

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
MISCELLANEOUS CAUSE NO.145 OF 2018
(ARISING FROM MISCELLANEOUS CAUSE NO.230 OF 2018)

1. OBEY CHRISTOPHER
2. OLOKA DAVID JAPIANS----- APPLICANTS

VERSUS

1. ATTORNEY GENERAL
2. DIRECTOR OF PUBLIC PROSECUTIONS
3. NAMTOVU JOSEPHINE----- RESPONDENTS

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

The Applicant brought this application by way of Notice of Motion against the respondent and did not cite any legislation or provision under which it was brought seeking the following orders that;

1. A writ of mandamus doth issue compelling the Respondents jointly and severally as the principal concerned officers/ agents of the Government of the Republic of Uganda, to comply with the order issued by court to release property comprised in; Bulemezi Block 884, Plots 5,17,11,13,19,20,21; Bulemezi Block 847 Plot 1 Bulemezi Block 538 Plot 29; Bulemezi Block 848 Plot X6; Bulemezi 845 Plot 12 & 13; LRV 1641, Folio 17, Block 847
2. General damages be provided by the respondents.

3. Costs of the application be provided by the respondents.

The grounds in support of this application are set out in the affidavit of Oloka David Japians dated 18th June 2018 which briefly states;

1. That an order was issued by this court for rejecting the request by Uganda represented by the 1st and 2nd respondents to keep properties of the applicant acquired prior to 2009.
2. That an application to extend orders attaching property belonging to the applicants was also dismissed.
3. That the applicant has on several occasions applied to the 1st and 2nd respondents to release properties comprised in; Bulemezi Block 884, Plots 5,17,11,13,19,20,21; Bulemezi Block 847 Plot 1 Bulemezi Block 538 Plot 29; Bulemezi Block 848 Plot X6; Bulemezi 845 Plot 12 & 13; LRV 1641, Folio 17, Block 847 which has not been honoured.
4. That the applicant is desirous of having his titles released by the respondent which they have continued to reject without lawful excuse.
5. That it is just and fair that the respondents be compelled to release titles by way of issue of writ of mandamus.

In opposition to this Application the respective Respondents filed affidavits in reply- Vicent Wagona a Senior Assistant Director of Public Prosecutions for the 2nd respondent, Akello Suzan Apita a State Attorney in AG's chambers and the 3rd respondent in her personal capacity wherein they vehemently opposed the grant of the orders being sought briefly stating that;

1. The certificates of title were lawfully recovered and kept by police during a series of investigations, where the applicants were being investigated for their participation in a high level fraud through a total of shs

165,000,000,000/= pension funds was squandered from government coffers using an array of sophisticated scams.

2. That the applicants were also being investigated for illicit enrichment in respect of their accumulated wealth, including certificates of title in this application which are not commensurate with their known legal incomes.
3. That the certificates of title are key exhibits in the illicit enrichment cases against the applicants and the investigations and prosecution of these case will be highly prejudiced if the certificates of title are released before the decision to prosecute is made.
4. That the prosecution of the applicants in some of the pension cases was concluded and the applicants have been convicted and ordered to refund the stolen money to government.
5. That in Criminal Session Case No. 009 of 2015, the 1st applicant was convicted on different corruption counts and ordered together with his co-convicts to jointly refund shs 50,000,000,000/= to the Uganda government, which he has not refunded to-date and the certificates of title in this application are potential sources for recovery of Government funds.
6. The 3rd respondent opposed the application on the main ground that she is protected under the law and she cannot be sued for actions arising out of her official functions in case she did not deliberately and maliciously act in bad faith or beyond her duties.
7. That the applicants have no cause of action against her and that the application should be dismissed with costs against her.

In the interest of time the respective counsel were directed to file written submissions; however the applicants counsel after the court issued directives of

filing written submission and a ruling date was set, wrote a letter allegedly withdrawing this application.

By the time he wrote the letter of withdrawal of the application the respondents had already filed their submission and this court had already embarked on writing the ruling. I have considered the respondents' submissions and ignored the letter withdrawing the application.

