

**THE REPUBLIC OF UGANDA**

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

**MISCELLANEOUS CAUSE NO. 45 OF 2011**

**ALLAN MUGISHA NYIRIKINDI.....APPLICANT**

**VERSUS**

**1. THE COMMISSIONER FOR LAND REGISTRATION**

**2. BEATRICE MUKORURUNGI.....RESPONDENTS**

**BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE**

**RULING**

This is an application by notice of motion brought under section 36, 37, & 38 of the Judicature Act, cap 13, rules 3 & 6 of SI No. 11 of 2009, section 98 of the Civil Procedure Act and Orders 41 r 1 & 52 r 1 of the Civil Procedure Rules (CPR) for an order for judicial reliefs that:-

1. The notice, intention and proceedings to effect changes in the register of Kyadondo Block 263 plot 89, land at Bunamwaya is ultra vires the powers of the Commissioner for Land Registration/Registrar of Titles, is illegal and irrational.
2. An order of certiorari to call and quash the notice issued by the Commissioner for Land Registration to effect changes in the register of the land aforesaid dated 1<sup>st</sup> June 2011.
3. An order of mandamus directing the Commissioner for Land Registration to desist from acting without jurisdiction and exercising the powers he does not have.
4. An order of permanent injunction restraining the Commissioner for Land Registration from effecting changes in the register of the land aforesaid and from cancelling the Applicant's certificate of title.
5. Costs of this application.

The grounds for the application are that:-

- (a) The 1<sup>st</sup> Respondent, without any authority whatsoever to do so has issued a notice of intention to effect changes in the register of land comprised in Kyadondo Block 263 plot 89 hence the 1<sup>st</sup> Respondent is acting ultra vires his authority.
- (b) The action taken by the 1<sup>st</sup> Respondent is illegal contrary to the law.
- (c) There is a pending suit in the High Court to determine the matter between the Applicant and 2<sup>nd</sup> Respondent where the 2<sup>nd</sup> Respondent seeks cancellation of the Applicant's title.
- (d) The act of the 2<sup>nd</sup> Respondent to commence proceedings for effecting changes in the register is irrational since a civil suit to determine the matter between the parties is pending before the High Court Land Division.

The application is supported by the affidavit of **Allan Mugisha Nyirikindi** the Applicant.

When this matter was first called for hearing on 3<sup>rd</sup> October 2011, the 1<sup>st</sup> Respondent was absent. The 2<sup>nd</sup> Respondent was also absent but her Counsel was present. Both Respondents had not filed affidavits in reply to the application. This court granted an adjournment as prayed by Counsel Rukundo for the 2<sup>nd</sup> Respondent to allow him peruse the file which he had reportedly just taken over and file an affidavit in reply by 7<sup>th</sup> October 2011. The Applicant's Counsel was to file an affidavit in rejoinder, if any, by 14<sup>th</sup> October 2011. The application was fixed for hearing on 19<sup>th</sup> October 2011 at 9 am. On the said date however, the Respondents and their Counsel were absent, neither had they filed any affidavits in reply. The matter therefore proceeded *ex parte* against both Respondents. Counsel Maxim Mutabingwa for the Applicant made oral submissions before this court. He was after that requested to avail court with a photocopy of the case he had cited, highlighting the points of law he relied on to support his case. However he did not do so.

In his submissions, Counsel for the Applicant chose to rely on the affidavit in support of the application deposed to by the Applicant **Allan Mugisha Nyirikindi**. The Applicant's evidence, as deduced from the Applicant's supporting affidavit and its annexures is that the Applicant purchased a plot of land comprised in in Kyadondo Block 263 plot 89 at Bunamwaya in 2002. The Applicant made a search in the Land registry before purchase and ascertained that the land was registered in the names of Issa Kamanzi who sold it to him. He toured the land and found it was empty in 2002. He fully paid the purchase price to Issa Kamanzi the seller who gave him the certificate of title and executed a transfer in his favour. After paying the requisite stamp duty the land was registered in his names. He occupied and used the land between 2002 and 2009 as registered owner. In 2009 he sub divided the land in 3 plots, namely 457, 458, and 459. The Applicant deposed that the acquisition of land and sub division was neither in error nor illegal nor fraudulent and that all channels were followed. On 6<sup>th</sup> October 2009, the 2<sup>nd</sup> Respondent instituted a civil suit *Mukorurungi V Allan Mugisha Civil Suit No. 269 of 2009* against him claiming that he had registered the suit land fraudulently. The Applicant filed his defence and the suit is pending before this court. The 1<sup>st</sup> Respondent (Commissioner Land Registration) has issued a notice to the Applicant that the former registered proprietor (2<sup>nd</sup> Respondent) procured the registration by fraud. The 1<sup>st</sup> Respondent intends to cancel the certificate of title held by the Applicant and the other two titles in respect of the land he sold to other people, purportedly under section 91 of the Land Act.

