

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

**MISC. APPLICATION NO. 1535 OF 2021**

**ARISING FROM MISC. APPLICATION NO. 1829 OF 2020**

**ARISING FROM COIVIL SUIT NO. 293 OF 2013**

**JULIET BBOSA NAMITALA**

**(Administrator of Estate of Joyce Nantongo Bbosa ..... APPLICANT**

**VERSUS**

**1. LOUIS BAKYENGA**

**2. CHARITY LINDA AGABA**

**3. MARTIN SEBULIBA**

**4. RICHARD SSONKO ..... RESPONDENTS**

**BEFORE HON. LADY JUSTICE FLAVIA NASSUNA MATOVU**

**RULING**

The applicant brought this application under O.9 R.23, O.52 R1&3 of the Civil Procedure Rules, S.82 & S.98 of the Civil Procedure Act together with S.33 of the Judicature Act. It was seeking for orders that;

- a) The dismissal order and ruling in Misc. Application No.1829/2020 be reviewed and set aside;
- b) Costs of the application be provided for.

It was brought by Notice of motion which was supported by an affidavit sworn by one Jeff Kinsambwe Bbosa. Grounds of the application were laid in the Notice of motion and affidavit in support. Briefly the grounds were that;

1. The court struck out the deponent's affidavit in support of Misc. Application No.1829/2020 on a preliminary point of law which grossly and unjustly affected the Applicant's interests in the suit which was a land matter.
2. That in the interest of justice the court should review and set aside the said ruling and order.

The 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed affidavits in reply in which they called upon court to dismiss this application with costs. The 2<sup>nd</sup> and 4<sup>th</sup> Respondents did not file affidavits in reply.

Briefly the 1<sup>st</sup> respondent deponed that;

- a) The Application was barred in law and an abuse of court process in that the deponent of the affidavit in support of the said application was not party to the application and has no locus in the same.
- b) The Applicant had not demonstrated how she was aggrieved by the decision of court in Misc. Application 1829/2020
- c) The application did not disclose any grounds for review.
- d) The Applicant having failed to respond to the preliminary objection raised in Misc. Application 1829/2020 is estopped from bring the instant application.
- e) There is a pending suit by the deponent in the instant application to wit HCCS No. 611/2021 Jeff Kinsambwe Bosa vs. Louis Bakyenga & 12 others and therefore this application is an abuse of court process.

The 3<sup>rd</sup> Respondent on the other hand deponed as follows that;

- a) The application was served on him outside the prescribed time for service and should thus be struck off against him
- b) There is a pending suit filed in respect of the same matter i.e. Civil Suit No. 611/ 2021 and this application is therefore an abuse of court process.
- c) The affidavit in support of this application is incurably defective as it is sworn by a person who is not party to the application.
- d) The affidavit in Misc. Application 1829/2020 was rightfully thrown out and there was nothing to be reviewed

When the matter came before court, the 1<sup>st</sup> and 3<sup>rd</sup> Respondent informed court that they had preliminary points of law to raise. Parties were therefore allowed to file written submissions in respect of the said points of law.

I have carefully studied the pleadings on record the submission of all counsel together with the relevant law.

The issues to be decided by this court are;

**1. Whether the application is proper before court**

## **2. What are the remedies available?**

### **Background:**

The Respondents filed Civil Suit No. 293 /2013 against the Applicant in respect of land comprised in Kyaddondo Block 195, plots 2206,2208,2209,2210 and 2434 at Kyanja. The Applicant was served with Summons to file defense but did not file the same. The matter proceeded ex parte was decided in favor of the Respondents in 2014. In 2018, the Applicant filed Misc. Application No. 1773 of 2018 against the Respondents seeking to set aside the ex parte Judgement in Civil Suit No. 293/2013. This application was dismissed for want of prosecution. The Applicant then filed Misc. Application No. 1829/2020 seeking to reinstate Misc. Application No. 1773/2018. This application (M/A 1829/2020) was dismissed on a preliminary point of law. She then filed the instant application No. 1535 /2021 to review and set aside orders issued in Misc. Application No. 1829/2020.

### **Issue1. Whether the application is proper before court.**

The Respondents contended that this application is an abuse of court process, it is improper before court and should be dismissed for the following reasons

- a) The application was not supported by an affidavit in support as required by law. The affidavit in support of the application was sworn by one Jeff Kinsambwe Bosa who was not a party to the suit and all applications arising therefrom and therefore had no locus to swear the said affidavit. This was contrary to the provisions of Order 3 rr1 & 2 which provide that any application to or appearance or act in any court required or authorized by law to be made, may be done by a party in person, or by his recognized agent or by an advocate duly appointed. That Jeff Kinsambwe Bossa was none of the above categories of persons. The application was therefore incurably defective and should be struck off.
- b) That Jeff Kinsambwe Bosa has already filed Civil Suit No. 611 of 2021 against the four Respondents in relation to the same suit land and this application is an abuse of court process
- c) That the 3<sup>rd</sup> respondent was served with the instant application out of time and without leave of court. The same should accordingly be struck off against him.

