

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISCELLANEOUS APPLICATION No. 0578 OF 2021
(Arising from Civil Suit No. 3108 of 2016)

SSALONGO MUWANGA GEORGE A.B :::::::::::::::::::::::::::APPLICANT

VERSUS

NASSER ABDUL GAMAR SSEBAGALA:::::::::::::::::::::::::RESPONDENT

BEFORE: HON. LADY JUSTICE CORNELIA KAKOOZA SABIITI

RULING

This application was brought under **Section 98 of the CPA, Section 222 of the Succession Act, Order 24 rules 4(1), (2) and 12 and Order 6 rule 19 CPR**, seeking orders that;

- a) The respondent be substituted as defendant in the place of his late father Al Hajji Nasser Ntege Sebagala under the head suit who died on the 26th day of September 2020, before the disposal of the main suit.
- b) That the respondent be granted letters of administration ad litem limited for the purpose of defending Civil Suit No. 3108 of 2016 that was filed against his late father Hajji Nasser Ntege Sebagala.
- c) The costs of this application be provided for.

The grounds for the application are set out in the **Notice of Motion** and amplified in the affidavit of **Ms Nakayima Harriet** the applicant's holder of powers of attorney. The grounds are;

- i) That counsel of the defendant under the head suit informed Court on the 18th day of November 2020 that the defendant had died.
- ii) That the defendant having been a public figure, it has since been established that he indeed died on the 26th day of September 2020, before the disposal of the head suit.
- iii) That counsel for the defendant further indicated to court that there was no legal representative of the deceased at the time.
- iv) That neither counsel for the defendant nor any beneficiary of the estate has since filed an application for the appointment of a legal representative of the deceased for purposes of defending the head suit.
- v) That however the applicant through his agents has since discovered that the respondent is a child and heir to the deceased defendant, who automatically has an interest in the affairs of the estate.
- vi) That the urgency of the matter requires that the respondent be appointed as an administrator ad litem limited for the purpose of defending Civil Suit No. 3108 of 2016 that was filed against his late father Hajji Nasser Ntege Sebagala.
- vii) That as such the respondent be substituted as defendant in the place of this late father Al Hajji Ntege Sebagala, under the head suit who died on the 26th day September 2020, before the disposal of the main suit.
- viii) That the pleadings be accordingly amended to reflect the new changes.
- ix) That there is no conflict of interest between the respondent and the deceased.
- x) That it is in the interest of justice that the application herein is granted.

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The application was opposed by **Gamal Abdul Nasser Ssebagala** who deposes that; he is one of the children of the late Al Hajji Nasser Ntege Sebagala who was the 1st defendant in the main suit (HCCS No. 3108 of 2016). That he is not the heir of his late father. That his father left a will. The application for the grant of

letters of probate has since been commenced and the delay in the process has been affected by the fact that the executors and beneficiaries of the deceased's estate stay in different countries. That the process is never the less on going. That the purported power of attorney does not allow Nakayima Harriet in her capacity to represent the applicant. That the applicant has no cause of action against him and he is not a legal representative of his deceased father. It is in the interest of justice that the application is not granted.

The applicant was represented by **M/s Sowali Katamba and Co. Advocates** and the respondent was represented by **Walusimbi & Co. Advocates**. Both parties filed submissions to the application and submissions in rejoinder, which I have ably relied on in my resolution.

Resolution.

Before I resolve the merits of this application, I shall first address the preliminary objections raised by the respondent counsel in his submissions.

Counsel raised the said objections in form of issues;

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- i) Whether the application is supported by an authorised affidavit in support and if not-then what is the effect?

Respondent counsel contended that the affidavit in support of the applicant's application deposed by Nakayima Harriet is fatally defective as the applicant gave powers of attorney jointly to three people namely; **Nalukoola Francis Drake, Nakayima Harriet** and **Ntumwa Erisa Salongo**. That the Power of Attorney appointed three people to act for the plaintiff.

Counsel contended that the said appointment was clearly for the three as joint attorneys otherwise the donor would have expressly stated any alternative appointment. That the construction of powers of attorney is very well settled to

the effect that powers of attorney are to be construed strictly or else the instrument or document will not be binding unless it complies with the powers of attorney. Counsel ably relied on the case of **Fredrick Zzabwe Vs Orient Bank Limited & others Civil Appeal No. 2006/4**, where the Supreme Court held that "*in short, the authority conferred by a power of attorney is that which is within the four corners of the instrument either in express terms or by necessary implication*". Counsel concluded that the power of attorney at hand did not authorise singular action by either of the three persons. The authority is not to be inferred but rather must be strictly observed.

