THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS CAUSE No. 232 OF 2008

IN THE MATTER OF S. 36 (1) (A) JUDICATURE ACT AND 0.46, r.4 (2) CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE STATUTORY DUTY OF NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA)

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

IN THE MATTER OF SCHEER PROPERTY LIMITED REGISTERED PROPRIATOR AND PRIVATE DEVELOPER OF LEASEHOLD REGISTER VOLUME 3843 FOLIO 23 PLOT 203 KYADONDO BLOCK 248 KAUKU KAMPALA (APPLICANT)

AND

IN THE MATTER OF NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) (RESPONDENT

BEFORE: HON. MR. JUSTICE PAUL K. MUGAMBA

RULING:-

This is an application for judicial review contained in a Notice of Motion filed by the applicant herein. The motion is accompanied by an affidavit as well as a statement. In the application the applicant contends as hereunder:

1. "The respondent being a corporation with capacity to take quasi judicial decisions and action and capable of being sued;

2. The respondent has taken an unlawful, illegal, biased and unjust decision and action trampling the rights of the applicant to develop and enjoy the exclusive use of its property comprised in leasehold Register Volume 3843 Folio 23 Kyadondo acquired from Block 248 Plot 203, a plot of land overseeing lake Victoria at Kawuku in Kampala District belonging to and registered in the namesof the applicant;

3. This Honourable Court is enjoined with jurisdiction to make declarations and issue judicial review by way of certiorari, mandamus, Prohibition and Permanent Injunction and to award damages against the respondent to quash its unlawful, illegal, biased and unjust decision;

4. The decision and actions of the respondent are wrong in fact and in law, unlawful, illegal, unjust and biased;

5. The decision and actions of the respondent are in excess of its jurisdiction, are ultra vires and relates to property over which it has no legal rights, functions and duties;

6. The decision and actions of the respondent were taken in breach of the principles of natural justice, without affording the applicant and other relevant public institutions a right to be heard, and with bias;

7. By reason of the said decision of the respondent, the applicant has been deprived of the right to develop and use its private property, has and continues to suffer immense financial loss and damages of its reputation, while its director has and continues to suffer personal incarceration; and

8. It is urgent, just and equitable that the remedies sought in this application be granted."

The facts behind this application are generally agreed.

Ownership of the land in issue is not in dispute nor is it disputed the land is close to the shores of Lake Victoria at a place known as Kawuku. It is not contested land use is meant to be residential and commercial with particular mention being made of ICT Scanning and archiving office premises. It is agreed the prospective developers approached the Uganda Investment Authority and the Kampala City Council and got a green light from both. The applicants add that they engaged services of professionals such as architects and lawyers before ground opening works started. It was in the course of these works that the attention of the respondent was drawn and the impugned intervention was initiated. There is a letter Annexture RA1 from an Environmental Inspector to effect Annexture RA2 are minutes of a meeting held on 29th July 2008 involving various stakeholders who included the Minister for ICT, the Executive Director Uganda Investment Authority, an Inspector for Wetlands as well as Mr. Ronald Scheer and Ms. Joan Kelly. The meeting related to EIA and the proximity of the property in issue to the lakeshore. Annexture RA3 is a letter dated 30th July 2008 addressed to the Executive Director of the

respondent by *M/S* Collar - IT director Ronald P. Scheers. Appended to the letter were copies of the Environment Impact Statement. The letter was followed by one from the Executive Director of the Respondent to the Director Collar - IT (Uganda Ltd) (sic). In that letter Collar - IT were given reasons why the Environmental aspects of this project in the location were not approved. The letter read in part:

"In view of the above, the National Environment Management Authority (NEMA) is not approving the circumstantial aspects of your project in this location.
You are advised to find an alternative site for the implementation of your project. Once an alternative site has been identified, you should consult this authority for advice before commencement of the development. I look forward to our continued collaboration."

