

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CIVIL DIVISION**

**MISCELLANEOUS CAUSE NO. 179 OF 2020**

**THE REGISTERED TRUSTEES OF  
KULIKA CHARITABLE TRUST A.K.A KULIKA UGANDA:..... APPLICANT**

**VERSUS**

**DEPARTED ASIANS PROPERTY CUSTODIAN BOARD:..... RESPONDENT**

**BEFORE: HON. JUSTICE SSEKAANA MUSA**

**RULING**

The Applicant filed this application under Section 36 of the Judicature Act as amended, Rules 3, 4, 5, 6 & 7 of the Judicature (Judicial Review) Rules, 2009 for the following reliefs by way of judicial review;

1. An Order of prohibition be issued against the respondent, their workers, agents or persons deriving authority from them evicting the occupants at land and developments comprised in LRV 207 Folio 10 Plot 16, Namirembe Road.
2. A permanent injunction be issued against the Respondent, their workers, agents, or persons deriving authority from them from interfering, having any dealings whatsoever, evicting, and interfering with the applicants' occupation, possession and or any other actions adverse to the interest of the applicant with respect of the property comprised in LRV 207 Folio 10 Plot 16, Namirembe Road.

3. An order of certiorari quashing the decision and the demand of UGX 5,690,000,000 (Uganda Shilling Five Billion Six Hundred Ninety Million only) as rental income.
4. A declaration be made that the application is the registered proprietor of land comprised in LRV 207 Folio 10 Plot 16, Namirembe Road.
5. The costs of this application be provided for.

The grounds in support of this application were stated very briefly in the Notice of Motion and in the affidavit of Ms. Magdalene Amujal Ogwang which is detailed but briefly the grounds are;

- 1) The applicant is a bonafide purchaser of the land comprised in LRV 207 Folio Plot 16, Namirembe Road wherein it got registered under instrument No. 297500 in the names of The Registered Trustees of Kulika Charitable Trust.
- 2) On the 10<sup>th</sup> May, 2021, the respondent wrote giving notice to the occupants/ tenants in the Applicants property ordering them to provide vacant possession of the suit property ordering them to provide vacant possession of the suit property within 30 days.
- 3) On the 19<sup>th</sup> May, 2021, the Applicant's through their lawyer's M/s OARS & BT Advocates replied to the respondents said notice wherein it was stated that the applicant was the registered proprietor to comprised in LRV 207 Folio 10 Plot 16, Namirembe Road and was not aware of any claim over their property.
- 4) On the 20<sup>th</sup> May 2021, the respondent wrote to Messrs. OARS & BT Advocates claiming accrued rental income of UGX. 5,690,000,000/= notwithstanding that the applicant is not a tenant and reiterated a demand for vacant possession.

- 5) The respondent's threat of eviction of the tenants within 30 days and claim of right to the Applicant's property without justifiable proof and due procedure is illegal, unlawful and in breach of the rules of fairness and justice.

The respondent opposed this application and filed an affidavit in reply through George William Bizibu, the Executive Secretary as follows;

1. On 10<sup>th</sup> May, 2021, the respondent provided information to the occupants of Plot 16, Namirembe Road and requested for vacant possession and that there is no decision in that communication.
2. That the application is ill conceived as it not amenable to judicial review.
3. That the application raises and contests issue of whether the former owner was compensated by the Government of Uganda and invites court to hold that if there was any compensation, it is ineffective thereby determining rights between the parties.
4. The applicant contests that the former owner was compensated by the government but it has a title which is indefeasible thereby asking the court via judicial review to determine proprietary rights.
5. That the applicant does not seek to review any decision but rather the conduct of the respondent.

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.

Three issues were framed by the applicant for court's determination;

1. *Whether the application raises any issues for judicial review.*
2. *Whether the claim of UGX. 5,690,000,000/= by the respondent is ultra vires, illegal, irrationally and procedurally improper.*

### *3. What remedies are available to the applicants*

The applicant was represented by *Ms. Rita Acheng Ogwal* holding brief for *Brian Tendo* whereas the respondent was represented by *Mr. Geoffrey Komakech* holding brief for *Counsel Wandera Ogalo*.

