THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 434 OF 2019

(Arising out HCCS NO.699 OF 2017)

1. **HASSAN SSEGAWA KAMBUGA**
2. **BONNY M KASUJJA**
3. **PROSCOVIA NAJJEMBA**
4. **NSANGI SARAH**
5. **NABUULE BEATRICE & 95 OTHERS.....APPLICANTS**

VERSUS

PASTOR DANIEL WALUGEMBE..... RESPONDENT/PLAINTIFF

AND

1. **BLASIO BWISE**
2. **YOSAMU MASEMBE**
3. **SENDAULA RONALD SENDAULA ISAIAH**
4. **LATIMAR MPAGI.....RESPONDENTS/DEFENDANTS**

Introduction:

This application seeks to have the consent judgment and decree entered by this court: ***vide Civil Suit No. 699 of 2017*** reviewed and set aside.

The affidavit in support of the application was deponed by Mr. Bonny Kasujja, filed together with others by Ms Sarah Nsangi, Nakibuule Beatrice, Proscovia Najjemba. Also attached to the affidavit was the written authority of 95 other *bibanja* claimants for the land located in Busia and Kimwanyi zones, Katanga, Wandegeya.

The applicants were represented by ***M/s Nalukoola , Kakeeto Advocates & Solicitors*** while the respondents were represented by ***M/s Mungoma, Mabonga, Wakhakha & Co. Advocates.***

Arguments by the applicants:

The gist of the applicants' claim is that they have interest in the land, which was the subject of the dispute in ***HCCS No. 699 of 2017.*** That by the time the 1st respondent, Pastor Daniel Walugembe brought the suit against the 2nd-6th respondents, the applicants were already *bona fide* occupants of *bibanjas* in Busia, Soweto and Kimwanyi zones. Furthermore, that the judgment in an earlier suit ***HCCS: No. 857 of 2000*** had recognized them as such.

That they were not however informed of the subsequent suit by Pastor Daniel Walugembe against the respondents filed vide: ***Civil Suit No. 699 of 2017.*** Not until it was settled by a consent judgment entered by this court on 13th October, 2017 did they get to learn about it.

Under the consent order, details of which are on record, the respondents claimed to have sold 15 acres to Pastor Walugembe, but not 13 acres as originally pleaded. The applicants also claimed that the respondents who were parties to the consent which they now seek to challenge, had connived so as to deprive the applicants of their interest in the land.

That the objective of the consent was to ratify their illegal acts, acts which amounted to an abuse of court process and that such illegalities should not be condoned by court.

The applicants who also claimed they were being threatened with eviction on the basis of the consent decree therefore concluded that it was just, fair and equitable for court to grant this application.

Arguments by the respondents:

For the respondents, an affidavit in reply was deponed by Ms Namboga Teddy who claimed to have to have been a resident in Kimwanyi Zone Katanga for 65 years. She however denied having granted authority to the applicants to file this application.

The second affidavit in reply was deponed by Mr. Richard Muwanga. Muwanga also claimed that he had lived on the land since his childhood. He too denied having signed the letter of authority.

Mr. Ronald Sendaula, also a respondent in this application was another deponent.

He was one of the administrators of the estate of the late Ashe Mukasa Mukanga, and one of the beneficiaries under that estate. He referred court to its earlier decision which declared the plaintiffs in that case as *bonafide* occupants of the suit *kibanja.*

He claimed that the applicants did not disclose the basis of the claim over the 15 acres (out of the total 38 acres) which they (respondents) had sold to Pastor Walugembe; and that the issues raised in the suit ***HCCS No. 699 of 2017*** neither concerned nor affected any of the applicants and therefore the question of a miscarriage of justice did not arise.

In another affidavit, Mr. Yosamu Masembe, the 3rd respondent, another of the administrators of the estate of his father averred that the 1st respondent Bulasio Bwise his brother and heir to his late father had passed away in 2018 and that by the time of filing the application no legal representative had been appointed to his estate.

That him, together with his sister Samali Namboga, and G. Kagimu and Bulasio (heir) filed this suit, however that Samali Namboga, and Kagimu had also died before the suit was concluded.

