

UGANDA / JUDGMENT

Kyomuhendo v Baguma

(Originating Summons 58 of 2023)

[2024] UGHC 410 (31 May 2024)

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COURT

High Court of Uganda

BEFORE

Wagona, J

CASE / FILE NUMBER

Originating Summons 58 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

ORIGINATING SUMMONS NO. 0058 OF 2023

IN THE MATTER OF THE ESTATE OF THE LATE KATABARWA EVANGELINE

KYOMUHENDO NATHAN ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

BAGUMA TIMOTHYKATABARWA ::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE VINCENT WAGONA

RULING

Introduction:

The applicant brought this motion under Order 37 rule 7 and 8 of the Civil Procedure Rules and section 98 of the Civil Procedure Act and 33 of the Judicature Act for determination of the following questions:

1. Whether the Respondent has continuously acted improperly to solely exercise the powers of Administration of the estate vide HCT 01 – FD – AC – 80 of 2021 claiming superiority over the three co-administrators of the estate of the late Katabarwa Evangeline.

2. Whether the Respondent acted legally and properly to solely and clandestinely sale 6 acres of land out of the estate of the late Katarbarwa Evangeline pending the disposal of more 4 acres without the consent and participation of his other three co-administrators and before the distribution of the estate by all the administrators of the estate.
3. Whether it is important and a legal mandate for all the administrators in HCT – 01 – FD – AC – 80 of 2021 to collectively distribute the estate of the late Katarbarwa Evangeline.
4. Whether the six (6) surviving beneficiaries/children of the late Katarbarwa Evangeline are entitled to equal shares out of the estate of the late Katarbarwa Evangeline.

Grounds of the Application:

The application is supported by the affidavit of Kyomuhendo Nathan, the applicant who deposed as follows:

1. That on 7/06/2023, court granted letters of administration of the estate of the late Katarbarwa Evangeline to; Baguma Timothy Katarbarwa (Respondent herein), Kaseegu Eric, Kyomuhendo Nathan and Katarbarwa Ruth in HCT – 01 – FD – AC – 80 of 2021. That prior to the grant, no certificate of objection was secured from the Administrator General since there was consensus from the beneficiaries.
2. That since the said grant, the Respondent has blocked all family meetings called by the co-administrators to have the estate distributed.
3. That the Respondent has also without the knowledge and consent of the beneficiaries and co-administrators sold off 6 and 4 acres of land and the proceeds of the said sale were not accounted for. That further, there is no joint account of the estate operated by the four administrators.
4. That there are six surviving children of the late and the question is whether they are entitled to an equal share. That the sale without the consent and knowledge of the beneficiaries and the co-administrators is null and void. That it is in the interests of justice that this originating summons is granted and the prayers it seeks.

Reply by the Respondent:

In opposition to the affidavit in support of the summons, the Respondent averred as follows;

1. That the application before court is incompetent since the issues it raises that are contentious which can only be addressed through a regular suit. That the other co-administrators did consent to the suit at hand.
2. That the applicant has been part of the affairs of the estate and the Respondent has never blocked any meeting to discuss issues regarding the estate of the late. That the Respondent has always been organizing consultative meetings with other co-administrators.

3. That the Respondent and one Ruth Katabarwa have been so ill thus there has not been the required quorum for the co-administrators meeting.
4. That any decision the Respondent has taken is in the best interests of the estate. That the alleged land he sold was with the consent of all the beneficiaries under the estate and there was no need to consult the applicant who is not a beneficiary under the estate.
5. That all beneficiaries including the applicant and other beneficiaries were given a share and the inventory was about to be filed. That the Respondent has been collectively executing his role as an administrator together with the others and the beneficiaries under the estate.
6. That it was in the interests of justice that the application is denied.

Representation and Hearing:

Mr. Mugisa Richard Rwakatooke appeared for the applicant while ***Mr. Twesigye Fred Micheal*** for the Respondent. Both counsel addressed me on the merits of the application by way of written submissions which I have duly considered herein.

Issues:

I find the following as the issues at the centre of the dispute that is:

1. Whether this application was properly brought before this Court.
2. Whether the application meets the test for grant of the orders sought by the applicant.
3. What remedies are available to the parties?
4. **Whether this application was properly brought before this Court.**

Submissions for the Respondent:

Learned counsel for the Respondent raised a pointed of law that the issues raised by the applicant cannot be competently adjudicated in this an application. It was pointed out that where the subject matter involves complex matters that require proof through oral evidence, or which require comprehensive analysis of the evidence, the best procedure to be adopted is a plaint and not an originating summons. (***Zalwango Elivasion&Anor v Dorothy Walusimbi & Anor; Originating Summons No. 3 of 2013***). The Court was thus invited to reject the application. Counsel for the applicant did not respond to this issue.

