

UGANDA / JUDGMENT

Buchunju v Wanjala and Another (MA NO.005 OF 2024) [2025] UGHC 187 (13 February 2025) [2025] UGHC 187

COURT

High Court of Uganda

BEFORE

Kawesa, J

CASE / FILE NUMBER

MA NO.005 OF 2024

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT TORORO MISC.
APPLN. NO.005 OF 2024 ARISING FROM MBALE CIVIL SUIT NO.53 OF 2010**

**BETTY PERUSI BUCHUNJU (Administrator of the Estate of the late Benjamin
Buchunju) ::::::::::::::::::::::::::::::::::: APPLICANT VERSUS**

**1. WANJALA MANUEL 2. SIFUNA PATRICK :::::::::::::::::::::::::::::::::::
RESPONDENTS RULING**

BEFORE: HON. DR. JUSTICE HENRY I. KAWESA

The application was brought by a notice of motion under **Section 33 of the Judicature Act Cap.16; Section 98 of the Civil Procedure Act Cap.282, Order 6 Rule 19 and Order 24 Rule 4(1) and (2) of the Civil Procedure Rules S. I 71-1** for orders that:

- 1. The applicant be substituted as defendant and respondent in the suit and any application arising therefrom being the Administrator of the estate of the late Benjamin Buchunju who died in Mulago National Referral Hospital on 18th day of September 2012 before disposal of the suit.
- 2. Costs of this application be provided for.

The application is supported by the affidavit of the applicant; and is opposed through an affidavit in reply sworn to by the 1st respondent. The applicant filed an affidavit in rejoinder to the same.

The grounds of the application are, briefly. That the applicant is a widow to, and administrator of the estate of the, late Benjamin Buchunju. That the late was a defendant in Civil Suit No.53 of 2010 and died before the completion of the said suit. That the respondents obtained a judgment against the late Benjamin Buchunju and are in the process of executing it and that it is necessary that the applicant is a party to the suit and incidental proceedings for purposes of representing the estate.

Representation

The applicant is represented by Counsel Eliaku Edward and the respondents are represented by Counsel Ochen Francis Xavier. Counsel for the parties filed written submissions which shall be considered in resolving the application.

The issues for resolution are:

- *1. Whether the applicant can be substituted as defendant and respondent in the suit and any application arising therefrom?*
- 2. *What remedies are available*?

Preliminary Objection

Counsel for the respondents argued that the application is misconceived, devoid of merit and prayed that it be dismissed with costs. He cited **O.24 r.4(1) of the Civil Procedure Rules** under which provides that:

...*where a sole Defendant dies and the cause of action survives or continues, the court on application made for that purpose, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit*.

Counsel argued that the above provisions dictate that the instant application can only be granted where the suit is still ongoing and not where the matter is concluded.

Further, Counsel also cited **O.24 r.11 of the Civil Procedure Rules** where it is provided that "...*nothing in rules 3, 4 and 8 of this order shall apply to proceedings in execution of a decree or order*." He stated the fact that the respondents are in the process of execution of the decree passed on the 18th day of March 2020; and argued that the application is misconceived and cannot be granted since the suit is at the execution process. He invited court to strike it out.

The applicant's Counsel did not specifically respond to the above submissions except that he premised his arguments on the first issue on **Order 24 Rule 4 of the Civil Procedure Rules**.

Resolution by Court

It is a fact that the suit from which this application arises was disposed of on the 18th day of March 2020. It is also a fact that the respondents are in the process of execution of the decree. Accordingly, I agree with the respondents' Counsel that the **Order 24 Rule 4(1) of the Civil Procedure Rules** is inapplicable to the instant application in view of the provisions of **O.24 r.11 of the Civil Procedure Rules**.

I note, though, that this is not the first application to be made by the applicant seeking to challenge the judgment of the court in Civil Suit No.53 of 2010 from which the application arises, among others. The applicant, in the same capacity, filed Misc. Appln. No.23 of 2023 seeking a review of the judgment on grounds of illegality, among others; and the same was dismissed for lack of locus standi by the applicant. The basis of the dismissal was that she was not a party to the suit and ought to first have sought leave to be added as a party to the suit under **O.24 R.4 of the Civil Procedure Rules**. However, as expressed already, the provisions of the said law only apply where there is still an ongoing suit; but, since she did not seek the said leave to before the completion of the suit, she falls outside the scope of the said law.

I have not come across any authority that applies to the applicant's circumstances. Therefore, I am persuaded by the decision in **Good African Foundation Ltd & Anor vs Agricultural Business Initiative Trust HCMA No.1592 of 2021**, to the effect that court may resort to its inherent power "...*in circumstances in which courts believe that existing law does not adequately address the problem at hand*". In this case, the application was also brought under the **Section 33 of the Judicature Act; and Section 98 of the Civil Procedure Act** which provides for the inherent power of the court "*to make such orders as may be necessary for the ends of justice*...." Thus, in the circumstances, I find that the application can be entertained on the basis of the court's inherent power under the said provisions of the law.

It is trite that the exercise of an inherent power of court is discretionally, but the exercise of the same must be judicious (**Good African Foundation Ltd & Anor vs Agricultural Business Initiative Trust, supra**). As a well-established principle, a preliminary objection cannot suffice where "*what is sought is the exercise of judicial discretion*" (**Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors [1999]1 EA 696**).

Thus, since what is sought requires an exercise of a judicial discretion, I find that the preliminary objection cannot suffice; and is accordingly overruled.

