

UGANDA / JUDGMENT

Makubuya & 4 Others v Bugaya & 4 Others (Originating Summons 16 of 2024) [2024] UGHCFD 73 (28 August 2024)
[2024] UGHCFD 73

COURT

HC: Family Division (Uganda)

BEFORE

Echokit, J

CASE / FILE NUMBER

Originating Summons 16 of 2024

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA (FAMILY DIVISION)

ORIGINATING SUMMONS NO. 0016 OF 2024

IN THE MATTER OF THE ESTATE OF THE LATE AINEA KWATABALYAWO NTATE
SSALONGO

AND

IN THE MATTER OF THE PROPERTY COMPRISED IN BULEMEZI BLOCK 808 PLOT 1,
BULEMEZI BLOCK NO. 808, PLOT NO. 8, BULEMEZI BLOCK NO. 811 NO.1 AND
BULEMEZI BLOCK 789 PLOT 2

| 4. | 1. APOLLO NELSON MAKUBUYA
2. SEMPIJJA DANIEL KAMUWANDA
DR. EDWARD
KIBIKYO MUKOOZA
BAKAZE MUKASA HERBERT
5. VICTORIA NABAKOOZA
MUKASA
(THE EXECUTORS OF THE ESTATE OF THE
LATE AINEA KWATABALYAWO
NTATE SSALONGO) | PLAINTIFFS |

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|| VERSUS ||

|| DAVID JOSEPH BUGAYA WASWA NTATE
2. JAQUELINE ALICE NAMANDA NTATE
3. NABAWESI MADELINE NTATE N
4. NABUUMA ELIZABETH NTATE
5. NAKYAMBADDE GORRETH, NABAWESI MADELINE
NTATE, DAVID NTATE AND NAMANDA JACKLINE]
(ADMINISTRATORS OF THE ESTATE OF THE LATE 1)
NTATE MARY)
| DEFENDANTS |

Before: Hon. Lady Justice Dr. Christine A. Echokit

JUDGEMENT

BACKGROUND:

These Originating Summons are brought under Order 37 rules 1(g) and 1(h) of the Civil Procedure Rules. The suit is supported by the affidavit of Apollo Nelson Makubuya who is the 1st Plaintiff. The 2nd Defendant filed an Affidavit in Reply on her behalf and on behalf of the 1st, 3rd, 4th and 5th Defendants.

The Plaintiffs' case is that the testator was the duly registered owner of the land comprised in Bulemezi Block 808 Plot 1, Bulemezi Block 808, Plot No. 8, Bulemezi Block 811 No. 1 and Bulemezi Block 789 Plot 2 all collectively measuring approximately 945 acres where he had his cattle ranch; that the Plaintiffs are currently the registered proprietors of the suit land; that the Plaintiffs were granted probate to the testator's will; that the will set out the percentage shares of the proceeds that would be shared amongst the beneficiaries of the estate; that the Plaintiffs upon being granted probate, began ascertaining the status of the various properties listed in the will; that the Plaintiffs conducted a survey on the suit land and discovered that there were several unknown occupants on the land who claimed to have purchased the land from the 1st Defendant who was the caretaker of the land; that the Plaintiffs held a family meeting in which the 1st Defendant affirmed that he sold the land with the full knowledge of the testator; that the Plaintiffs discovered that the 1st Defendant had obtained over Ug. Shs. 2,000,000,000 from the sale of the land; that the Plaintiffs resolved to negotiate with the occupants of the land, to offer them the opportunity to obtain the land titles and then remit the proceeds of these sale to the beneficiaries as directed by the will; that there is hope that the land can be sold and some of the value obtained for the beneficiaries; that 19 beneficiaries to the land have consented to the sale of the land while 13 have not given their consents; and that it is in the best interests of the beneficiaries that this Honorable Court makes an order allowing the executors to sell the land and the proceeds be divided amongst the beneficiaries as directed by the will of the Testator.