The Applicant on the other hand maintained that the application is proper before court and should be heard on merit for the following reasons

- a) The affidavit in support of the application was sworn by Jeff Kinsambwe Bosa who is a beneficiary to the estate of late Joyce Nantongo Bbosa to which the Applicant is administrator. That under the law beneficiaries have a right to institute and defend actions meant to preserve and protect the estate and the instant application is intended to do that. That the appointed administrator seems to be unavailable to prosecute matters of the estate and Jeff Bosa as a beneficiary could not and watch the estate being put to waste.
- b) HCCS No. 293 was Consolidated with HCSS No. 611/2021 as sister suits and therefore this application is not an abuse of court process
- c) That as regards service of court process the Respondents were served by way of substituted service upon direction by court.

#### **Resolution of issue 1**

This application was filed by Juliet Bbosa Namitala (Administrator to estate of Joyce Nantongo Bbosa). She did not swear any affidavit in support of the application but the affidavit in support was deposed by one Jeff Bbosa. No reason was advanced as to why the applicant did not swear any supporting affidavit to this application. Counsel for applicant maintained that Jeff Bbosa swore this affidavit in his capacity as beneficiary to the estate of late Joyce Nantongo Bbosa. That as a beneficiary he could not sit back and relax as the estate was being put to waste and yet it was not yet distributed. He further insisted that the law allows him to do so.

I do appreciate that it is true a beneficiary can institute and defend actions meant to protect and preserve the estate. This is especially so where there is no administrator officially appointed by court and this was the decision in the case of ***Isreal Kabwa Vs. Martin Banoba Supreme Court Civil Appeal No. 52 of 1995***. In that case the estate had no administrator and the beneficiary had applied for a certificate of no objection from the Administrator General which the Supreme court believed to have given the beneficiary power to institute proceedings.

However, the law does not allow beneficiaries to usurp powers of an administrator under the guise that the administrator is failing in his or her duties as appears to be the case in the instant case. Where the administrator is failing in their duties, the

appropriate remedy would be for beneficiaries to go back to the court that issued the letters of administration and seek revocation of the same.

Under S.191 and 192 of the Succession Act, it is the Administrator who has a right to initiate proceedings concerning estates of deceased persons in courts of law.

Indeed, the instant case was instituted by an administrator formally appointed by court and authorized to institute and defend proceedings intended to defend an estate. She ought to have sworn a supporting affidavit as well. She had no power to delegate this responsibility. In the case of ***Nakabuye Agnes vs. Martin Strokes & Edward Kato Strokes Misc. Application No. 38 of 2021*** Justice Henry Kaweesa while dismissing a claim brought by a beneficiary who had been given Powers of Attorney by an Administrator cited with approval the case of ***Re: Estate of Krishan Murti Maini (Deceased) 2011EALR*** wherein it was held that “An administrator has no power to delegate his or her mandate.”

An administrator to the estate of a deceased person is therefore expected to perform his or her functions fully. He or she should not delegate this role to beneficiaries.

I therefore find that Jeff Bbosa who swore the affidavit in support of this application in his capacity as beneficiary had no locus to do so. The said affidavit in is accordingly hereby struck off the record.

2ndly the applicant claimed that HCCS No. 293/2013 was Consolidated with HCSS No. 611/2021 as sister suits and therefore this instant application is not an abuse of court process. Upon perusal of the court record I ascertained that the court ordered consolidation of the two suits on 30/5/2022. That being the case the two files shall be treated as one and the instant application cannot be said to be an abuse of court process.

The 3<sup>rd</sup> respondent further maintained that was served out of time and without leave of court to which the Applicant responded that he was served by way of substituted service. In paragraph 3 (a) the 3<sup>rd</sup> Respondent maintained that he was served on 18<sup>th</sup> May 2022. It is clear the Notice of motion was issued by court on 10/9/2021. O.5 r 2 of the Civil Procedure Rules provides that service of summons issued by court shall be effected within 21 days from the date of issue and that the

time may be extended on application to the court within 15 days after the expiration of the 21 days, showing sufficient reasons for extension. Under 0.5 R3 where the above provisions are not complied with the suit shall be dismissed without notice.

The law does not provide that where service is by way of substituted service then it can be effected outside the prescribed time without leave of court. My understanding of the above provision is that even where the court orders substituted service the same should be within required time lines. Since the Applicant did not seek leave of court to serve the said application outside time the all subsequent action in respect of the 3<sup>rd</sup> Respondent was null and void.

I also note that this application was brought under 0.9 R.23 of the Civil Procedure Rules and S.82 of the Civil Procedure Act. However, the two sections are not related at all. While 0.9 r 23 provides for reinstatement of suits dismissed under 0.9 r 22, S.82 provides for review. Therefore, even the law cited in this application was incurably defective.

## **Issue 2.**

### **What are the remedies available?**

Having struck off the said affidavit in support of the application as indicated above, the application remains with no supporting evidence is accordingly hereby fails.

This application is hereby dismissed with costs to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

Since the court has already ordered consolidation of HCCS No. 293/2013 and HCSS No. 611/2021 this order should be respected and all subsequent applications in this matter should go to the same trial judge.



**FLAVIA NASSUNA MATOVU**

**AG. JUDGE**