CONSIDERATION BY COURT:

Order 4 rule 1 of the Civil Procedure Rules provides that every suit shall be instituted by presenting a plaint in that court. The Civil Procedure Rules also provide for other ways of moving the court. In this case, the application was commenced by way of Originating Summons under Order 37 rule 1 of the Civil Procedure Rules. The said rule provides that:

“The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestuique trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course an originating summons, returnable before a judge sitting in chambers, for such relief of the nature or kind following, as may by the summons be specified, and the circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions—

(a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestuique trust;

(b) the ascertainment of any class of creditors, devisees, legatees, heirs, or others;

(c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;

(d) the payment into court of any money in the hands of the executors, administrators or trustees;

(e) directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;

(f) the approval of a sale, purchase, compromise, or other transaction; or

(g) the determination of any question arising directly out of the administration of the estate or trust.”

The plain reading of the above order returns the view that questions relating to administration of an estate specifically, directing the executor or administrator to give an account, payment of any money in the hands of the executor into court or directing the executor to act or abstain from acting in a particular manner are triable under Originating summons.

Courts however have overtime guided, that matters to be considered under the said procedure should be those that are straight forward and which do not require oral evidence to prove the allegations therein or evidence beyond affidavit evidence to reach a fair and just decision. Where the matters raised in the Originating summons are complex and require oral evidence or evidence beyond the affidavits submitted, then the appropriate mode of institution of such a suit would be by way of an ordinary plaint. (See: **Zalwango & anor v Walusimbi & anor (Originating Summons No. 03 of 2013) [2014] UGHCCD 22 (11 February 2014**, *Ssesanga Robert v Asaba Paul, HCMC No. 004 of 2022 & Mugerwa Ahmed & 4 others v Gemstone International Ltd and 4 others, HCMC No. 17 of 2018)*).

In **Wakf Commissioners –versus Mohamed [1984] KLR 346** the Court of Appeal of Kenya held that: ****“Where complex issues are raised and disputed in an application made by way of originating summons the court should dismiss the summons and leave the parties to pursue their claims by way of ordinary suit.”****

The Hon. Justice Dullu in the Kenyan case of **Joseph Chesire Sirma v Erick Kipkurgat Kiprono [2005] eKLR** cited the case of **Kanyi Gitonga –versus- Peter Gacuiga Mugweru and 2 Others – Nairobi High Court Civil Suit No.3356 of 1989 (unreported)** where the Hon. Justice Bosire, as he then was, held that striking out pleadings is a draconian measure that can only be done in the clearest of cases, where such pleading is beyond resuscitation by amendment. He further noted that ****“In this particular case, however, it is not that the pleadings are defective, but that the procedure adopted is for determination of simple straight forward issues. I find no justification for striking out the originating summons.”**** He went ahead and validated the Originating summons as a plaint and required the defendant to file a defense.

The above approach may not necessarily serve the ends of justice in every case. Where an Originating Summons may not properly resolve the dispute between the parties, the appropriate solution may well be to reject such pleadings and direct parties to file a plaint; it does extinguish the claims of the parties (**Zalwango & anor v Walusimbi & anor (supra)**).

In the present application, the questions already outlined, which the applicant has framed for determination, would require taking and interrogating evidence from the applicant’s co-administrator to establish the veracity of the allegations. The court will have to analyze the instances where the Respondent is alleged to have been acting alone. This requires going beyond the evidence presented in the supporting affidavit and hearing from the beneficiaries under the estate.

The applicant also asked court to pronounce itself on the validity of sale of 4 acres of land forming part of the estate of the late without their consent and participation of other three co-administrators. He claimed that the said sale was null and void. I also believe court cannot competently investigate the legality of the sale of the said 4 acres of land forming part of the estate by mere reliance on the affidavits of the parties. This issue requires oral testimony from the beneficiaries, the co-administrators and the person who bought the said land. Further the other questions regarding whether the legal mandate vested in all the three administrators and not one and the persons entitled to the estate cannot be adjudicated without hearing from the beneficiaries and taking other material evidence beyond what is in the affidavit of the applicant.

I therefore find that this is not a proper case whose merits can be properly investigated under the originating summons filed by the applicants. The matter raises complex issues which require evidence beyond affidavit evidence presented by the applicant. I thus agree with the submissions of learned counsel for the Respondent that this application was improperly brought by way of notice of motion. The best mode of institution would be a plaint. I thus reject this application on that account with no orders as to costs since it is a suit by an administrator who desires to protect the estate. I so order.

Vincent Wagona

High Court Judge

FORT-PORTAL

DATE: 31/05/2024

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