

UGANDA / JUDGMENT

Bukaalamye & Another v Sensuwa (Miscellaneous Application 3868 of 2023) [2024] UGHCLD 93 (4 April 2024) [2024] UGHCLD 93

COURT

HC: Land Division (Uganda)

BEFORE

Naluzze Aisha Batala, J

CASE / FILE NUMBER

Miscellaneous Application 3868 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA (LAND
DIVISION) MISCELLANEOUS APPLICATION NO. 3868 OF 2023 (ARISING FROM
CIVIL SUIT NO 1320 OF 2023)

1. BUKAALAMYE DAVID

2. **KYASA NAKANWAGI JUSTINE** (administrators of the estate of the late Lugendo
John) ::::::::::::::::::::::::::::::::::: **APPLICANTS**

VERSUS

SENSUWA HANNY (Administrator of the Estate of the Late Yakobo Sekubwa
Nsanja) ::::::::::::::::::::::::::::::::::: **RESPONDENT**

BEFORE: HON. LADY JUSTICE NALUZZE AISHA BATALA RULING.

Introduction:

- 1. This is an application by chamber summons brought under Sections 33 of the Judicature Act, Section 98 of the Civil Procedure Act, Order 26 rules 1,2 & 3 of the Civil Procedure Rules (CPR) for orders that:
 - i) The respondent furnishes security for costs
 - ii) Costs of the application be in the cause.

Background;

2. The respondent instituted Civil Suit No.1320 of 2023 against the applicants jointly and severally for fraud that led to the late Lugendo John's proprietorship of land comprised in Kibuga Block 7 Plots 340 & 321 at Mengo. They are currently registered as the proprietors by virtue of being the administrators of their father's estate. The respondent seeks various orders inter alia; a declaration that the suit land belongs to the estate of the late Yakobo Sekubwa Nsanja, General Damages, Punitive Damages, Interest and costs of the suit.

Applicant's evidence;

- 3. The application is supported by an affidavit in support deposed by BUKALAAMYE DAVID the 1st applicant who deposed the same on behalf of the 2nd applicant as well which briefly states as follows;
- i) That the applicants are jointly administrators of the estate of the late Lugendo John vide Admin Cause No.610 of 2015.
- ii) That the respondents sued the applicants vide Civil Suit No.1320 of 2023 that the suit land was transferred fraudulently.
- iii) That the suit filed by the respondent is time barred and the same is frivolous and discloses no cause of action.
- iv) That the applicants are being put to unnecessary cost and expenses to defendant Civil Suit No.1320 of 2023.
- v) That the respondent is likely to be unable to pay the costs of the suit should it be decided in the Favour of the applicants.
- vi) That the respondent is of advanced age over 70 years with no known source of income and neither does he have any known place of abode or property that can be attached upon failure to pay costs.

Respondent's evidence;

4. The application is responded to by an affidavit in reply deposed by Mr. Sensuwa Hanny the respondent which briefly states as follows;
- i) That I am the administrator of the estate of the late Yona Sensuwa Kidda vide Admin Cause No.0169 of 2015.
- ii) That Civil Suit No.1320 of 2023 is not frivolous, vexatious and barred by limitation and the same discloses a cause of action.
- iii) That the suit land forms part of the estate of the late Yakobo Sekubwa Nsanja.

- iv) That the applicants do not have any documentations showing the genesis of their late father's registration on the certificate of title to the suit land.
- v) That the applicants are merely speculating my inability to pay costs since there is no proof that I am a pauper or that I have been declared bankrupt.
- vi) That the Civil Suit has a likelihood of success against the applicants and it is not frivolous.

Representation;

5. The applicants were represented by Nakamanya Harriet of M/S Atrium Advocates whereas Naigaga Shube of M/S Larry Advocates represented the respondent. Both parties filed their affidavits and

submissions which I have considered in the determination of this application.

Issues for determination;

- *i) Whether there are sufficient grounds for the grant of an application for security for costs to the applicants against the respondent?*
- *ii) What remedies are available to the parties?*

Resolution and determination of the issues:

Issue 1. Whether there are sufficient grounds for the grant of an application for security for costs to the applicants against the respondent?