On 28th October 2008 the Executive Director of the Respondent wrote to the Director Scheer Property Ltd. I presume the business name is Scheer Property Ltd having looked at the letter head in the attachment RA? The communication of 28th October 2008 also stated that the respondent did not approve of the site and urged the addressee to look for an alternative site. Perhaps of note for this case are paragraphs two and three of that letter which read:

"As you are aware, following your request for a reconsideration of the decision communicated in mine of even reference dated 3rd September, 2008, I visited the project site on 22nd October, 2008

in your presence. During the site visit, I did confirm to you that the location of your project is in a very fragile ecosystem of a wetland and lake shore.

As the principal agency for environment management in Uganda in ensuring sustainable development, NEMA has continued to ensure that environmental safeguards are incorporated into all development policies, programmes and projects. In pursuit of this development objective,
NEMA reviewed the Environmental Impact Assessment Report for the proposed ICT Scanning and Archiving Office premises and did not approve the project.
_____"

From the same author to the same addressee is Attachment RA6 dated 13thNovember 2008. The letter states that there should be a protection zone of 200 metres measured from the Low water mark to land for any envisaged project around Lake Victoria in particular. The letter continued at page 2 thereof:

"This is to confirm to you that inspections and measurements carried out established that the land for the proposed ICT Scanning and Archiving Office premises and belonging to Joan

M.Kelly is located in a wetland and within the protection zone of Lake Victoria.

This plot was found to be located at exactly 59 metres from the lowest water mark.. "

Needless to say, the letter stated that the proposed project was not approved in the circumstances and urged for an alternative suitable site. A letter dated 8th October 2008 addressed to the Executive Director of the Respondent by *M/S* Scheer Property Ltd is appended to the affidavit in reply as RA? It is headed 'RE: Official Letter of Apology and Request for a solution from Scheer Property Ltd Ref. NEMA/4.5' In summary the letter is a lamentation by the author stating what the companies Scheer Property *Ltd/Collar* - IT Uganda Ltd had had to contend with already and how much had gone amiss. The letter sought for a compromise. It is ended:

"With your guidance and advice on how to handle this matter, we hope to come to a solution suitable to all and the environment. We shall do anything within our means to ensure that the development of our land does not in anyway (sic) tamper with the natural resources within vicinity of the land... "

In the application for judicial review the applicants seek writs of certiorari, mandamus, prohibition and Permanent Injunction. In order to make such an application there must be a decision, which is being contested. From

the generality of the pleadings and counsel's submission the decision being contested is that of the respondent when it refused to approve a proposed project for ICT Scanning and archiving office premises on the land in issue. At page 551 of
Administrative Law, 5thEdition, HWR Wade notes:

"Originally, certiorari and prohibition lay to control the functions of inferior courts i.e. judicial functions. But the notion of what is a "Court" and what is a "judicial function" has been greatly stretched *so that those remedies have grown to be comprehensive remedies for the control of all kinds* of *administrative as well as judicial acts.* "

Indeed Article 42 of the Constitution of Uganda ordaining:

> *"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."*

Certiorari and prohibition are designed to make the machinery of government operate according to law and public interest. While certiorari issues to quash decisions, which are ultra vires, arbitrary or oppressive, prohibition prohibits the happening of an act or the taking of some decision, which would be ultra vires. Certiorari thus is a remedy for something done in the past. Prohibition on the other hand is preventive as

it prevents a future decision. A word about mandamus. Simply put the writ would issue to compel a statutory body such as the respondent to fulfill its statutory obligation.

From the generality of this application, submission of both counsel and indeed respondent's reply to the application it is apparent there is a decision in existence. That being the case application for a writ of prohibition is moot. Equally redundant would be the writ of mandamus since the respondent has not failed to perform its statutory duty. It is no wonder therefore the thrust of the arguments by the applicant relates to the writ of certiorari.