Determination of the Issues

Issue No.1: *Whether the applicant can be substituted as defendant and respondent in the suit and any application arising therefrom?*

The evidence shows that the respondents instituted Civil Suit No.53 of 2010 against Benjamin Buchunju at the High Court of Uganda at Mbale claiming as owners of land measuring 9.13 hectares and comprised in LRV 2978 Folio 24 Plot 103 Samia Bugwe, Busia District (hereinafter the suit land), among others. A copy of a final

judgment, attached to the applicant's affidavit in rejoinder as annexure "C", shows that on the 19th of April 2017, the respondents applied and were granted an interlocutory judgment and the suit was fixed for assessment of damages. That the respondents adduced evidence of 3 witnesses and later abandoned the suit. Because of that, the court entered the final judgment in their favour on the 18th of March 2020 and granted all prayers in the interlocutory judgment, except damages.

The applicant's evidence also shows that the late Benjamin Buchunju died on the 18th of September 2012; and therefore about two and a half years prior the entrance of interlocutory judgment and about seven and a half years before the said final judgment. The applicant adduced a copy of a death certificate of the late Benjamin Buchunju in support of that (annexure "A" to the affidavit in rejoinder).

In addition to that, the applicant's evidence also shows that a one Wafula Polycarp, of the Chief Magistrate's Court of Busia at Busia, swore to an affidavit of service on the 15th of April 2021 stating that he served Benjamin Buchunju, personally, with a notice to show cause why execution should not issue on the 14th of April 2021. The deponent stated also that the service was made upon behalf of the respondents herein (reference is made to annexure "D" of the affidavit in rejoinder). That evidence of service is contrary to the fact that Benjamin Buchunju died on 8th of September 2012.

It is also the applicant's evidence that the late Benjamin Buchunju was never served with summons to file a defence and did not know of the suit. That the non-service of summons is the reason why the late did not file a defence in the suit since he was at the time bedridden at Mulago Hospital under her care and never saw any document involving the late. That the respondents attended the burial of the late Benjamin Buchunju which happened on the suit land, but proceeded with the suit and obtained judgment against the late after his demise.

The respondents did not rebut the statement in the notice of motion that the late died on 18th of September 2012. In fact, their Counsel admitted to the same in his submissions. However, they adduced evidence of a copy of a letter by their Counsel to the High Court of Uganda at Mbale upon which the interlocutory judgment was entered, annexure "A" to the affidavit in reply. The same shows that the said judgment was entered on the 15th of April 2011.

The applicant's Counsel argued that the suit abated when the respondents wilfully failed to inform court of the demise of Benjamin Buchunju or to seek to substitute him with his legal representative. On the other hand, the respondent's Counsel argued a suit abates where the defendant dies while it is ongoing but; that in this case, the interlocutory judgment was entered on 15th of April 2011 before the death of the late on 18th of September 2012. That because of that and because the late and was already closed out from the hearing of the suit, his presence or that

of his legal representative was not required. That for those reasons, the suit could not abate.

Court's Resolution

The law is that where a defendant dies while there is a pending suit and whose cause of action survives, his or her legal representative can apply to be made a party so that court proceeds with the suit (**O.24 r.4(1) of the Civil Procedure Rules**).

The interlocutory judgment was entered under **Order 9 r.8 of the Civil Procedure Rules**, according to annexure "A" of the affidavit in reply. I have found no authority suggesting that an interlocutory judgment terminates a suit. In fact, the provisions dictate that after such judgment is entered, the plaintiff is required to "set down the suit for assessment by the court of the value of the goods and damages or the damages only, as the case may be, in respect of the amount found to be due in the course of the assessment" (**Order 9 Rule 8 of the Civil Procedure Rules**). In fact, a copy of the final judgment shows that the court proceeded with the suit after entering the interlocutory judgment, and the respondents called 3 witnesses. Therefore, as far as **O.24 r.4(1) of the Civil Procedure Rules** is concerned, there was a pending suit at the time of death of the late Benjamin Buchunju; and to which the applicant could be added as a party after taking the necessary steps.

According to **Order 24 Rule 4(3) of the Civil Procedure Rules**, "where within the time limited by law no application is made under subrule (1) of this rule, the suit shall abate as against the deceased defendant." However, there is no specific law dictating the time within which an application under **O.24 r.4(1) of the Civil Procedure Rules** can be made. For that case, **Section 34(2) of the Interpretation Act Cap.2** guides that "where no time is prescribed or allowed within which anything shall be done, that thing shall be done without unreasonable delay and as often as due occasion arises." In this case, no application to make a legal representative of the deceased defendant was made by the time the final judgment was entered. Seven (7) years and six (6) months had lapsed, following the death of the late Benjamin Buchunju which is undoubtedly reasonable delay hence implying that no application was made within the time envisaged by **Order 24 Rule 4(3) of**

the Civil Procedure Rules.

Did the suit abate?

Unlike the applicant's Counsel, the respondents' Counsel argued that the suit did not abate since there was an interlocutory judgment before the demise of the late Benjamin Buchunju who had already put himself out of the court's jurisdiction owing to his failure to file a defence.

Nevertheless, the applicant averred that the late was not served with the summons to file a defence by the respondents because there is no affidavit of service to that effect. It is difficult to ignore her averment considering her further evidence, premised on an affidavit of service, that the late was served by the respondent with a notice to show cause why execution should not issue on 14th of April 2021!