HEARING AND REPRESENTATION:

The Plaintiffs were represented by Counsel Kenneth Kiapi Katura. The Defendants were represented by Counsel Ssemagulu Abubakr Saava and Counsel Kanaabi Emmanuel. The 1st Plaintiff was present in court. The 2nd, 3rd and 4th Defendants were present in court.

QUESTIONS FOR THE DETERMINATION OF THIS COURT:

1. Whether the Plaintiffs can proceed to sell the land comprised in Bulemezi Block 808 Plot 1, Bulemezi Block 808 Plot 8, Bulemezi Block 811 and Bulemezi Block 789 Plot 2.
2. Whether the Plaintiffs have the power/ authority under the will of the Late Ainea Ntate Kwatobalyawo Ntate Ssalongo to divide the suit land and distribute it to the Defendants.

DETERMINATION OF THE QUESTIONS RAISED BY THIS COURT:

When the matter came up for hearing, Counsel Semagulu raised a preliminary objection.

POINT OF LAW: Whether the suit was brought before this Honorable court under the proper procedure.

The Defendants' case:

Counsel for the Defendants submitted that Originating Summons is not an application. It is a suit on its own. Section 267 of the Succession Act requires the executor to apply for directions where sale is objected to. The wording of the law does not allow a suit but directions. Under 0.52 rr 1, 2 & 3 CPR, a notice of motion is the proper procedure. Even if court was to rely on 0.37 r 1 (g) & (f), those rules cannot rectify the defect. Those rules apply to approval of sale etc. This presupposes that a transaction has taken place already and the only thing required is the approval of court.

The question before court is that the defendants withheld their consent on the sale. This is because they needed to know relevant information including the value of the land and the intended buyers. Accordingly, counsel prayed that the Originating Summons are struck out with costs.

The Plaintiffs case:

Counsel for the Plaintiff submitted that this Originating Summons is brought under 0.37 r 1 CPR empowering executors to seek the approval of court for sale, purchase, compromise or other transactions. 0.32 r 1 (g) & (f) CPR allows executors to bring a suit by Originating Summons.

The question seeks interpretation of the Will that seeks sale but the beneficiaries want the land to be divided. In the circumstances, it is proper that the suit is brought by way of Originating Summons. Furthermore, S.267(3) of the Succession Act allows for an application by way of Originating Summons also under 0.37 r 1(f) of the CPR. Hence, counsel prayed that court finds that the proper procedure was used.

Court's ruling on the Preliminary Objection:

Counsel for the defendants raised a Preliminary Objection on a point of procedure stating that under S. 267(3) of the Succession Act, the correct procedure is by way of notice of motion and not Originating Summons. In reply, counsel for the plaintiff stated that in matters where the defendants have withheld their consent for the executors to sell the land, and in view also of the 2nd question to be determined by court in the Originating Summons, it is only prudent that court grants proceeding by way of Originating Summons.

I agree with counsel for the defendants that ordinarily seeking directions of court should be by way of notice of motion under 0.52 rr 1, 2 & 3 of the CPR. However, r.1 of 0.52 of the Civil Procedure Rules also recognizes that there are exceptions to the general rule i.e. where otherwise provided for under the rules. 0.37 r 1 (f) & (g) of the Civil Procedure Rules cited by counsel for the plaintiff provides for Originating Summons to determine questions of approval of sale, purchase and other transactions and for the determination of other questions arising directly out of the administration of the estate or trust. I see that S. 267 (3) of the Succession Act requires that where the consent of the beneficiaries to the disposal of the property is withheld, the administrator/executor may apply to a court of competent jurisdiction.

In the circumstances, both 0.52 and 0.37 of the Civil Procedure Rules apply. Since 0.37 expressly encompasses the 2 questions and to avoid multiplicity of proceedings, I will allow procedure by way of Originating Summons; otherwise, only in respect of the 1st question, the matter would have been best determined by way of an application under 0.52 r 1, 2 & 3 of the Civil Procedure Rules.

Counsel for the Plaintiffs submitted that the land in question is already occupied by several persons, some of whom have already bought their portions of the land while others are bibanja holders.