That during the pendency of the hearing the 3rd-5th respondents were added as co-administrators of the estate, and it is within that capacity that they entered into the consent which was concluded with the free consent of the parties.

The family of their late father Ashe Sendaula Mukasa Mukanga which owned land comprised in ***Block 38, plots 386-390 situate at Katanga Valley, Wandegeya*** were recognized by court as holding an equitable interest in the land. He therefore like the rest deponents for the respondents denied any knowledge of the applicants as licensees, contending that they were in illegal occupation on that land.

In the affidavit deponed by Pastor Walugembe more or less the same issues were raised and I need not reproduce them here.

The respondents accordingly prayed for the dismissal of the application, with costs.

Consideration by court:

I have carefully perused the pleadings and the submissions made each side. Counsel for the respondents relying on the ***order 1 rule 8 of the CPR*** raised a point of law which I shall deal with first.

The gist of the objection is that where a representative suit is filed, it is a mandatory requirement under the above rule for a party to secure a representative court order before filing it. The absence of that order therefore would render that suit a nullity. Similar principles would in my view apply to any other form of action.

Counsel for the applicant in response argued however that the application was brought under ***order 1 rule 12 of the CPR*** which states that where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for that other in any proceeding.

Order 1 rule 8 of the CPR provides:

1. ***Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or***

may defend in such suit, on behalf of or for the benefit of all persons so interested. But the court shall in such case give notice of the institution of the suit to all such persons either by personal service or, where, from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

The object of ***Order 8 rule 1*** is to facilitate a large group of persons who are interested in the same action to sue collectively without recourse to the normal procedure where each one of them would individually maintain a separate action by way of a separate suit. ***(Justice Geofrey Kiryabwire in Ibrahim Buwembo & 3 others (for and behalf of 8 others) vs M/s UTODA Limited High Court Civil Suit No.664 of 2003)***

Mulla on Code of Civil Procedure states that the courts when called upon to deal with an application under ***Order 1 rule 8,*** should bear in mind that the provisions contained therein are mandatory and not merely directory, and are essential preconditions for trial of the case as a representative suit.

As per ***Chitaley and Rao in A.I R Commentaries, The Code of Civil Procedure 7th Ed Vol. II pages 1896 and 1997***, the obtaining of judicial permission is an essential condition for binding persons other than those actually parties to the suit and their privies. If this essential condition is not fulfilled, the suit is not a representative one.

As a matter of procedure, the court ought to insist on the permission prescribed by the rules being obtained before a matter is allowed to be brought out in a representative capacity, and as such the requirement to permission cannot be waived.

The mandatory nature of this requirement is fortified in ***Order 7 rule 4 of the Civil Procedure Rules*** which provides that where the plaintiff sues in a representative character, the plaint shall show not only that he/she has an actual existing interest in the subject matter but that he or she has taken steps if any, necessary to enable him or her to institute a suit concerning it.

Leave to file such a suit must be sought before and not during the pendency of the suit. ***(refer: Henry B Kamoga & 5 others vs Bank of Uganda Civil Suit No.62 of 2009).*** A plaint is therefore incurably defective for being brought in a representative capacity without a representative order.

Order 1 rule 12 of the CPR on the other hand, provides:

1. ***Where there are more plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for that other in any proceeding, and in like manner, where there are more defendants than one, any***

one or more of them may be authorised by any other of them to appear, plead or act for that other in any proceeding.

2. ***The authority shall be in writing signed by the party giving it and shall be filed in the case.***

In Equity Bank (U) Ltd Vs Buyinza John, HC M.C No. 33 of 2018 court observed that the above provision, ***(Order 1 Rule 12)*** clearly provides for a situation where there is more than one plaintiff or defendant and one seeks to appear, plead or act for the other in a proceeding before the court for example, swearing an affidavit for or on behalf of the other.

In the case of ***Lena Nakalema Binaisa & 3 Others Versus Mucunguzi Myers Miscellaneous Application No. 0460 of 2013*** where no authority of the other respondents was included the court held that whether it is a representative action or a suit by a recognized agent under ***Order 3 rule 2 (a) of the Civil Procedure Rules*** or by order of the court, the person swearing on behalf of others ought to have their authority in writing, which must be attached as evidence and filed on court record. The affidavit is incurably defective therefore if sworn on behalf of another when the requirement is not met.