In this application, the affidavit in support was by Nakayima Harriet in her capacity as holder of Power of attorney of the applicant Ssalongo Muwanga George. The instrument indeed appointed three people as attorneys to which Nakayima Harriet is among. It is counsel's averment that since the Power of attorney appointed three people jointly, the affidavit is defective having been deposed by Nakayima alone as holder of the powers of attorney without the other two donees.

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In my considered view, the Fredrick Zzabwe case is not applicable in these circumstances. The thrust in that case was that the scope of the authority given in Powers of Attorney should be strictly applied without acting ultra vires to the powers given. In this case, one of the donees to the powers deposed an affidavit and pleaded facts that are known to her. I agree with counsel for the applicant, there is no provision in the said powers that the three parties should always act jointly. Nakayima Harriet thus had authority to depone the affidavit as evidence to the application without regard of any technicalities since she is one of the donee of the Powers of attorney.

Therefore, the objection has no merit, it is overruled.

Counsel further raised points of law that the plaintiff has no cause of action and that the suit is barred by limitation.

I have addressed my mind to counsel's arguments regarding the above objections and I agree with applicant's counsel, these points of law have been raised prematurely. In my view, this application is not the right forum to raise the above issues. The said issues are better adjudicated upon in the main suit for these are averments regarding the suit. Therefore, I shall restrict myself to the merits of the application before me.

Counsel for the applicant submitted that for this application to succeed, one has to demonstrate that; the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to nominee of a party in the suit limited for the purpose of representing the deceased in that suit or owing to special circumstances of the case, the urgency of the matters as appears from the affidavit is so great that it would not be possible for the court to make a full grant in sufficient time. Counsel cited the case of **Okway John Kimbo Vs Oddia Nuru and Anor HCCS No. 31 of 2013.**

Counsel emphasised that there is urgency in this matter which has been in court since 2012 and the applicant is now 89 years. That the court be pleased to appoint the respondent as administrator Ad litem limited for the purposes of defending Civil Suit No. 3108 of 2016 against his late father.

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32/8/21* On the other hand, counsel for the respondent submitted that the respondent clearly avers that the deceased left a will, the respondent is not the heir nor is he a legal presentative and the process of obtaining the grant of probate for the estate of the deceased has commenced. That the respondent cannot in fact or law stand in the stead of the deceased first defendant. That according to **Section 222 of the Succession Act** for the court to grant the letters of administration ad-litem to have a deceased party substituted, the executor or person entitled to administration of

the deceased's estate must be unwilling to act and evidence must be produced in court to that effect.

Section 222 of The Succession Act permits the grant of letters of administration for the purposes of a pending suit. It provides as follows;

When it is necessary that the representative of a person deceased is made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in the suit, limited for the purpose of representing the deceased in that suit or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in that cause or suit, and until a final decree shall be made in it, and carried into complete execution.

In the case of **Okway John Kimbo Vs Oddi Nuru & Anor** (Supra) which the applicant's counsel relied on court observed that; *"A grant of this nature is made where owing to the special circumstances of the case, the urgency of the matter as appears from the affidavit is so great that it would not be possible for the court to make a full grant in sufficient time to meet the necessities of the estate of the deceased. It is in the nature of a grant of administration ad litem, limited for the purpose of filing or prosecuting a suit or defending a suit, with no powers to the grantee to distribute the estate under the grant."*

Different from the above case, where the applicant was willing to become administrator ad litem, in this particular case, the respondent is strongly unwilling to be substituted as an administrator for the purposes of the suit. The law does not compel any person to be a legal representative of a deceased person. Therefore, the respondent cannot be forced to be the legal representative of the late Al Hajji Nasser Ntege Ssebagala.

Since the respondent has objected to being the administrator ad litem of the estate of the deceased 1st defendant, I advise the applicant and his counsel to liaise with the respondent on details of the purported ongoing process of obtaining the letters of probate and which stage it is at. In the event it is discovered that the process has not commenced, in the alternative the applicant could proceed through **Section 4(3)(d) of the Administrator General's Act, Cap. 157**, so that they move the Administrator General to apply for the Letters of Administration to the estate, if any. The section is to the effect that; *Upon receiving such report or upon such death coming to his or her knowledge, if it appears to the Administrator General, that probate or letters of administration have not been obtained within two months from the death of the testator, the Administrator General may apply to the court for letters of administration of the estate of the deceased person, whereupon the court shall, except for good cause shown, make a grant to him or her of letters of administration.* Otherwise the applicant's HCCS No. 3108 of 2016 will be greatly affected by **Order 24 rule 4 (3) of the Civil Procedure Rules** which provides; that: -*"Where within the time limited by law no application is made under sub-rule (1) of this rule, the suit shall abate as against the deceased defendant"*

In the circumstances, I dismiss this application. The applicant should consider pursuing the remedies I have recommended. Each party should bear its costs.

It is so ordered.



CORNELIA K. SABIITI
JUDGE

Date: 30th August 2021