Counsel for the Defendants submitted that the land is not fully encumbered as presented by counsel for the Plaintiffs. Counsel prayed that the Defendants should be part of the process of the survey of the land. Counsel further prayed that the matter be referred to the Registrar for possible settlement under Section 268 (3) of the Succession Act.

In rejoinder, counsel for the Plaintiffs submitted that Section 268 (5) of the Succession Act requires practice directives to be issued before settlement under Section 268 (3) of the Succession Act. Counsel noted that these directives have not been made.

Counsel for the Plaintiffs submitted further that the executors have been requesting the Defendants for a meeting since March 2024 but in vain. Counsel submitted that the Defendants are simply delaying the process.

Resolution of the Court:

I have taken into consideration the affidavit evidence of the parties attached and the oral submissions of both counsel. It is noted that the land in question is already occupied by several persons, some of whom have already bought their portions of the land. For purposes of comprehensive disposal of the questions before Court, it is imperative that the suit land is surveyed and the land dealt with in accordance with the Will of the late Ainea Kwatabalyawo Ntate Ssalongo, only then will the issues in contention be resolved. Executors of a Will should not be encumbered in the performance of their duties in accordance to the Will of the deceased. To do so would be to undermine the intention of the testator. That said, where a sale of land is to be undertaken in accordance to the Will, the provisions of the law requiring the consent of the beneficiaries must be respected. Where beneficiary consent is not given, it is imperative that the unreasonable withdrawal of consent must be brought to the attention of court, which then proceeds to give the necessary directions in accordance with the law.

To ensure that the executors have complied with the directives of court, they are required to report back to this court.

CONCLUSION:

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In the premises, I hereby grant these summons and order that;

- a) The Plaintiffs shall ensure that a comprehensive survey is undertaken in respect to land comprised in Bulemezi Block 808 Plot 1, Bulemezi Block 808 Plot 8, Bulemezi Block 811 Plot 1 and Bulemezi Block 789 Plot 2 (Hereinafter referred to as the "Suit Land") referred to in clause 9.2(x) of the Will of the Late Ainea Kwatabalyawo Ntate Ssalongo to determine the acreage of the land, and to document the persons who hold/own any part of the said land, including measuring the size of their holding.
- b) The 1st Defendant shall participate in the survey process referred to in paragraph 1 and the 1st Defendant shall co-operate with the Plaintiffs/Executors and their agents in identifying, to the best of his knowledge, the persons on the land and the nature of their holding.
- c) The Plaintiffs shall declare to the beneficiaries of the Estate all the occupants who have approached them to purchase portions of the suit land and also declare the purchase price (consideration) that has been offered by these occupants and/or negotiated with the Plaintiffs, following which the Plaintiffs shall execute the sale and/or transfer of the legal interest in the land, subject to the consent of the beneficiaries.

- d) The Plaintiffs shall determine which portion of the land is still vacant and has no kibanja claimants/occupants and report the same to the beneficiaries in an agreed forum.
- e) The parties shall comply with the wishes of the Testator under clause \$9.2(x)\$ of the Will and endeavor to have the land referred to in paragraph 4 handled in accordance with the first paragraph of clause \$9.2(x)\$ of the Will, failing which the land may be sold by the Plaintiffs and the proceeds shared among the beneficiaries enumerated in the 2nd paragraph of clause \$9.2(x)\$ of the Will.
- The Plaintiffs are further authorized to execute the sale of the land and do all acts necessary \$f\$ to organize/manage the suit property and to facilitate the sale where those acts are beneficial to the Estate of the deceased.
- g) All costs of the processes relating to the management and/or sale of the land shall be borne by the Estate.
- h) Where a consent of the beneficiaries to the sale is withheld, the Plaintiffs shall revert to court for further directions.
- In any event, the parties shall revert to court on the 28/3/2025 at 9.30a.m. wherein the \$i)\$ Plaintiffs shall provide to court a report relating to how this order has been implemented.

I so order.

Dated at Kampala this.....

that wit

Hon. Lady Justice Dr. Christine A. Echokit Judge.

The right of appeal explained.

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