

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL SUIT NO.656 OF 2020

5 **MKS LIMITED:.....PLAINTIFF**
VERSUS

1. COMMISSIONER, LAND REGISTRATION

2. NABUUMA JUSTINE LUSIYA

10 **(Administrator of the Estate of the Late**

LUSIYA NAMUTEBI):.....DEFENDANTS

Before: Lady Justice Alexandra Nkonge Rugadya.

RULING ON PRELIMINARY OBJECTION:

15 **Brief Background:**

The plaintiff instituted this action against the defendants for cancellation of the subdivision and registration of Nabuuma Justine Lusiya as the proprietor of land described as ***Kyadondo Block Block 216 plot 4992 land at Buye*** (hereinafter referred to as the 'suit land'); an order to reinstate the plaintiff as the registered proprietor of the suit land; a declaration that the plaintiff is a *bonafide* purchaser for valuable consideration without notice as well as a permanent injunction, general damages, interest and costs of the suit.

At the commencement of the hearing and in her written statement of defence, the 2nd defendant raised four preliminary objections. Court ordered the parties to file parties to file written submissions to address the following objections raised:

- 25 **1. *The suit discloses no cause of action against her, is frivolous, vexatious and an abuse of court process.***
- 2. *The plaintiff's suit is ultra vires, illegal and barred.***
- 30 **3. *The 2nd defendant has no privity of contract with the plaintiff to give rise to any cause of action.***
- 4. *The suit property does not exist in law and fact.***



Representation:

the plaintiff was represented by **M/S R. Mackay Advocates**, while the 2nd defendant was represented **M/S Lubega, Babu & Co. Advocates**.

Preliminary objection No.1: Whether the plaintiff's suit discloses a cause of action.

5 A cause of action means every fact which is material to be proved to enable the plaintiff succeed or every fact which if denied the plaintiff must prove in order to obtain judgment. **(See the case of Uganda Aluminium Ltd -Vs- Restuta Twinomugisha Court of Appeal Civil appeal no. 22 of 2000).**

10 Under **Order 7 rule 11 (a) of the Civil Procedure Rules S.I 71-1**, a plaint may be rejected by the court if it does not disclose a cause of action.

In determining whether the plaint discloses a cause of action, a court must look only at the plaint and its annexures if any and nowhere else. **(See: Kapeka coffee Works Ltd -Vs- NPART Court of Appeal Civil appeal no. 3 of 2000).**

15 In order to prove there is a cause of action, the plaint must show that the plaintiff enjoyed a right; that the right has been violated; and that the defendant is liable. If the three elements are present, a cause of action is disclosed and any defect or omission can be put right by amendment. **(See: Tororo Cement Co Ltd V Frokina International Ltd Civil Appeal No. 2/2001).**

20 According to *paragraph 5* of the plaint, the plaintiff company bought the suit property from the then registered proprietor Samuel Mugabi and became registered as the proprietor of the same. Further, that the plaintiff company took possession of the suit land and has since enjoyed quiet possession of the same.

25 It was further averred that the plaintiff's tenant, Hardware World Limited was first served with a warrant of attachment and sale of movable property arising out of **HCT-EMA No.928 of 2019 Justine Nabuuma vs Ssenkakya Simeon and Kindergarten School** wherein a one Justine Nabuuma had sued the plaintiff's tenant for recovery of accrued rent arrears amounting to **Ugx. 120,000,000/=**.

30 On 26th August, 2019, the same tenant was served with a plaint in **Civil Suit No.599 of 2020 Justine Nabuuma v Ssenkankya Simeon & Peak Kindergarten** in which the plaintiff therein is seeking an order of eviction and vacant possession in respect of the suit land.

35 That upon perusing the plaint in the above matter, the plaintiff company discovered that the 1st defendant had without the plaintiff's knowledge issued a special certificate of title in respect of the same property at the instance of and for the benefit of the 2nd defendant and had taken steps to cancel the plaintiff's registration as the proprietor of the suit property.