- 6. Counsel for the applicants submitted that the respondent's suit is frivolous and vexatious since the same is barred by the law on limitation. The same is stated under paragraph 5 of the applicants' affidavit in support of the application.
- 7. Counsel further submitted that the applicants are being put to undue expenses for defending a vexatious and frivolous suit instituted by the respondent.
- 8. Counsel for the applicants relied on the decision in **Galukande Kiganda Michael vs Kibirige George William and 2 ors MA No.261 of 2018** before Hon Justice Godfrey Namundi where the learned trial judge had this to say, court in exercising its discretion in an application for security for costs the following principles ought to be considered; Whether the applicant is being put to undue expenses by defending a frivolous and vexatious suit, that he has a good defence to a suit and Only after the two factors have been considered would factors like inability to pay costs come into account.

9. Counsel for the respondent in his submission stated that Civil Suit No.1320 of 2023 is neither frivolous nor vexatious, he further referred to paragraph 1 of the respondent's affidavit in reply where he states that the suit is one of fraud and the respondent instituted the said suit as the administrator of the estate of the late Yakobo Sekubwa Nsanja who discovered that the applicants and their late father John Lugendo fraudulently transferred the certificate of title to the suit land in their names in the absence of transfer instruments.
- 10. Counsel for the respondent further submitted that the applicants do not have a good defence to the suit, and he referred to the applicants' written statement of defence where they claim that they got registered on the certificate of title through a sale however there was no sale agreement adduced nor copies of transfer instruments.
 - 11. In rejoinder, counsel for the applicants maintained the position that the respondent's suit is frivolous and vexatious since it discloses no cause of action and that the respondent lacks locus to bring the said suit by referring to the consent order that arose from a temporary injunction application that arose from Civil Suit No.419 and 166 of 2019 by the High Court Family Division where it was agreed that the respondent was restrained from dealing with the estate of the Late Yakobo Sekubwa Nsanja and from acting under the letters of administration granted to him pending the determination of the mentioned suits.
 - 12. Although it is a fundamental principle that a person who asserts a claim should have access to justice, there are particular circumstances in which he should be required to provide security (if such an order is just in the circumstances of the case) because of the risk that the defendant may not otherwise recover his/her costs.
 - 13. The notion security for costs is provided for under O.26 rule 1 of the Civil Procedure Rules which gives Court discretionary powers to order payment of security for costs where it deems it fit to do so.
 - 14. I will draw reference to the decision by Ssekandi Ag. J, in **Anthony Namboro and Anor versus Henry Kaala [1975] HCB 315** where it was held that the main considerations to be taken into account in an application for security for cost are;
 - i) **Whether the Applicant is being put to undue expenses by defending a frivolous and vexatious suit.**
 - ii) **That he has a good defence to the suit which is likely to succeed.**
 - iii) **Only after these factors have been considered would factors like inability to pay come into account.**
 - 15. In ascertaining whether the considerations above have been proved, the observations of Oder JSC in **G. M. Combined (U) Ltd versus A. K. Detergents (U) Ltd. SCC. A. No. 34 of 1995**, are instructive. He observed thus; "In a nutshell, in my view, the"

Court must consider the prima facie case of both the Plaintiff and the Defendant. Since a trial will not yet have taken place at this stage, an assessment of the merit of the respective cases of the parties can only be based on the pleadings, on the affidavits filed in support of or in opposition to the application for security for costs and any other material available at this stage".

16. I will go forth to consider the prima facie case of both parties with such care as to avoid touching the merits of the main suit.

Whether the Applicant is being put to undue expenses by defending a frivolous and vexatious suit.

- 17. A plaintiff should never be permitted to litigate on a vexatious claim and leave the defendant with just a paper judgment for costs.
- 18. In the case of **R vs Ajit Singh s/o Vir Singh [1957] EA 822 at 825** defined a frivolous and vexatious suit as one that is; **"Paltry, trumpery not worthy of serious attention; having no reasonable ground or purpose."**

19. Further Oder JSC in **GM Combined (U) Ltd vs AK Detergents**

(U) Ltd (supra) as regard 0.26 r.1 had this to state that; **"...a major matter of consideration is the likelihood of the plaintiff's case succeeding. If there is a strong presumption that the defendant will fail in his defence to the action, the court may refuse security for costs. It may be a denial of justice to order a plaintiff to give security for the costs of the defendant who has no defense to the claim...."***

