

UGANDA / JUDGMENT

Bakanansa and 2 Others v Nsubuga and 5 Others (Civil Suit No. 27 of 2019) [2023] UGHCLD 109 (24 April 2023)

[2023] UGHCLD 109

COURT

HC: Land Division (Uganda)

BEFORE

Nakachwa, J

CASE / FILE NUMBER

Civil Suit No. 27 of 2019

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO (LAND DIVISION) CIVIL SUIT NO. 27 OF 2019

1. BAKANANSA KEZIA HADIJA
2. KIZITO YOSIYA SSAJABI
3. MUBIRU JOHN (Administrators of the Estate of
the Late Benyameni Masajage)

VERSUS

- 1. JAMES NSUBUGA
- 2. YUNUSU GITA
- 3. JOYCE KAWEEESA KIKULWE
- 4. COMMISSIONER LAND REGISTRATION
- 5. BATIIBWE WILLIAM
- 6. SHELDRIK KAYIZI DEFENDANTS

BEFORE HON. LADY JUSTICE FLORENCE NAKACHWA

RULING

1. This is a ruling arising out of various preliminary objections raised by the 2nd and 3rd Defendants' counsel when the matter came up for hearing on 5th April, 2023.
- 2. The Plaintiffs were represented by Counsel Solomon Sebowwa from M/s Katende Sempebwa & Co. Advocates and Counsel Ssemwogerere Samuel from M/s AVRAX Advocates. The 2nd & 3rd Defendants were represented by Counsel Amanyaa Joseph from M/s MORIAH Advocates. The 1st & 6th Defendants were represented by Counsel Kirya Henry from M/s Justice Centres Uganda. The 5th Defendant was in court but unrepresented.
- 3. The Plaintiffs' counsel claimed that the Defendants have not complied with the court's directives to file the parties' trial bundles and witness statements. Counsel further orally submitted that the 5th Defendant has entered into a consent with the Plaintiffs and the suit against him was withdrawn with no order as to costs.
- 4. Counsel Amanyaa contended that the 2nd & 3rd Defendants' trial bundle and witness statements were not filed on account that when they were preparing the documents, they were served with a consent judgment which is on page 20 of the Plaintiffs' trial bundle. That the said consent judgment especially paragraphs 1 and 2 revert the suit land to the **Plaintiffs**
- 5. That the 5th Defendant was never a party to Civil Suit No. 27 of 2019. That there were 2 applications that is to say, Miscellaneous Applications No. 96 of 2019 arising out of Civil Suit No. 42 of 2017 and Miscellaneous Application No. 76 of 2021. That in Miscellaneous Application No. 96 of 2019, Mr. Batiibwe had asked court to consolidate Civil Suit No. 42 of 2017 and No. 27 of 2019. That in the alternative, Mr. Batiibwe had asked court to stay the proceedings in Civil Suit No. 27 of 2019 (the current suit).
- 6. Counsel added that in Miscellaneous Application No. 76 of 2021, the Plaintiffs had sought to add the 6th Defendant - Mr. Shieldrick Kayizi. That Mr. Batiibwe was never a party to Civil Suit No. 27 of 2019 and that they are not aware how he came to join this suit whereby he entered a consent to, which affects the rights of the 2nd and 3rd Defendants
- 7. Further, that on that account, the 3rd Defendant filed Miscellaneous Application No.040 of 2023 against all the Plaintiffs and Mr. Batiibwe William seeking the indulgence of court to first set aside the consent judgment and thereafter adjudicate the rights of the parties on merit. Counsel prayed that the pending application is first tackled.

- 8. It was further argued for the 2nd and 3rd Defendants that their counsel had intended to raise a preliminary objection on the capacity of the Plaintiffs to file this suit. Learned counsel prayed for court's indulgence and guidance. Counsel concluded that the Plaintiffs' counsel served their witness statements on 4th April, 2023 yet they are saying they are ready to proceed.
- 9. In reply, Counsel Sebowe averred for the Plaintiffs that Miscellaneous Application No. 96 of 2019 arising from Civil Suit No. 42 of 2017, was disposed of and thereby allowing Mr. Batiibwe William who was the Applicant to be joined as a party to Civil Suit No. 27 of 2019 by way of

consolidation. That after Mr. Batiibwe William being added as a party to this suit, the Plaintiffs informed their lawyers that they had been approached by him who entered into a consent with the Plaintiffs to withdraw the suit against him.