Counsel for the Applicant submitted that the Commissioner Land Registration does not have powers to cancel the title under section 91 of the Land Act. He argued that the said section gives instances where the Commissioner Land Registration can correct errors in the register. He contended that there is no instance in this case which gives the Commissioner power to cancel the title because the Applicant bought the land from a registered owner. He argued that the registration of the Applicant was lawful and his interest cannot be impeached unless fraud can be pleaded and proved. He stated that though in the notice (annexture C) the Commissioner is alleging fraud, fraud is not one of the instances mentioned under section 91 of the Land Act. He submitted that it is trite law that questions of fraud are very serious and have to be pleaded and proved, and that can only be done in a civil suit, which civil suit is already filed in this court where the issue of fraud will be resolved. He also contended that since there is a pending suit to determine the issues, the Commissioner Land Registration would have no reason to cancel the certificates of title while the suit is pending. He cited the case of **Fr. Francis Bahikirwe Muntu**

**V Kyambogo University Misc. Application No. 643 of 2005**, unreported, where Kasule J, as he then was, defined irrationality. He argued that if the Registrar proceeded to cancel the titles while *Civil Suit No. 269 of 2009* is still pending, the said civil suit would be rendered nugatory.

Counsel in his submissions wondered why the very person who had written to the 2<sup>nd</sup> Respondent to surrender the certificate of title would now want to reinstate him. Relying on the case of **Fr. Francis Bahikirwe Muntu V Kyambogo** earlier cited, Counsel further submitted that the 1<sup>st</sup> Respondent is guilty of illegality because she wants to cancel the certificate of title under a law which does not allow her to do so, and that she wants to add another instance to section 91 which is not provided for. However, as stated above, Counsel did not avail court with a copy of the judgment of the said case which is unreported. Counsel submitted that under section 36 of the Judicature Act the High Court may make orders of mandamus, prohibition and certiorari. He contended that this court has jurisdiction to prohibit the proceedings under the said section and that it does not have to wait for cancellation. He argued that the case arose when the Applicant was served with notice to cancel his certificate of title as it is the notice which commences the proceedings. He concluded by stating that the Applicant had satisfied the grounds for making the orders prayed for, and for costs.

I have carefully looked at the application and its supporting affidavit, together with the submissions of learned Counsel on the matter.

On the issue of not filing a defence, in this case, an affidavit in reply, to the application and its supporting affidavit, Order 9 rule 11(2) of the CPR provides that:-

*“Where the time allowed for filing a defence...has expired and the Defendant...has...failed to file his or her defence(s), the Plaintiff may set down the suit for hearing ex parte.”*

There are court decisions to the effect that in such circumstances, the Defendant will not be allowed to participate in the proceedings though he or she may be present in court. In **Kubibaire V Kakwenzire [1977] HCB 37**, court held that since the Appellant had been served with summons and failed to enter appearance, they had by that failure put themselves out of court and had no locus standi. Also see **Musoke V Kaye [1976] HCB 171**. Thus the case proceeded *ex parte* on the foregoing authorities. However, whether a suit proceeds *ex parte* or not, the burden of the Plaintiff to prove his or her case on the balance of probabilities remains.

Order 9 rule 10 of the CPR is to the effect that where the Defendant has not filed a defence on or before the date fixed in the summons, the suit may proceed as if he has filed a defence. Case decisions on this point are to the effect that a party who has not filed a defence is deemed to have admitted the allegations. In the instant application, the facts as stated on oath by the Applicant have neither been denied nor rebutted by the Respondents. On the authority of **Samwiri Masa V Rose Achieng [1978] HCB 297**, the facts as adduced in the affidavit evidence of Allan Mugisha Nyirikindi the Applicant which are neither denied nor rebutted are presumed to be admitted. Also see **Eridadi Ahimbisibwe V World Food Programme & Ors [1998] KALR 32**, Lugayizi J; **Nakityo Miriam & 4 Ors V Jackson Muleebe & 7 Ors HCT - 00 - CV - CS - 0052 - 2008 UGHC**, unreported, Bamwine J, as he then was.

In this case learned Counsel for the Applicant submitted that the acts of the 1<sup>st</sup> Respondent are illegal and irrational. The question to address therefore is whether the acts of the 1<sup>st</sup> Respondent are illegal or irrational.

It is trite law that judicial review can only be granted on three grounds namely illegality, irrationality and procedural impropriety – **Council of Civil Service Unions V Minister for the Civil Service [1985] AC 374**. The first two grounds are known as substantive grounds of judicial review because they relate to the substance of the disputed decision. Procedural impropriety is a procedural ground because it aims at the decision making procedure rather than the content of the decision itself - **Aggrey Bwire V The Attorney General & Anor Civil Application No. 160 of 2008 Mpagi Bahigaine JA** as she then was.

The question of whether the act of the 1<sup>st</sup> Respondent of invoking section 91 of the Land Act for purposes of cancelling the Applicant's certificate of title is illegal can only be determined by ascertaining whether the Commissioner for Land Registration has powers to cancel such title under the said section. It was Counsel for the Applicant's argument that the 1<sup>st</sup> Respondent is guilty of illegality because she wants to cancel the certificate of title under a law which does not allow her to do so, and that she wants to add another instance to section 91 which is not provided for.