In the present case, the authority was granted, purportedly, by each of the 95 claimants, reduced in writing and signed or thumb printed by each them. Counsel for the respondents argued that the said ***order 1 rule 12*** does not apply to this situation but however gave no explanations for believing so.

The mere fact that some two or so persons denied having given out any such authority; and the fact that some of those who endorsed the petition have since passed on, were not by themselves enough to stand in the way of the majority who may hold genuine and provable interest, from filing this application.

Without concrete reasons provided by the respondents, I would therefore also be disinclined to reject the application on the mere fact that it had been brought ***order 1 rule 12*** and not ***under Order 1 rule 8,*** where a representative order must be sought as a pre-condition.

Now for the merits of this application.

The first question is therefore whether or not the applicants have any interest in the land in dispute or any legal grievance in the main suit, under which this application was filed, to merit the prayers sought under the ***section 82 of the of the Civil Procedure Act, Cap. 71*** and ***order 46 of the CPR:***

Section 82 states that:

" any person aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred or by a decree or order which no appeal is allowed, may apply to the Court which passed the decree or order for a review of the judgment. The Court may make such order(s) as it thinks fit"

Order 46 r.1 Civil Procedure Rules provides additional factors to be taken into account in applications for review:

" ..... and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her,....."

The expression "*person aggrieved*" was considered to mean a person who has been injuriously affected in his rights or has suffered a legal grievance. ***James L.J*** in the case of ***Ex parte Side Botham in re Side Botham (1880) 14 Ch. D 458 at 465*** held that:

"A person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully affected his title."

It does not include a mere busy body who is interfering in things, which do not concern him, but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests. (***See: Lord Denning in the Privy Council case of Attorney General of Gambia vs. N'jie [1961] AC P 617*** at ***page 634)***.

An applicant for a review order therefore has the duty to satisfy court that he/she has a legal grievance which grants him/her the necessary *locus standi* to take any such action. It is emphasized that the unfailing requirement is that *locus standi* to institute a suit, by whatever mode prescribed must be established at the time the suit (or application) is instituted, by expressly pleading facts that give the plaintiff the legal standing to institute the matter. It should not be left to the court to guess where a plaintiff derives the *locus standi* to file the action. It must be expressly clear on the facts pleaded, particularly those that give rise to the cause of action.

Going by that argument, this court was quick to note that the interests of the 2nd -5th respondents in relation to the suit land had been confirmed based on an earlier order of this court obtained vide: ***HCCS 857 of 2000,*** which declared them as the *bona fide* occupants of the land comprised in ***Freehold Register Vol.59 Folio 21 in Kyadondo County, Mengo District,*** owned by

Makerere University. The titles for ***plots 387, 388, 395, 396, 403,506-510 of block 38*** had been issued, though later cancelled.

The applicants in this matter who also claim to be *bona fide* occupants in that same area, (a contention which the respondents however deny), never took the trouble to challenge that decision which was passed by this court as early as 2015.

By way of a brief background, the suit: ***HCCS 857/2000 Jonathan Masembe & Others vs Makerere University & Others*** had been filed in 2000 by the beneficiaries of the estate of the late Ashe Sendaula Mukasa, under whom the respondents lay their claims.

It was instituted against Makerere University, the Attorney General and Registrar of Titles, seeking to challenge among others, cancellation of the various titles for the land which had been created under various plots in ***Mulago Kyadondo, Block 38.***

The said land had been registered in the names of Ashe Sendaula Mukasa on 17th November, 1930. Upon his demise, the family had secured a grant for letters of administration over the estate in 1989. Following a subdivision in 1990, several plots were curved out which were however cancelled in 1993. The plaintiffs in that suit therefore sought an order restoring the cancelled titles.