The applicant was represented by *Mr Hariwomugasho Francis* whereas the 1st & 2nd respondents were represented by *Ms Maureen Ijang* and the 3rd respondent was represented by *Mr Mackay Robert* who was also a private brief of the 2nd respondent

The 1st respondent counsel submitted that the respondents are not in defiance of the court order as alleged. That the 1st Applicant was convicted in corruption courts owing to different corruption counts and ordered to pay a compensation of **UGX 50,000,000(Fifty Billion shillings)** vide **Criminal Session No. 9 of 2015** is not in dispute. Neither is it disputed that the 2nd Applicant was convicted on a plea of guilty for embezzlement of pension funds in the sum of **USD 102,000** under **CID HQS E/351/2012**.

The Office of the DPP has stated that the Applicants are being investigated for illicit enrichment and the titles that are the subject of this Application are key exhibits in the investigation.

Section 31 of the **Anti-corruption Act, 2009** empowers the Inspector General of Government or the Director of Public prosecutions to investigate or cause an investigation of any person where there is reasonable ground to suspect that the person **(a)** maintains a standard of living above that which is commensurate with their known sources of income and **(b)** is in control or possession of pecuniary resources or property disproportionate to his known sources of income or assets.

That the Applicants have already been found guilty and convicted for fraud involving Government funds is a fact. The evidence of the Applicants speaks for itself attached as Annexure A2 to the affidavit of Oloka David Japiens is a list of 82 properties owned among other property either jointly or individually by the two

Applicants. The Applicants were until their indictment and convictions civil servants and these properties clearly fall within the ambit of **section 31(1) and (2)** of the **Anti-Corruption Act, 2009**.

Illicit enrichment is one of the predicate offences of corruption. Its inclusion in the anticorruption legal regime is informed by the fact that corruption is a clandestine offence whose direct evidence of commission is hard to get but can be manifested by the immense wealth of a public official despite a modest official salary.

The order of Hon. Justice Lawrence Gidudu is in regard to fraud charges for which the Applicants have already been charged with which can be differentiated from the current investigations for illicit enrichment for which the said titles are of interest and importance.

The respondent's counsel contended that in investigating the applicants for illicit enrichment, the Office of the DPP is well within its mandate to seize titles to the suspected properties as evidence to help facilitate charges for illicit enrichment and subsequent conviction. Returning the titles to the Applicants would allow for the titles to be transferred as the applicants intend to do and this would lead to a collapse of the investigation. The Applicant's intention is clear and it clearly bolsters the argument that the Applicants are attempting to dispose of property that is the subject of investigation and this would defeat the purpose of the investigations. This is without doubt an abuse of the court process.

The 1st Respondent has not yet paid any of the compensation ordered by court to the tune of **UGX 50,000,000,000/=**. These properties are subject to execution for the judgement debt to be realised by the DPP. **Section 35(1)** of the **Anti-Corruption Act** allows for payment of compensation out of resources of a convicted person.

The law on illicit enrichment criminalizes possession of illicitly acquired wealth and the properties are potential sources of funds recoverable by Government.

In the circumstances, the 1st respondent submitted that that the DPP is rightly in possession of the said Certificates of Title for purposes of prosecuting the applicants for other new charges.

The 2nd and 3rd respondents raised three preliminary points of law on the propriety of this application before Court namely;

- (a) *Whether this was a proper case for Judicial review;*
- (b) *Whether the 3rd respondent was a proper party to the application.*
- (c) *Whether the DPP can be sued in his own capacity;*

Whether this was a proper case for Judicial review

The purpose of Judicial Review is concerned not with the decision but with the decision making process. Essentially judicial review involves an assessment of the manner in which a decision is made, it is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality. The case of **Koluo Joseph Andrew & others versus the Attorney General and others Misc Cause No.106 of 2010** is instructive.

The remedy of judicial review is discretionary in nature and can only be granted on three grounds namely; illegality, irrationality and procedural impropriety.

If court was to find that anyone holding a public office acted either illegally, unfairly and irrationally it would intervene to put things right so to say. In exercise of its jurisdiction, this court is not required to vindicate anybody's rights but merely to examine the circumstances under which an act is done and determine as to whether the standards set out above have been met and if not prescribe the remedies in form of prerogative orders set out in the Rules.

