SCCA No. 8 of 2004* Mulenga JSC(RIP) in his lead Judgment held that; *A malicious abuse of legal process occurs when the party employs it for some unlawful object, not the purpose which it is intended by law to effect; in other words, a perversion of it"*

The applicant having filed this application well aware that it had filed an earlier suit in the land division was trying to seek the same reliefs or remedies through a multiplicity of suits which must be discouraged and it creates a backlog of cases in this strained judicial system with possibility of having two uncertain and inconsistent decisions by the same court. The filing of multiple suits is also another form of '*forum shopping*' that may clog the judicial system.

Whether this is a proper case for judicial review?

The 1st respondent's counsel submitted that the nature of the alleged decision and remedies being sought by the applicant point to enforcement of private law rights in a judicial review application. One of the remedies sought by the applicant is re-instatement of the applicant's management structure in the running of Nakasero Market which is substantially about management and control of Nakasero Market.

It was the respondent's contention that judicial review is only available against a public body in a public law matter. Not every act of a statutory body necessarily involves an exercise of statutory power. Some statutory duties imposed on public bodies may still create private rights in favour of individuals; enforceable by way of ordinary claim. See *Arua Park Operators and Market Vendors Cooperative Society Limited v Arua Municipal Council High Court Misc. Cause No. 0003 of 2016*

The dispute before the court does not concern the public at large. It is a dispute based on private ownership and management of Nakasero Market. The respondent submitted that the nature of the instant case is not amenable to judicial review. It should be subject to civil suit to determine ownership and management rights.

The applicant's counsel submitted that the control, establishment, acquire, and administration of Markets under **S 1 of the Markets Act Cap 94 & S. 7 (1)(m) of the Kampala Capital City Act** is vested in the administration of a district, a municipal council, A town council, which has power to delegate such management and control.

Even where you establish a market on a private property the management and control vests in the local administration. The 1st Respondent, in Paragraph 4 of the affidavit in reply deponed by **Esau Galukande on 9th day of February, 2021** stated that the 1st Respondent was acting pursuant to the **Markets Act Cap 94** with legal mandate for establishment and maintenance of the markets.

The 1st Respondent is a Public body established under the KCCA Act, It exercised its mandate under the Market Act in public interest. The Applicants case is that in exercising its mandate under the Acts, the 1st

Respondent acted with procedural impropriety, was arbitrary, irrational and acted unlawfully.

The 1st Respondent decision flows from the administration of the markets under the Market Act & KCCA Act which vests that administration & Control to the local authority in public interest otherwise the 1st Respondent would have no business in running private markets.

Judicial review of administrative action therefore is a procedure by which a person who has been affected by a particular *administrative decision, action or failure to act of a public authority, may make an application to the High Court, which may provide a remedy* if it decides that the authority has acted unlawfully. *See Rebecca Nassuna v Dr. Diana Atwine, Misc. Cause No. 322 of 2018* (supra) The Applicant's complaint is that the decision was arrived at in total disregard of the rules of natural justice.

The applicant submitted that this is a proper case for judicial review and prayed that court finds no merit in the second objection.

Analysis

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 the present case, the applicant is actually complaining about a breach of the terms of a contract or lease and management agreement, that 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 right 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.

The applicant entered into a sub-lease agreement with the 1st respondent dated 20th September, 2016 setting out terms and conditions to govern the relationship of Sub-lessor and Sub-lessee. The applicant and the 1st respondent further entered into an administrative arrangement with the applicant to collect revenue from the market on behalf of the Council. 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.

This application was not a proper case for judicial review based on the facts and circumstances of the case.

The preliminary objections of the application offending the principle of *lis pendens* and propriety of application for judicial review are both upheld.

This application is dismissed with no order as to costs.

I so Order

SSEKAANA MUSA
JUDGE
23rd/07/2021