Further, that the 1st defendant cancelled the subdivision of formerly **plot 2500 Block 216** and the 2nd defendant became the registered proprietor of the same as the *administratrix* of the estate of the late Namutebi Lusiya and she went ahead to cause the subdivision and transfer of the said plot into **plots 4991 and 4993 Block 216**.

5 **Resolution.**

It is the contention of counsel for the defendant that the Commissioner, Land Registration issued a notice to effect changes in the register to Samuel Mugabi, Dick Kizito, M/s MKS Ltd and Annet Kirumira and that the plaintiff herein and Dick Kizito filed their respective defenses to the notice.

10 In addition, that on 21st November, 2017, the Commissioner made the amendment order and cancelled the plaintiff's certificate of title from the register.

Counsel further contends that the plaintiff was supposed to appeal the said decision within 60 days but did not. That if the plaintiff claimed not to have had notice of the said decision, it ought to have sought an extension of time within which to appeal the decision and not file
15 the instant suit, more than a year and seven months later.

Counsel then referred this court to the authority of ***Paul Saku Busagwa & Another v Commissioner Land Registration MC No.40 of 2014; Uganda Crop Industries Ltd v URA MC No. 5 of 2009*** which cited the cases of ***Shamir Productions Ltd. & another vs URA & others MC No.28 of 2012*** and ***Microcare Insurance ltd vs Uganda Insurance***
20 ***Commission MA No.31 of 2009*** for the position that where there is an internal remedy of appeal, a party cannot rush to file an action without exhausting that internal remedy as provided under the law.

He argued further that in the ***Paul Saku Busagwa*** case (*supra*), the judge dismissed the suit stating that the plaintiff therein had not exhausted the remedy under **section 91 (10)** by
25 appealing, hence making the action premature; and in conclusion therefore, that the matter before this court was premature, incompetent, illegal and *ultra vires* and ought to be dismissed with costs.

Plaintiff's counsel on the other hand did acknowledge the fact that the Commissioner, Land Registration indeed cancelled the subdivision of what was formerly **Block 216, plot 2500**
30 out of which the plaintiff had purchased **Plot 4478** thereby consequently cancelling the plaintiff's certificate.

Learned counsel argued however that the appeal referred to in **Section 91 (10) (supra)** is not a judicial appeal where evidence will be evaluated and that it is only administrative in nature. He went on to cite several authorities including the case of ***Mulwooza Brothers v N. Shah & Co. Ltd Supreme Court Civil Appeal No.26 of 2010; Deo Semakula v Bayogera***
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Valentine Kajungo & 2 others High Court Civil Suit No.442 of 2013, in support of his position.

That the cases cited for the 2nd defendant to wit; **Paul Saku (supra)** and **Uganda Crop Industries Limited case (supra)** are distinguishable from the issues and circumstances in the instant case because they were applications for judicial review seeking prerogative orders and that such applications are governed by the **Judicature (Judicial Review) Rules 2009 (as amended)**, which requires any aggrieved party to mandatorily exhaust existing remedies available within a public body or given law, as per **section 7A (1) (b)** of the rules. That such actions should be distinguished from the current matter which is governed by different statutes and regulations.

Counsel further argued that an appeal from the Commissioner, Land Registration only lies to the High Court within 60 days if the decision was communicated to the aggrieved party and that while in the instant case, the Commissioner's decision was not communicated to the plaintiff, the question of whether or not the same was communicated is one of fact that can only be determined through cogent evidence on the merits during trial and not on a preliminary objection.

Section 91 of the Land Act Cap 227 (as amended), accords the Commissioner Land Registration special and wide powers, to do such things and take necessary steps to give effect to the Act, including cancellation of a title under **Subsection (2) (b)**.

However, in exercising these powers, the Commissioner is required to give notice to all parties and also conduct a public hearing to which they are invited to attend and given a hearing. The Commissioner then makes the decision in writing.