### **DETERMINATION**

#### ***Whether the application raises any issues for judicial review.***

The applicant submitted that Rule 3 of the Judicature (Judicial Review) Amendment Rules, 2009 defines judicial review as the process by which the High court exercises jurisdiction over the proceedings and decisions of subordinate courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties. It noted that the purpose of judicial review is to ensure that the individual is given a fair treatment by the authority to which he or she has been subjected to.

The applicant submitted that the respondent on the 10<sup>th</sup> May, 2021 wrote to the occupants in the Applicant's property ordering them to provide vacant possession of the suit property within 30 days. The respondent indicated that the government of Uganda had compensated S&S Developments Limited and that the Minister of Finance wanted to deal with the property and no further warning was to be accorded to occupants.

It further noted that in response, the applicant's legal representative informed the respondent that on 30<sup>th</sup> October, 1998, under instrument No. 297500, the Applicant became a registered proprietor of the property comprised in LRV 207 Folio 10 Plot 16, Namirembe Road and has been in occupation of the property for over 21 years without any person or entity claiming any superior right for ownership.

The applicant relied on section 38 (1) and (3) of the Judicature Act that the High court shall have power to grant an injunction to restrain any person from doing any act as may be specified by the High Court. It submitted that it is immaterial

that the minister responsible for finance wants to deal with the property since he lost control of the said property in 1995 and the applicant has enjoyed quiet and unchallenged possession of the property until 2021 when the respondent threatened eviction without justifiable proof.

Counsel submitted that clearly the respondent is not only acting illegally and ultra vires but are equally abusing their powers as a public body by threatening to evict tenants of the applicant's property the within 30 days without further warning. She stated that this act warrants an injunction to be issued against the respondent's decision and if left unchecked will cause irreparable loss to the applicant.

The applicant also noted that there was a contradiction in the respondent's letters as far as compensating S & S Development Ltd and further stating that none of its directors or shareholders returned and the minister acted with his statutory powers to retain the property. She cited section 3 (2) of the Expropriated Properties Act, which empowers the minister to transfer property or business to former owner unless the minister is satisfied that the former owner shall physically return to Uganda, repossess and effectively manage the property or business. It was further noted the fact that the property was registered in the names of S&S Development Ltd and got registered in the names of Amirali Karmali and later transferred into the names of Hussein Habib Virani and finally, the applicant.

Counsel submitted that the conduct of the respondent is procedurally irregular, ultra vires its powers and must be regarded by this honourable court as equally unlawful. He therefore submitted that the applicant has not only raised grounds for judicial review of the respondent's conduct in a sense that the decision making process was flawed whereby it ordered the occupants to vacate the suit property within 30 days and thus prayed that the court finds so.

In respect of the claim of UGX. 5,690,000,000/=, counsel submitted that in further abuse of its powers, the respondent issued the demand for the accrued rent for

the period January 1973 to May, 2021 which assumes that the applicant was in occupation of the suit premises since January 1973 which is not true.

In reply, the respondent submitted that there is no decision whatsoever that was made in the demand letter save for a request and an invitation for the applicant to contact for the assistance. The respondent stated that the applicant was given an opportunity to contact the respondent but applied for judicial review. Counsel further submitted that the applicant's complaint is a threat of eviction and not a decision of an administration tribunal requiring judicial review. He therefore submitted that the decision of writing a letter by the applicant stating what they believe to be facts, even if wrong, cannot be subjected to supervisory powers of the high court.

The respondent submitted that it is clear that there is no decision over the property that has been made and it is premature to insist that a decision has been made in the matter. Counsel noted that if the applicant is dissatisfied with the decision of Minister, it has the right of appeal against such under section 15 of the Expropriated Properties Act.

The respondent concluded that the application for judicial review [even if there was a decision] is premature, ill conceived and not properly before the court.

### Analysis

It is the respondent's contention that in issuing the said demand notices, it did not make a decision but this only amounted to requests and that the communications adduced as evidence before this Court did not disclose a decision for the court to review.