- \$10.\$ Additionally, that clause 3 of the consent is to the effect that the mutation being referred to in items 1 and 2 would be done by the Plaintiffs upon being registered on the suit property. That the effect of the clause is that compliance of clause 1 and 2 would be done upon the Plaintiffs successfully litigating the suit registered in their names.
- \$11.\$ That Miscellaneous Application No. 76 of 2021 arising from Civil Suit No. 27 of 2019 was also disposed of and the 6th Defendant was added as a party to the suit. That it is misleading for counsel to submit that Batiibwe who was added as a party to join Civil Suit No. 27 of 2019 cannot have the locus to have a consensus with the Plaintiffs.
- The Plaintiffs' counsel further added that Miscellaneous 12. Application No. 40 of 2023 is intended to waste court's time, this being a suit filed in 2019 involving fraud where the 2nd and 3rd Defendants in their defence cannot clearly explain how the property ended up into the names of the late Eliab Sempala. That the 2nd and 3rd Defendants are in possession of the suit property, therefore they have nothing to lose if the case takes forever. That the Plaintiffs did not file an application for injunction because they wanted the matter determined on merit instead of wasting time on applications.
- That the claim by counsel for the 2nd and 3rd Defendants that the \$13.\$ Plaintiffs have no capacity to sue is intended to waste court's time and prevent the court from investigating the fraud on its merit. That the Plaintiffs in the plaint stated that they were suing as administrators of the estate. That this shows that their capacity and the grant of administration was attached to the plaint.
- Besides, that if counsel for the 2nd and 3rd Defendants intended \$14.\$ to raise this preliminary point, they ought to have brought it up in the scheduling memorandum as one of the 1st issues to be determined as to whether the Plaintiffs have the capacity to sue but this issue was not placed in the scheduling memorandum. Learned counsel prayed that this court sets strict directions for disposal of the suit as some of the witnesses

are old and weak. That it is wrong practice that the Defendant's counsel always wants to be served with the Plaintiff's witness statements before filing their witness statements.

Issues

- (1) Whether the 5th and 6th Defendants are parties to Civil Suit No. 27 of 2019;
- (2) Whether the consent judgment between the Plaintiffs and the 5th Defendant in Civil Suit No. 27 of 2019 should be set aside;
- (3) Whether the Plaintiffs have the capacity to sue in this suit.

Issue 1: Whether the 5th and 6th Defendants are parties to Civil Suit No. 27 of 2019.

- I have perused the court record and all the documents about the 15. civil suits and applications referred to by the parties' counsel. By consent of the Applicant and the 3rd, 4th, 5th and 6th Respondents in Miscellaneous Application No. 96 of 2019, dated 15th October, 2019 and endorsed by the Deputy Registrar of this court on 25th day of November, 2019, Civil Suits No. 42 of 2017 and No. 27 of 2019 were consolidated. There is no record on court's file that the said consent was challenged by the 1st and 2nd Respondents. Therefore, I find that the 2 suits were consolidated making Mr. Batiibwe William (5th Defendant) a party to both suits.
- As to Miscellaneous Application No. 76 of 2021, Mr. James 16 Nsubuga who is the 1st Respondent in that application wrote a letter dated 2nd August, 2021 to the Registrar of this court consenting to the amendment of this suit to add Mr. Sheldrick Kayizi as a Defendant. The record further shows that before court could respond to the above letter, Counsel Solomon Sebowa wrote a letter on 23rd August, 2021, informing this court that all the Respondents have consented to the application and requested for a mention date of the main suit.
- The then trial judge on the same date of 23rd August, 2021 directed that the parties file a formal consent approved by counsel for

either party. There is no record indicating that the parties have filed a formal consent in Miscellaneous Application No. 76 of 2021 to add the 6th Defendant as directed by the judge. This in essence means that there was no amendment granted by this court to add the Mr. Sheldrick Kayizi as the 6th Defendant in this suit. Otherwise, the parties were to follow the court's directive to file a formal consent which could have been endorsed by the court. In my judgment, the 6th Defendant is not a party to this suit and his name is hereby struck off the court record. I further recall the previous directive issued to the 6th Defendant's counsel to file his trial bundle and witness statements and if already filed they are hereby expunged from court record. Since counsel is also representing the 1st Defendant in this suit, only his trial bundle and witness statements will be considered.

Issue 2: Whether the consent judgment between the Plaintiffs and the 5th Defendant in Civil Suit No. 27 of 2019 should be set aside.

The 2nd and 3rd Defendants contended that the consent judgment entered into between the 5th Defendant and the Plaintiffs affects their property rights and right to be heard. The law is now settled on the conditions for setting aside a consent judgment. A consent judgment once endorsed by the court becomes a full judgment and it's binding on all the parties to it. Therefore, parties to a consent judgment are estopped from asserting different positions from their stipulated agreement.

In Attorney General & Anor v. James Mark Kamoga & Anor, 19. Supreme Court Civil Appeal No. 8 of 2004 Justice Mulenga held that:

"It is a well-settled principle, therefore, that consent decree has to be upheld unless it is violated by reason that would enable a court to set aside an agreement such as fraud, mistake, misapprehension or contravention of court policy. This principle is on the premise that a consent decree is passed on terms of a new contract between the parties to the consent judgment."

20. Further, in the case of *Hirani v. Kassam* (1952) 19 EACA 131 at 134, the court stated thus:

> "The position is clearly set out in *Seton on Judgments and Orders* (7th Edition), Vol. 1, page 124, as follows:-

> Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the Court... or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement."

In the instant case, counsel for the 2nd and 3rd Defendants 21. claimed that when they were preparing the trial bundle and witness statements for the 2nd and 3rd Defendants, they were served with a

consent judgment by the Plaintiffs' counsel which is on page 20 of the Plaintiffs' trial bundle. That the said consent judgment especially the 1st and 2nd paragraphs revert the suit land to the Plaintiffs. For ease of reference I will quote the wordings of the said consent judgment:

"CONSENT JUDGMENT"

By consent of the Plaintiffs and the 5th Defendant, it is hereby agreed that the above suit be settled on the following terms.