Section 91 (10), stipulates that any party aggrieved by a decision or action of the Commission under that section may appeal to the District Land Tribunal within 60 days that such decision is communicated to them.

In the instant case, it is clear that the Commissioner, Land Registration was exercising the statutory special powers vested in him under **Section 91** in cancelling the plaintiff's certificate of title in respect of land comprised in **Kyadondo Block 216, plot 4478**.

A cursory examination of the evidence adduced by the 2nd defendant reveals that the 1st defendant by notice dated 12th July, 2016, informed the plaintiff of its intention to effect changes in the register by cancelling registration on the suit property, pursuant to a complaint by, Nabuuma Justine (Administrator of the estate of the Late Lusiya Namutebi), the 2nd defendant herein.

It is however not clear whether or not the Commissioner, land Registration conducted a hearing to afford the parties involved before cancelling the plaintiff's certificate. It is also not



clear whether or not the notice of the same or the decision for that matter was communicated to the plaintiff.

What is evident is that the instant suit was filed by the plaintiff on 8th September, 2020, after the Commissioner, Land Registration had already executed his duties. **Section 91(10) & (11) of the Land Act** also provides for a right of appeal. Going by that provision, a transfer is not to be effected until the determination of the appeal.

Needless to say there are several other options to resort to, including judicial review, if any party is aggrieved by the Commissioner's decision.

In interpreting the above provision of the law, I am guided by the position in the case of **Edward Katumba Vs. Daniel Kiwalabye Musoke CA No. 2 of 1998. (CA)** which was relied on in the case **Deo Semakula v Bayogera Valentine Kajungo & 2 others High Court Civil Suit No.442 of 2013** (cited by counsel for the plaintiff) wherein court stated that:

"..the court must consider the whole scope and purpose of the statute. Then to assess the importance of the impugned provision in relation to the general object intended to be achieved by the Act. Court must consider the protection of the provision in relation to the rights of the individual and the effect of the decision that the provision is mandatory".

In the case of **Paul Saku Busagwa & Another v Commissioner Land Registration MC No.40 of 2014;** which was relied on by counsel for the 2nd defendant the court observed that the provisions of **S.91 (10) Land Act** by their wording are not mandatory and an aggrieved party may proceed by plaint if aggrieved by proceedings of the Commissioner which may result into a decision that is prejudicial to them.

I am further persuaded by the reasoning of court in the case of **Deo Semakula v Bayogera Valentine Kajungo & 2 others High Court Civil Suit No.442 of 2013** which was also relied upon by counsel for the plaintiff, where it was noted that it would be a great injustice if a decision had the effect of taking away the right of ownership of land under the Act and the affected party could not bring an action in court to contest it because the period within which to appeal has elapsed.

The provisions of **section 91 of the Act** were never meant to oust the jurisdiction of this court to hear an appeal against the decision of the commissioner by way of a plaint. For had that been the intention of the legislature then it would have expressly stated so.

More important as court did observe in the above case, the use of the words *may* as opposed to *shall* appear to make the provision merely directory and not mandatory. Court in dismissing the objection ruled therefore that the procedure by suit to challenge the decision of the commissioner was not expressly prohibited by statute and can therefore be applied.



The particular provision was not concerned with the jurisdiction of the High Court but the decision of the commissioner, the right by any individual to appeal such decision and the procedure to be followed in that event. I have no reason to depart from that view.

5 The provision was never intended to close out all other avenues to a disgruntled party, restricting it to a mere hearing before the commissioner.

I am therefore disinclined to agree, with all due respect, to the submissions by counsel for the 2nd defendant that this matter is therefore prematurely before this court; and that the plaintiff ought to have appealed against the commissioner's decision rather than file this suit.

10 As for the rest of the objections, that the suit is *ultra vires*, illegal and barred learned counsel did not come out strongly on what exactly he had in mind. I shall reserve them for the full trial.

Costs in the cause.

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Alexandra Nkonge Rugadya
Judge
23rd September, 2021.

Delivered by email

Alexandra
23/9/2021

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