

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISCELLANEOUS APPLICATION NO.2004 OF 2021
(Arising out Civil Suit No. 210 OF 2021)

1. ASABA CHARLES

2. KIIZA GERALD OSMAN

(Administrators of the estate of the

late RWAHERU AKIIKI MARGRET):.....APPLICANTS

VERSUS

1. KAFEERO ANDREW

2. LUBEGA ACHILES:.....RESPONDENT

Before: Lady Justice Alexandra Nkonge Rugadya.

RULING.

Introduction:

This application is brought by way of Chamber summons under **Section 98 of the Civil Procedure Act Cap. 71, Section 33 of the Judicature Act Cap.13 and Order 1 rule 13 & Order 6 rule 19 of the Civil Procedure Rules SI 71-1** seeking orders that the applicants be granted leave to amend their plaint and costs of the application be provided for.

Grounds of the application:

The grounds of the application are contained in the affidavit in support of Mr. Asaba Charles but briefly they are that the applicants filed **Civil Suit No.210 of 2021** against Kafeero Andrew, the 1st respondent which is pending hearing, but before the same was determined, the applicants learnt that the defendant in an endeavor to defeat the applicants' interests, fraudulently sold the suit land to a one Lubega Achilles, the 2nd respondent and that the applicants now seek leave of this court to add Lubega Achilles as a defendant in the main suit since he is claiming an interest in the suit *kibanja*.

Further, that when the new facts emerged, it became necessary to amend the plaint in order to determine the real question in controversy and that the respondents will not be prejudiced in any way since the hearing of the main suit has not started and they (respondents) will have an opportunity to respond to the said amendment.

The respondents both objected to the application through their affidavits in reply. The 1st respondent raised a preliminary objection to the effect that while the plaintiffs/applicants had up to 11th May 2021 to take out summons for directions, the same was not complied with.

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Therefore the suit abated despite the fact that they tried to smuggle onto the court record summons for directions by 26th May, 2021; and that the applicants have not taken any further steps since 8th July, 2021 when they were supposed to appear before court.

That the applicants are just on a fishing expedition which is demonstrated by their failure to attach a copy of the intended amended plaint to enable court determine whether or not this application has any merit.

That while the proper procedure would have been to consolidate **Civil Suit No. 210 of 2021 and Civil Suit No. 214 of 2021** since they all relate to the same subject matter and are between the same parties, the main suit has since abated and is incapable of being amended since the applicants failed to comply with the necessary legal procedure. In addition, the applicants have never filed any defense in **High Court Civil Suit No.241 of 2021** despite having been effectively served.

Further, that if this court is to allow the applicants to amend their plaint, they should pay the sum of **Ugx 1,500,000/=**, which the 1st respondent has already incurred.

In rejoinder, the applicant averred that the respondents in their respective affidavits in reply have not offered any reply to the affidavit in support of the application and that they abandoned the instant application and instead went to the merits of the main suit which is premature.

In reply to the claim for **Ugx 1,500,000/=** being costs incurred by each respondent as a condition precedent to amending the plaint, the applicant alleged that the same exposes the self-enrichment minded character of the respondents and their intention to frustrate the applicants' efforts to seek justice.

Representation:

The applicants were represented by **M/s Owoyesigire Muhereza & Co. Advocates** while the respondents were both represented by **M/s Luzige Lubega Kavuma & Co. Advocates**. Both Counsel filed written submissions in support of their clients' respective cases as directed by this Court.

Consideration by court.

Counsel for the respondent in his submissions raised a preliminary objection to the effect that there is no case before this court since the same abated due to the applicant's failure to take out summons for directions within the 28 days and that since the written statement of defence was filed on 24th March, 2021, endorsed by court of 6th April, 2021 and served on 13th April 2021, no reply to the written statement of defence was ever filed and therefore the pleadings closed.

Counsel for the respondents citing **Order XIA rule VI of the Civil Procedure Rules (as amended)** argues that the consequence of the applicant's failure to take out summons for directions within the stipulated 28 days is that such an action abates and that in the instant case, the applicants did not take out summons for directions until 26th May, 2021 after the 28 days had already elapsed. That it follows that there is no case to amend before this court and that the instant application ought to be dismissed.

In reply, applicants' counsel referred this court to the case of **Seruwude vs Swangs Avenue Civil Appeal No.39 of 2021** wherein it was held that when a law is passed for the purpose of enabling the



doing of something and prescribes the formalities which are essential to be attended for the purpose, those prescribed formalities which are essential to the validity of such thing would be mandatory.

However, if by holding them to be mandatory, serious general inconvenience is caused to innocent persons or the general public, without much furthering the object of the law the same would be construed to be directory.

Moreover a provision regulating a matter of procedure will generally be read as directory when disregard of it or failure to follow it exactly will not materially prejudice a litigant's case or deprive him or her of a substantial right.

That the court in that case further observed that the automatic abatement under **Order XIA rule 6 (supra)** when invoked and applied automatically will be counterproductive in light of **Order XIA rule 7** which provides that where the suit has abated the plaintiff may subject to the law of limitation file a fresh suit. Then the court will be inundated with repeat suits over the same issue.

Further, citing **Article 126 (2) (e) of the 1995 Constitution** applicants' counsel argued that the applicants came before the court to seek justice and that courts are enjoined to administer justice without due regard to technicalities.

That in order to avoid a repeat of suits over the same subject matter, the preliminary objection raised by counsel for the respondents ought to be dismissed and this application heard on its merits.

As rightly pointed out by counsel for the respondent in his submissions, **Order XIA rule 2 of the Civil Procedure (Amendment) Rules of 2019** provides for the taking out of Summons for Directions where a suit has been instituted by way of a plaint. It provides that:

"Where a suit has been instituted by way of a plaint, the plaintiff shall take out summons for directions within 28 days from the date of the last reply or rejoinder referred to in rule 18(5) of Order VIII of these Rules."

Sub rule (6) thereof further stipulates that where summons for directions are not taken out in accordance with **sub rule (2) or (6)**, the suit shall abate.

In the case of **Geoffrey Wasswa vs Amy for Africa Limited & 2 others Civil Suit No.127 of 2020**, court dealt with a similar issue where counsel for the 1st defendant raised a preliminary objection to the effect that the suit had abated under **Order XIA (supra)** because the plaintiff therein had failed to take out summons for directions within 28 days of the last rejoinder. Court in its ruling had the following to say:

"...Where summons for directions are not taken out the suit shall abate under sub-rule (6). This brings court to the consideration of the principles governing the use of 'shall' in a legislative sentence. In its ordinary significance, 'shall' is a word of command."

Given the fact that rules are handmaidens of justice, attaching an interpretation which is different from that which was intended would be softening that rule by making it permissive and according it the weight of a mere technicality contrary to the original intentions of the legislature.

Bearing in mind all sorts of tricks the legal mind may conjure up or design, the alteration of such a rule is likely to occur each time the occasion may arise, against the letter and spirit for which the amendment

of **Order XIA rule 2 of the Civil Procedure (Amendment) Rules of 2019** had in the first place been intended.

I therefore uphold the preliminary objection on the ground that a non-existent suit cannot be amended. However since this court has allowed the applicants herein (who are also the applicants in **MA No. 2003 of 2021**) leave to file their defence under **Civil Suit No. 0241 of 2021** out of time, all arguments arising in the suit under which this application arises can be raised in **Civil Suit No. 0241 of 2021** which is still pending.

Costs awarded to the respondents.

I so order.


Alexandra Nkonge Rugadya

Judge

10th January, 2022

Delivered by email
10/1/2022