It is argued by the applicant that the land in issue is private land and that the respondent's approval or lack of it does not extend to it. The respondent on the other hand argues that there is need for an approval by it of Environmental Impact Assessment (EIA) reports for all land in Uganda, tenure notwithstanding. Article 245of the Constitution is relevant here and states:

"Parliament shall, by law, provide for measures intended –

a) to protect and preserve the environment from abuse, pollution and degradation;

b) to manage the development; and environment for sustainable development; and

c) to promote environmental awareness."

Indeed the National Environment Act, Cap. 153, was subsequently enacted. Section 5 of the Act provides that the National Environment Management Authority shall be the principal agency in Uganda for the management of the environment and shall coordinate, monitor and supervise all activities in the field of the environment. I agree with the respondent here that the extent of the activity conferred by section 5 of the Act is nowhere limited or curtailed. It is wrong therefore to peddle the idea, as the applicant does, that respondent's responsibility does not extend to the land in issue. In any case proposed activities on the land would very likely have impact on land and environment in the vicinity and perhaps far beyond hence the relevance of a body such as the respondent. That being the case I find no justification for the proposition that the respondent acted ultra vires. In fact the letter from Scheer Property Ltd to the respondent dated 8th October 2008 acknowledges respondent's statutory responsibility. See Annexture RA? to the affidavit in reply. In my view that letter on its own would estop applicant from making the claim he does. Suffice it to say neither Uganda Investment Authority nor Kampala City Council have been delegated this statutory duty.

Related to the above is applicant's contention that it was not afforded a fair hearing. This is not the view of the respondent, which says enough opportunity was given to the applicant to be heard and that applicant was duly heard. I have earlier related to the correspondence between the applicant and respondent. They do not only relate to exchange ideas but also to several site visits. Again annexture RA7 of the affidavit in reply could be invoked for it is more evidence that the concerns of the applicant were brought to respondent's attention. I am satisfied applicant was given ample hearing and that there was no need to call the various experts

applicant says it engaged since its environment Impact Statement was duly presented and considered. I do not share the view that presentation of an Environmental Impact Assessment statement per se calls for automatic approval in order to justify the claim fair hearing took place. That is not real life. In real life it is possible for there to be approval or the antithesis.

Bias may be actual or implied. It would be actual if the respondent had genuine prejudice against the applicant or the subject matter. On the other hand it would be implied if there was apparent prejudice from the experience or relationship of the respondent or its agents.
See *Black's Law Dictionary, 8th Edition.* It is contended by the applicant that in the vicinity of the land in issue there is some property, which is closer than the land in issue to the protected zone of the lake. I should note that the decision of the respondent revolved around the requirement for a distance of at least 200 metres between the property to be developed and the protected zone of the lake. The applicant stated that that property in the vicinity is 70 metres removed from the protected zone. Applicant says therefore that it is a clear sign of bias if the applicant is being denied approval when no approval has been denied that adjacent property. I note however there is on record correspondence between the respondent and the applicant where it is stated in no uncertain terms that the land where the ICT project was proposed to be situate is 59 metres from the protected zone. I refer to Annexture 'RA6'. It does not require a genius to note therefore that applicant's land is even closer to the protected zone than the other property mentioned in this connection. Furthermore the applicant does not say what use the other property has been put to. I must confess I am at sea to find evidence of bias howsoever, particularly where reason for denying the applicant approval has been so clearly given.

It was the concern of the respondent it was not clear whether the applicant has locus standi to bring this application especially since correspondence was between the respondent and Sheer Property Ltd (mistaken for Scheer Property Ltd/Collar - IT Uganda Ltd or whatsoever. I have taken into account that those various concerns relate to the same project and the same piece of land. Indeed the application relates to that particular piece of land and the prospects of the project on the piece of land. I am satisfied the applicant in the circumstances has the right to be heard in this matter and that there is need to address the subject of the application.

Given all the above circumstances I do not find this is a matter where the writ of certiorari can be granted. I must note also that the other remedies sought cannot be granted either because they are out of turn.

I dismiss this application with costs.

JUDGE
26TH MAY 2009.