Section 91(2) of the Land Act states as follows:-

*"The registrar shall, where a certificate of title or instrument---*

- (a) is issued in error;*
- (b) contains a misdescription of land or boundaries;*
- (c) contains an entry or endorsement made in error;*
- (d) contains an illegal endorsement;*
- (e) is illegally or wrongfully obtained; or*
- (f) is illegally or wrongfully retained,*

*call for the duplicate certificate of title or instrument for cancellation, or correction or delivery to the proper party."*

Section 91(8) and (9) of the same Act require the Registrar of Titles, while exercising the said functions, to give due notice to the party likely to be affected by the decision, to provide such party with an opportunity to be heard, to conduct the hearing within the rules of natural justice, to give reasons for any decision, and to communicate her decision in writing to the parties and the Committee. Section 91(10) accords a right of appeal to the District Land Tribunal to the party aggrieved by the Registrar's decision.

In my opinion, in view of the foregoing provisions, the Registrar was exercising the special administrative powers under the said provisions when she issued the notice. The Registrar's issuing a notice of intention to effect changes in the register on grounds of a complaint that the Applicant "in connivance fraudulently procured registration" of himself on the title to the suit land, would fall under section 90(e) of the Land Act that is, that *"the certificate is illegally or wrongfully obtained"*. I would therefore not

agree with learned Counsel for the Applicant's submissions that the instances outlined in section 91 of the Land Act do not cover fraud or that she wants to add another instance to section 91 which is not provided for. Counsel for the Applicant had also submitted that it is trite law that questions of fraud are very serious and have to be pleaded and proved. This is a correct legal position as per the numerous case decisions on the matter, like **Fredrick Zaabwe V Orient Bank & 5 Ors SCCA 04 of 2006** where cases are handled in court as civil matters. Learned Counsel maintained that this can only be done in a civil suit, but he cited no authority to support this position.

On the question of whether the acts of the 1<sup>st</sup> Respondent are irrational, regard will be had of the circumstances of the case. The affidavit evidence adduced by the Applicant, which is uncontroverted, reveals that there is a pending suit, *Mukorurungi V Allan Mugisha Civil Suit No. 269 of 2009* against the Applicant claiming that he had registered the suit land fraudulently. The Applicant has filed his defence and the suit is pending before this court. The pleadings which are annexed to the application as annexures "A" and "C" do indicate that the Defendant, who is the Applicant in this case, is being sued by the Plaintiff, who is the 2<sup>nd</sup> Respondent in this application, because he "fraudulently and recklessly got himself registered as proprietor of the lands which at all material times belonged and still belongs to her." The said suit is still pending before this court. The case was filed on 6<sup>th</sup> October 2009 and the Defendant who is the Applicant in this matter filed his WSD on 30<sup>th</sup> October 2009. The 1<sup>st</sup> Respondent (Commissioner Land Registration) has however issued a notice to the Applicant dated 1<sup>st</sup> June 2011 of her intention to amend the register. The 1<sup>st</sup> Respondent intends to "delete the entries" of the Applicant's names and others and "re instate the names of the complainant" under section 91 of the Land Act.

In my opinion, much as the principles of natural justice in the proceedings before the Registrar would be observed, the intended action of the 1<sup>st</sup> Respondent would prejudice and pre-empt the pending court case. It is a fact that the subject matter or the basis on which the Registrar intends to cancel the title to the suit land, which is fraud, is to be established on hearing the pending case on merit. The Registrar's proceedings were initiated after the court case had been filed. In my view, it is irrational for the Registrar to have commenced the cancellation of title proceedings in respect of the suit property when there is a pending court case in respect of the same property. The court case was filed much earlier (in 2009) than the Registrar's intended proceedings (June 2011). The Applicant was served with the application and the hearing notices and she/he did not file a reply or defend her/his actions to rebut the Applicant's affidavit evidence that his/her decision to commence the proceedings was irrational. Thus, I would agree with learned Counsel for the Applicant that the Registrar was acting irrationally when she commenced the said proceedings when a civil suit on the matter is pending. I also agree that the said civil suit would be rendered nugatory if the 1<sup>st</sup> Respondent was not restrained from executing her intended acts of cancelling the Applicant's certificate of title to the suit land.

I may also mention that under section 33 of the Judicature Act, this court is empowered to grant absolutely or on such terms as and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and any multiplicities of legal proceedings concerning any of those matters avoided.

In the premises, and on the foregoing authorities, I would grant against the following declarations and/or orders:-

1. The notice, intention and proceedings to effect changes in the register of Kyadondo Block 263 plot 89, land at Bunamwaya by the Commissioner for Land Registration/Registrar of Titles is irrational.
2. An order of certiorari to call and quash the notice issued by the Commissioner for Land Registration to effect changes in the register of the land aforesaid dated 1<sup>st</sup> June 2011.
3. An order of mandamus directing the Commissioner for Land Registration to desist from acting irrationally.
4. An order of permanent injunction restraining the Commissioner for Land Registration from effecting changes in the register of the land aforesaid and from cancelling the Applicant's certificate of title.
5. Each party in this application will bear their own costs.

Dated at Kampala this 8<sup>th</sup> day of December 2011.

Percy Night Tuhaise

**JUDGE.**