The law with regard to the discretionary writ of Mandamus was explained; in **M/s Semwo Construction Co. vs Rukungiri District Local Government, Misc. Cause No. 30 of 2010, by Justice Yorokamu Bamwine thus:** "Mandamus is a prerogative writ to some person or body to compel the performance of a public duty. Before the remedy can be given, the applicant must show a clear, legal right to have the thing sought by it done, and done in a manner and by a person sought to be coerced. The duty whose performance is sought to be coerced by mandamus must be actually due and incumbent upon that person or body at the time of seeking the relief. That duty must be purely statutory in nature, plainly incumbent upon the

person or body's office, and concern which he/she possesses no discretionary powers. Moreover, there must be a demand and refusal to perform the act which it is sought to be coerced by judicial review"[emphasis ours].

The 2nd and 3rd respondent submitted that the above principles of law and after thorough perusal of the pleadings, we have noted that the Applicants are seeking orders from this Court to prevent their investigation and prosecution by the DPP on pending charges of illicit enrichment.

Granting the orders sought would be to defeat the constitutional obligation of the DPP to direct police in investigations and also to prosecute criminal matters in this country.

This Court being a Civil Court cannot properly determine the criminal liability or otherwise of the Applicants in relation to the offences which are subject of the impugned land titles that are pending and under investigations. The orders sought such as mandamus if issued would be illegal because they would strip the DPP of its powers and constitutional obligations to prosecute criminal cases.

It is was the submission that the Applicants have not demonstrated by way of evidence how the 2nd and 3rd respondent acted illegally, irrationally and/or engaged in procedural impropriety so as to invoke the discretionary remedy of Judicial review.

Whether the 3rd respondent was a proper party to the application.

The 2nd and 3rd respondent further submitted that the 3rd Respondent was sued in her personal capacity for acts/omissions alleged to have been committed by her as the servant of Government or attributed to her in her official capacity as a Principal State Attorney in the office of the DPP.

The 3rd respondent contended that this application is incompetently commenced against the 3rd respondent in her personal capacity. The applicants did not allege any acts or omissions done by the 3rd respondent in her personal capacity. I am fortified in the authority of **Charles Harry Twagira vs AG, DPP and another SCCA No.4 of 2007**, where it was held that:-

“Where a person is on official government duty; such person is protected against personal law suits arising from his/her official functions by the law. He/she can only be sued in his/her personal capacity if there was a possibility that he/she deliberately and maliciously acted beyond the scope of his/her duties”.

There is not any evidence that the 3rd respondent in her personal capacity, acted deliberately and maliciously, a fact which is not pleaded in this application.

It is trite law that bad faith must be pleaded with sufficient particularity; this the applicants have not done. The authority of **Robert Mwesigwa & Anor Vs. Bank of Uganda HCCS No. 588 of 2003** is instructive and ought to be followed by this court.

The applicants have not pointed out any single act of bad faith on the part of the 3rd respondent. Most of the alleged breaches relate to the work of the office of the DPP.

It is a requirement **under order 6 rules 2, 3, and 5 of the Civil Procedure Rules** not only to plead bad faith but also to particularise it. The rationale for pleading and particularizing particulars of bad faith is to enable the 3rd respondent know how to counter them.

Imputing bad faith on the 3rd respondent is a grave matter. It goes to her reputation and professionalism.

Therefore in as far as these pleadings do not particularise particulars of bad faith, like it would be in the case of alleging fraud, the application is barred by law because it is mandatory that those particulars have to be pleaded. **Sun Air Ltd vs. Nanam Transport Company Ltd HCCS 29 of 2008 per Madrama J. (As he then was) followed.**

But more importantly if the 3rd Respondent was implementing a decision that was not her own but one reached by the Director of Public Prosecutions (**if any**), the question that the decision was taken in bad faith would not arise as far as the 3rd Respondent is concerned. She would be merely an implementer and since the decision maker was made party it was not necessary to include the 3rd Respondent. We pray that you hold that the 3rd respondent was maliciously added as a party.

Whether the DPP can be sued in his own capacity?

The 2nd respondent's counsel submitted that this application is procedurally flawed in as far as the application has been brought against the DPP in his own capacity. Article 120 of the Constitution which provides for appointment and functions of the DPP does not establish it as a body Corporate. We are fortified in the authority of *Charles Harry Twagira Vs Attorney General & Anor SCCA 4 of 2007* where it was held *inter alia* that the appellant should have proceeded only against the Attorney General and the 3rd respondent since the Director of Public Prosecutions is a government department but it is not a body corporate with powers to sue or be sued.