.....

,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,

"Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms -

(a) |

-----|

(b) |

(c) the right to fair hearing: $\frac{1}{2}$ |

(d) |

24. In every decision involving rights of individuals, the rules of natural justice have to be followed by the adjudicating authority. In *R v. Commissioner for Racial Equality, ex parte Cottrell & Rothern* (1980) 1 WLR 1580 at page 1586, Lord Lane, CJ, held that

"Of course there is a wealth of authority on what are and what are not the rules of natural justice. As has been frequently said, and there is no harm in repeating it, all that the rules of natural justice mean is that the proceedings must be conducted in a way which is fair to the firm in this case, fair in all circumstances."

25. In *Lloyd v. McMahon* [1987] AC 625 at page 702 Lord Bridge said:

"My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision making body, the kind of decision it has to make and the statutory or other framework

in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness "

- 26. I find that the consent judgment entered into by the Plaintiffs and the Defendant violates the other defendants' right to be heard. The Deputy Registrar should have given the other defendants a fair hearing before endorsing the proposed consent. The hearing need not have been an oral hearing. The agreement between the Plaintiffs and Defendant that parts of the suit land be given to the Defendant and the family of the late Eriabu Sempala when the said land is the subject of litigation in which court has to determine the issue of its ownership was unfair because the other defendants were not given an opportunity to be heard. In my judgment, that consent was void.

- 27. Accordingly, the consent judgment entered between the Plaintiffs and the 5th Defendant dated 20th April, 2022 and endorsed by the Deputy Registrar of this court is a nullity at law since it was entered into in the absence of the 1st, 2nd, 3rd and 4th Defendants yet it affects their rights. The same is hereby set aside. The suit ought to be heard and determined on its merit to dispose of all the issues agreed to by the parties.

Issue 3: Whether the Plaintiffs have the capacity to sue in this suit.

28. The Succession Act, Cap. 162, vests all the legal rights of a deceased person in his or her legal representative as the administrator of his or her estate. Section 180 of the Succession Act provides thus:

> "The executor or administrator, as the case may be, of a deceased person is his or her legal representative for all purposes, and all the property of the deceased person vests in him or her as such."

- Letters of administration entitles the administrator to all rights 29. belonging to the intestate as effectually as if the administration has been granted at the moment after the death of the deceased. At that point in time the beneficial interest passes and all assets are then held by the administrator on bare trust for the beneficiaries, since the administrator's role is merely distribution. All that the grant does is give the administrator the legal power necessary to deal with the deceased's estate.
- Therefore, after a grant of letters of administration, no person 30. other than the person to whom the power has been granted, has the authority to sue or prosecute any suit, or otherwise act as representative of the deceased, until the probate or letters of administration has or have been recalled or revoked as clearly provided for under section 264 of the Succession Act.
- One of the duties of an administrator of an estate is to collect and 31. realize the assets of the deceased. Effective management of the estate includes proper collection and realization of the assets of the deceased and protection of the deceased's assets from adverse claims.
- 32. In the instant suit, the Plaintiffs have attached to their plaint letters of administration dated 22nd January, 2019 appointing them as administrators to the estate of the late Benyameni Masajage hence they have full capacity to sue to safeguard the deceased's interest from any adverse claim. The administrator can also be sued in that representative capacity. The 2nd and 3rd Defendants' preliminary objection is hereby overruled since it has already been brought to the attention of this court

- 33. Since this is a 2019 case, it is one of the backlog cases which has to expeditiously be disposed of without delay. In that regard, I hereby direct the parties who have not complied with the court's directives to file their trial bundles and witness statements on or before the 15th May, 2023 and serve the opposite parties with the same on the same day. If all the parties have complied, the hearing of this suit shall commence on 22nd August, 2023 at 11:30 a.m. In this ruling, this court shall make no order as to costs. I so rule.

This ruling is delivered this 24 day of ... April. 2023 by

FLORENCE NAKACHWA JUDGE.

In the presence of:

- (1) Counsel Solomon Sebowo from M/s Katende Sempebwa & Co. Advocates and Counsel Ssemwogerere Samuel from M/s AVRAX Advocates, for the Plaintiffs;
- (2) Counsel Amanyia Joseph from M/s MORIAH Advocates, for the 2nd and 3rd Defendants;
- (3) Counsel Kirya Henry from M/s Justice Centres Uganda, for the 1st and 6th Defendants;
- (4) Ms. Bakanansa Kezia Hadija, the 1st Plaintiff;
- (5) Mr. Kizito Yosiya Ssajabi, the 2nd Plaintiff,
- (6) Mr. Mubiru John, the 3rd Plaintiff;
- (7) Ms. Joyce Kaweesa Kikulwe, the 3rd Defendant;
- (8) Mr. Batiibwe William, the 5th Defendant;
- (9) Ms. Pauline Nakavuma, the Court Clerk.

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