Counsel, in support of his submission cited the decision of this Court in Mohamed Alibhai & 2 others vs Attorney General Misc Cause No. 70, 117 and 119 of 2020 for the proposition that *"a mere wrong decision without anything more in most cases will not be sufficient to attract the powers of judicial review"*

Having had the opportunity of reading the submissions of both counsel, it can be deduced from the facts, pleadings and evidence that the respondent made a decision which led to the issuing an eviction notice to the applicant and its tenants. The respondent in its letter dated 20<sup>th</sup> May, 2021 also sought for accrued rental income over the suit property to a tune of UGX. Shs. 5,690,000,000/= from the applicant. From this, it is clear that the respondent had made a decision that the applicant was illegally registered on the suit property and thereby sought to have it evicted and further pay rent from the year 1973.

As noted above, judicial review is not concerned with the decision in issue but with the decision making process through which the decision was made. It is not in doubt that the respondent is a public body that is subject to judicial review to test the legality of its decisions if they affect the public. This fits well within the definition under Rule 2 of the Judicature (Judicial Review) Rules 2009 and its decision is amenable to judicial review.

In these circumstances, it is clear that there was a decision made by the respondent. As to whether the said decision to evict and demand accrued rent from 1973 from the respondent was made in accordance to the rules of natural justice; is an issue to assess from the evidence.

In Uganda, the Constitution under Articles 42 guarantees a right to just and fair treatment in administrative decisions: *Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.*

The doctrine of natural justice is not only to secure justice but to prevent miscarriage of justice. The rules of natural justice are not codified nor are they unvarying in all situations, rather they are flexible. They are all summarized in one word 'fairness'. In other words, what they require is fairness by the authority concerned. Of course, what is fair would depend on the situation and the context. A decision reached in complete defiance of natural justice is void and the court

ought to declare the same as such depending on the circumstances of the case. See *O'Reilly v Mackman* [1983] 2 AC 237

The law has moved on along the principle of fairness; the courts are now able to insist upon degree of participation in reaching most official decisions by those whom the decisions will affect in widely different situations, subject only to well established exceptions. Whenever a public function is being performed there is an inference, in the absence of an express requirement to the contrary, that the function is required to be performed fairly. See *Ojangole Patricia & 4 Others vs. Attorney General* H.C.M.C No. 303 of 2013; *Thugitho Festo vs. Nebbi Municipal Council* Misc. Civil Appl. No. 0015 of 2017.

In light of the above principles and in consideration of the facts presented before this court, it is clear that the Respondent did not treat the applicant fairly and justly before the decision for eviction of its tenants and payment of rental arrears of UGX. 5,690,000,000/= was made. The Constitution enjoins the respondent as a public body to treat the applicant fairly and justly and the respondent has not set out any justifiable reasons why they never invited the applicant to be heard before making the decision they made.

There is a presumption that procedural fairness is required whenever the exercise of power adversely affects an individual's rights or interests protected under the Constitution or any rights or interests created by statute. The decision makers must always be alive to the principles of fairness for which they are enjoined to uphold in executing their public duty.

The applicant is challenging the decision of the respondent in evicting it and its tenants and demanding for rental arrears of UGX. 5,690,000,000/= as illegal and contrary to the rules of natural justice. As discussed, the respondent made the said decision; the subject of this application which falls squarely within the ambit of judicial review.

This issue is therefore answered in the positive.



*Whether the claim of UGX. 5,690,000,000/= by the respondent is ultra vires, illegal, irrationally and procedurally improper.*

The applicant submitted that the respondent acted in abuse of its powers, when in its letter of 20<sup>th</sup> May, 2021 without any proof; demanded that the applicant pays Ugx. 5,690,000,000/= as accrued rent for the period between January, 1973 to May, 2021. The applicant stated that this is an illegality since the respondent did not show any narration as to how it arrived at the colossal figure nor did it provide any justification as to why the applicant ought to pay the rental income.

Counsel stated that the respondent acted ultra vires to the powers that were granted to it by illegally soliciting rental income from the suit property which sums are not due to the respondent. In support of this, she relied on the case of *Arua Kubala Park Operators & Market Vendors' Cooperative Society Limited vs Arua Municipal Council MC. No. 3 of 2016* where it was held that judicial review is premised on allegations that a public body acted without powers, went beyond its powers, failed to comply with applicable rules of natural justice, proceeded on a mistaken view of the law or arrived at a decision so unreasonable that no court, tribunal or public authority properly directing itself on the relevant law and acting reasonably could have reached it.