- 20. Premised on the above authorities, the applicants state that the respondent's suit is vexatious and frivolous since it is barred by the law on limitation and that the respondent has no locus to bring the said suit.
- 21. By the look at the pleadings in Civil Suit No.1320 of 2023, the suit is one of fraud challenging how the applicants and their late father got themselves registered on the certificate of title to the suit land. The applicants allege to have been registered via a sale but there are no transfer instruments adduced to prove the same.
- 22. By the perusal of the certificate of title to the suit land attached onto the application, it indicates how the applicants late father John Lugendo was registered on the said title upon being

transferred from the former proprietors who were two executors of the estate of the late Yakobo Sekubwa Nsanja yet the respondent avers that they were three executors to the estate of the late Yakobo Sekubwa Nsanja and not two as provided for on the certificate of title to the suit land.

- 23. The respondent clearly states how he brought the said suit as an administrator of the Late Yakobo Sekubwa Nsanja in his plaint. The respondent further submits that the said suit is time barred under the law on limitation.

- 24. This is a suit that's premised on fraud as a cause of action and as per Section 25 of the limitation act, the limitation time for fraud as a cause of action starts to run from the time when the party gets to know of the fraud. The respondent claims that he got to know of the fraudulent transactions in 2017 after acquiring the said letters of administration. The applicants did not adduce any evidence to the contrary.
- 25. My observation is that it is difficult, at this point, to determine whether the Respondent's suit is *frivolous* and *vexatious*, on the ground of being time barred or short of locus without going into

the merits of the main suit. In my opinion, both the Applicants and the Respondent have a prima facie case.

That the Applicants have a good defense to the suit which is likely to succeed

- 26. The reading of the applicants' written statement of defence vide 1320 of 2023 speaks to the fact that the respondent's suit is time barred, short of locus rendering the same frivolous and vexatious. The applicants further state in their defence that the late John Lugendo got registered on the said certificate of title as bonafide purchaser for value without notice of any fraud.
- 27. The respondent's plaint states how the said suit is neither time barred nor short of locus since he states the capacity under which the suit is being brought and that claim is one of fraud which he got to know of in 2017.
- 28. I am of the view that both pleadings raise issues that are best resolved upon trial of the matter. It is more or less the same in respect of whether the Applicants' defence is likely to succeed since the same rotates around the principles of locus standi and the law of limitation.
- 29. In determining whether the Respondent will be unable to pay costs to the Applicants in case judgement is entered against him.
- 30. It is trite law that mere poverty of a Plaintiff is not by itself a ground for ordering security for costs. The rationale is that if this were so, poor litigants would be deterred from enforcing their legitimate rights through the legal process. (*See; Anthony Namboro and Anor versus Henry Kaala [1975] HCB 315).*
- 31. The courts have emphasized that impecuniosity or the state of lacking sufficient money or material possession of the plaintiff is not a basis on which the court would order security for costs. The reasoning here is that an order for security on this ground alone would prevent access to justice because of a party's pecuniary position.

- 32. In his submissions, counsel for the Applicants states that the respondent is of advanced age and has no known source of income nor known properties that would be attached in case judgement is entered against him, counsel for the Applicants further states that the respondent instituted Misc. Cause No.20 of 2023 in the High Court of Uganda at Mubende and that the same was withdrawn

with costs, a bill of costs was filed but the same is still pending taxation.

- 33. I find the applicants claims speculative in nature since the same have not been proved neither has evidence been adduced to prove the same.
- 34. It is now a settled proposition of law as held, by Mulenga JSC, in **Bank of Uganda versus Joseph Nsereko & 2 Others Civil Application No. 7 of 2002**, that; lack of knowledge on part of the Applicant cannot amount to evidence of the Respondent's inability to pay costs. The learned Justice of the Supreme Court linked this to a fishing expedition, namely putting in the application as a challenge to the Respondent to disclose their 'whereabouts and value of their assets, if any.
- 35. Basing on this authority, I find the Applicants' claim that the Respondent will be unable to pay costs in the suit baseless. The Applicants have not shown any proof of the Respondent's inability to pay.
- 36. In conclusion, after consideration of the circumstances of this case, it is the finding of this court that the instant application fails and the same is hereby dismissed by this court.

37. Costs of the application to be in the main cause.

I SO ORDER.

Hamleyey-

NALUZZE AISHA BATALA

JUDGE

4/04/2024

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Prepared on 14 October 2026 · Esheria