For the reasons above the 2nd & 3rd respondent contended that this court finds that this application is incompetent and not fit for Judicial Review. It was filed against a non-existent legal entity and the same be dismissed with costs to the 2nd and 3rd respondents.

In absence of any submissions by the applicants counsel this court is left with no option but to agree with the submissions of the respondent in respect the issues raised in their respective submissions.

The applicant did not set out any law under which this application was brought before court although they were seeking a writ of Mandamus to compel the respondents to release of their several properties.

In Uganda, the principles governing Judicial Review are well settled. Judicial review is not concerned with the decision in issue but with the decision making process through which the decision was made. It is rather concerned with the courts' supervisory jurisdiction to check and control the exercise of power by those in Public offices or person/bodies exercising quasi-judicial functions by the granting of Prerogative orders as the case may fall. It is pertinent to note that the orders sought under Judicial Review do not determine private rights. The said orders are discretionary in nature and court is at liberty to grant them depending on the circumstances of the case where there has been violation of the principles of natural Justice. The purpose is to ensure that the individual is given fair

treatment by the authority to which he/she has been subjected to. ***See; John Jet Tumwebaze v Makerere University Council & 2 Others Misc Cause No. 353 of 2005, DOT Services Ltd v Attorney General Misc Cause No.125 of 2009, Balondemu David v The Law Development Centre Misc Cause No.61 of 2016.***

For one to succeed under Judicial Review it trite law that he must prove that the decision made was tainted either by; illegality, irrationality or procedural impropriety.

Judicial review is not an appeal from a decision, rather, it is a review of the manner in which the decision was made; its purpose is not to ensure that the decision making body reaches a conclusion that is correct in the eyes of court. The court limits itself to the decision made; otherwise, it would amount to usurping the powers of the decision making body. The court is thus not entitled to consider whether the impugned decision as opposed to the decision making process was fair and reasonable; and it cannot substitute its own decision or impose its own conditions, but it must leave this to the decision making body. ***See YWCA & Others v National Council for Higher Education & Another High Court Miscellaneous Cause No. 579 of 2005***

According to the application before court, it is not clear why the applicants joined the 3rd respondent as a party to this application. There is single iota of evidence to justify her to the proceedings. This was very wrong and the application was incompetently brought against her.

The applicants also joined the Director of Public Prosecutions as the 2nd respondent. In as much as the 2nd respondent's counsel submitted that the joinder of the DPP was erroneous, this court does not agree since in judicial review matters a decision maker may be joined to the proceedings in order to clarify to court the nature of the decision he or she made.

.....
However in the present application, the applicants have not shown any reasons or advanced any evidence of any decision that was made by the DPP in this matter. Therefore there is basis of bringing this application against the DPP and

it does not show what duty the DPP had in order to be compelled to release the land titles.

This court agrees with the submission of counsel for the respondents that the order sought is intended to curtail the execution of the DPP's functions as enshrined under the Constitution.

An applicant for an Order of Mandamus is required to establish the following:

- a) A clear legal right and corresponding duty on the Respondent
- b) That some specific act or thing, which the law requires that particular officer to do, has been omitted to be done by him;
- c) Lack of an alternative, or
- d) Whether an alternative exists but is inconvenient, less beneficial or totally ineffective.

See Hon Justice Geoffrey Kiryabwire & Others vs Attorney General High Court Miscellaneous Application No. 783 of 2016

Similarly in the case of **M/s Semwo Construction Co. vs Rukungiri District Local Government, Misc. Cause No. 30 of 2010, Justice Yorokamu Bamwine noted thus:** "Mandamus is a prerogative writ to some person or body to compel the performance of a public duty. Before the remedy can be given, the applicant must show a clear, legal right to have the thing sought by it done, and done in a manner and by a person sought to be coerced. The duty whose performance is sought to be coerced by mandamus must be actually due and incumbent upon that person or body at the time of seeking the relief. That duty must be purely statutory in nature, plainly incumbent upon the person or body's office, and concern which he/she possesses no discretionary powers. Moreover, there must be a demand and refusal to perform the act which it is sought to be coerced by judicial review".

The applicants have not shown any corresponding duty on the party of the respondents to release the land titles which are subject to investigations.

In the final result for the reasons stated herein above this application fails and is hereby dismissed with costs.

It is so ordered.

SSEKAANA MUSA

JUDGE

11th/10/2018