The applicant thereby prayed that this honourable court finds in favour of the applicant that the respondent in making this claim/ decision and falls short of fairness and natural justice.

The respondent in reply submitted that judicial review is not concerned with the private rights or merits of the decision being challenged but with the decision making process. He stated that the principles governing judicial review were stated in *Simon Semboga vs Uganda Revenue Authority Misc. Cause No. 301 of 2019* that the remedy is not intended to detract properly constituted authorities of the discretionary powers vested in them.

Counsel further contended that the respondent has not adduced any evidence to show that S&S Developments was compensated. He relied on section 14 (b) of

the Assets of Departed Asians Act. He noted that the finding on the merits of this dispute goes beyond the purpose of judicial review as it would allow the court to fully and finally determine the propriety rights of the parties.

Counsel also noted that the contested amount of money is a simple demand note and not a decision to be reviewed by this court. It was therefore submitted that this application goes against the Judicial Review Rules and that the letter itself is a product of a decision and that the applicant has failed to show which due process was not followed. He also noted that the application does not show any unjust and unfair treatment since the contents of the letter do not convey a decision.

### Analysis

As earlier noted, for one to succeed under Judicial Review, he/she must prove that the decision made was tainted either by; illegality, irrationality or procedural impropriety.

In consideration of the three pillars that constitute a cause under judicial review: the learned *Lady Justice Lydia Mugambe in Cecil David Edward Hugh vs The Attorney General, Miscellaneous Application No. 266 of 2013*, in defining an illegality held that;

“Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of the law or its principles are instances of illegality.”

Procedural illegality was been defined by Justice Eldad Mwangusya in *Yustus Tinkasimire & 18 Others v Attorney General and Dr. Malinga Stephen (Miscellaneous Cause No. 35 of 2012*, wherein the learned justice quoted the decision of the *locus classicus* case of *Council of Civil Service Unions vs Minister of Civil Service [1985] AC 375* that it was found that;

*“Procedural illegality is when the decision-making authority fails to act fairly in the process of its decision making which would include...failure by an administrative authority or tribunal to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”*

It is important to note that **Section 59 of the Registration of Titles Act** provides for indefeasibility of a certificate of title where it states that; no certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate. It further states that a certificate of title shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power.

Furthermore, the Supreme Court in the case of *Hilda Wilson Namusoke & 3 Others vs. Owalla’s Home Investment Trust (EA) Limited, SCCA No. 15 of 2017* held that; the power to cancel certificates of title where fraud is alleged is vested in the High Court. An aggrieved party complaining of fraud should straightaway file a suit for adjudication on the issue.

In the case before court, the respondent alleges that the applicant obtained the suit property irregularly and through fraud since the property had not been dealt with. It therefore stated that the applicant was registered irregularly on the title. This however is a very serious allegation that can only be determined by the Courts of law and its burden of proof by the respondent being heavier than one on a balance of probabilities generally applied in civil matters.

As such, the respondent acted with procedural illegality in making its decision thereby issuing demand and eviction notices on the applicant and its tenants rather than applying to court questioning the proprietary of the applicant and for determination on whether the title was indeed irregularly obtained.

Irrationality/unreasonableness has been defined to mean when there has been such gross unreasonableness in the decision taken or act done, that no reasonable authority addressing itself to the facts and law before it would have made such a decision. Such a decision is said to be in defiance of logic and acceptable moral standards. *See: Council of Civil Unions vs Minister of the Civil Service [1985] AC 374.*

The respondent made a decision to evict the applicant and its tenants from the suit land on which the applicant is registered as a proprietor without according it a fair hearing or following the rules of natural justice and further sought for payment of UGX. 5,690,000,000/= as accrued rent for the period between January, 1973 to May, 2021. It is important to note that rules of natural justice are strictly applicable in quasi-judicial tribunals when making decisions as discussed above.

As such, the fair and reasonable opportunity to meet a prejudicial demand must be afforded in clear terms without it having to be gleaned from or read into correspondence. *See: Charles Oloo vs Kenya Posts and Telecommunications; Civil Appeal No. 56/1981*

In respect of the principle of irrationality as defined above, I am inclined to find that the respondent in issuing its demand and eviction notice was irrational. In considering unreasonableness, the court is concerned with whether the power under which the decision maker acted had been improperly exercised or insufficiently justified. The court is not confined to simply examining the process by which the decision maker arrived at the decision but must consider the substance of the decision itself to see whether the criticism of it was justified.