The matter was heard and determined 15 years later and court upheld the title of Makerere University comprised in ***Freehold Register Folio 59, Volume 21.*** It however also recognized the plaintiffs in that suit as *bonafide* occupants of the suit *kibanja.*

In a yet earlier case, ***HCCS No. 378 of 1993***, court had ordered cancellation of titles for specific plots in that area which had been transferred to St. Mark Educational Centre, a decision that had been upheld by the Court of Appeal. It is not clear from the pleadings which specific area the applicants were laying claim as *bona fide* occupants since in 1990, at the time when the cancelled titles were created their interests were not known or revealed. The court is therefore left in speculation as to where their interests lie.

Indeed at no point in time did they take any step to challenge the respondents in their earlier bid to acquire legal ownership or obtain a review of the orders which recognized both the respondents as *bona fide* occupants and the University as the legal owners.

Needless to add, in the event that the applicants had any equitable interest at all, the common law principle: *qui prior est tempre* is applicable where there are two competing equities and neither claimant has a legal interest. The first equity in time would be stronger in law and would therefore take precedence, thus prevailing over the one that occurred later in time.

But in such a situation as this one, I would also add that where a party has obtained judgment in a court of justice, he/she is by law entitled not to be deprived of that judgment without very solid grounds: (***Refer: Brown vs Dean [1910] AC 373, [1909] 2 KB 573, Aluma & 2 Others vs Okuti HCMA No. 12 of 2016).***

Besides is also the fact that, within the spirit of ***section 7 of the Civil Procedure Act, Cap. 71*** no court is to try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

Thus the doctrine of *res judicata*, applicable to the present circumstances, bars re-litigation of cases over issues already determined by a competent court, the rationale being to prevent multiplicity of suits and bring finality to litigation. ***(Refer also to: In the Matter of the estate of the late Namadowa Butanda Bruhan & 6 others vs Hakim Kawaidhanako & 3 others HCCS No. 100 of 2012.)***

The applicants' cause of action against the respondents is presumed to have occurred in 1990, the year when the titles were issued and that is around the time when they should have registered their interest in the land, if indeed they had any.

This court notes that this is a matter that has been in court since the early 1990s. Matters relating to ***plots 397*** (*formerly* ***plot 389***) and ***plot 402*** had even found their way up to the Court of Appeal. With all due respect, litigation must come to a close.

With the ownership of the land having been duly determined as early as the 1990s and confirmed in this court in 2015, the applicants cannot be seen to bring up the same matter years later. As such, the applicants have no legal grievance upon which this court would allow the reliefs sought by them under ***section 82 of the CPA*** and ***order 46 of the CPR.***

As I conclude, I also note in passing that ***MA No. 0463 of 2019*** had earlier been filed by the respondents, seeking security for costs in relation to this application. The court presided over by the Asst. Registrar had granted the application and ordered the applicants herein to pay ***Ugx30,000,000/=*** as security for costs, within 60 days from the date on which the order was passed on 27th June, 2019.

Generally, the rationale for depositing security is to maintain *status quo* among the parties; ascertain that the purpose of the application is not merely intended to defeat the course of justice by delaying tactics whereby after execution has been stayed the decree holder is made to wait

indefinitely for the fruits of his success. By providing such security, the judgment debtor is also trying to prove how serious he is in his application for stay. ***(Ntege Mayambala vs Christopher Mwanje (1993) KALR 97).***

It is not clear from the record as to whether or not the money was deposited within the time as directed by court, or at all; and neither counsel in any case made any submissions on this point. But be that as it may, a party against whom an order is issued whether that order is null or valid, regular or irregular, cannot be permitted to disobey it. It would be most dangerous to hold that suitors or their solicitors could themselves judge whether the order was null or void, regular or irregular.

A party knowing of such order and who might be affected is expected to know that he/she must apply to court that it might be discharged. But for as long as it exists and remains undischarged, it must not be disobeyed. ***(Stanbic Bank (U) Ltd & Jacobsen Power Plant Ltd vs. URA HCMA No. 42 OF 2010).***

Such disobedience meant that the applicants did not come to court with clean hands.

For all those reasons as indicated above, I decline to grant the application.

Costs to the 1st, 3rd and 4th respondents.

Alexandra Nkonge Rugadya

Judge

29th September, 2021

Delivered via email

Akhonge

J

29/9/2021