It is necessary for court to look at the evidence when considering reasonableness or rationality of the decision and after full and proper consideration of the evidence that the court would find that the public authority had acted unlawfully.

From the evidence on the record, it is clear that had the respondent taken into account all the matters which ought to be taken into account as to the proprietary

of the suit property from the year of 1973 to date, there is no way it would have come to the decision of evicting the applicant and further demanding for payment for rent from the 1973 to 2021 since it is clear from the evidence that the applicant only became the registered owner of the suit property in 1998.

A careful evaluation of paragraph 3 of the respondent's affidavit in reply and the request for vacant possession marked "A" and demand of accrued rent of UGX. 5,690,000,000/= in a letter dated 20<sup>th</sup> May, 2020 without any clear indication of according the applicant any opportunity to be heard was unreasonable, irrational and illegal since it is clear that the applicant is the registered proprietor in respect of the suit land.

Furthermore, as the registered proprietor of the suit land, there was a legitimate expectation by the applicant to be heard having been on the suit land since 1998 without any claims from the respondent. The respondent could have made investigations and summoned the applicant to ascertain how it acquired ownership of the suit property and if indeed it was a bonafide purchaser for value with or without notice.

The principle of legitimate expectation is concerned with the relationship between public administration and the individual. It seeks to resolve the basic conflict between the desire to protect the individual's confidence in expectations raised by administrative conduct and the need for the administrators to pursue changing policy objectives.

At the root of the principle of legitimate expectation is the constitutional principle of rule of law, which requires regularity, predictability and certainty in government's dealings with the public.

The origins of this ground of review is traced in the case of *Schmidt vs Secretary of State for Home Affairs* [1969] 1 All ER 904. Lord Denning noted that;

*"It all depends on whether he has some right or interest or, I would add, some legitimate expectation of which it would not be fair to deprive him without hearing what he has to say"*

The legitimate expectation may be based on some statement or undertaking by, or on behalf of, public authority which has the duty of making the decision, if the authority has through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied an inquiry. See: ***World Point Group Ltd vs AG & URA HCCS No. 227 of 2013***. In the circumstances of this case, it was only right that the respondent accorded the applicant a hearing to determine the allegations that had been made in respect of the proprietorship of the suit property before making any eviction and demand notices to the applicant.

It is clear that the claim of UGX. 5,690,000,000/= by the respondent was ultra vires, illegal, irrationally and procedurally improper when it did not accord the applicant a fair hearing or a just and fair treatment.

This issue is resolved in the affirmative

### **Whether the applicant is entitled to the remedies sought?**

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

### Certiorari

The applicant sought an order of certiorari quashing the decision and the demand of UGX 5,690,000,000 (Uganda Shilling Five Billion Six Hundred Ninety Million only) as rental income.

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.

A writ of certiorari should often freely be granted by the courts, where a prejudicial decision has been made by a public authority in the course of exercise of its statutory authority. If the decision is anticipated, then the remedy is prohibition. See: *Kampala University-v- National Council for Higher Education MC No. 053 OF 2014*.

In the circumstances, I hereby make the following orders: -

1. An order of prohibiting the respondent, its workers, agents or persons deriving authority from it from evicting the occupants on the land and developments comprised in LRV 207 Folio 10 Plot 16, Namirembe Road.
2. A permanent injunction is hereby issued against the Respondent, its workers, agents, or persons deriving authority from it from interfering, having any dealings whatsoever, evicting, and interfering with the applicant's occupation, possession and or any other actions adverse to the interest of the applicant with respect of the property comprised in LRV 207 Folio 10 Plot 16, Namirembe Road.
3. An order of certiorari quashing the decision and the demand of UGX 5,690,000,000 (Uganda Shilling Five Billion Six Hundred Ninety Million only) as rental income is hereby issued against the respondent.

This application is hereby allowed with costs to the applicant.

I so Order.

**SSEKAANA MUSA**

**JUDGE**

**6<sup>th</sup> April 2023**