

UGANDA / JUDGMENT

Mugasha v Housing Finance Bank and Another (Miscellaneous Application No. 1132 of 2020) [2020] UGCommC 152 (29 December 2020)

[2020] UGCommC 152

COURT

Commercial Court of Uganda

BEFORE

Wabwire, J

CASE / FILE NUMBER

Miscellaneous Application No. 1132 of 2020

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION) 5 MISCELLANEOUS APPLICATION NO. 1132 OF
2020 [ARISING FROM CIVIL SUIT NO. 685 OF 2020]

MUGASHA RODNEY (LEGAL REPRESENTATIVE /BENEFICIARY OF THE LATE
SAMWIRI MISHAMBI KWESIGA===== APPLICANT

VERSUS

1. HOUSING FINANCE BANK 2. BALAJI GROUP(EA) LTD=====
RESPONDENT

15 BEFORE: HON. MR. JUSTICE RICHARD WEJULI WABWIRE

RULING

This Application seeks for orders that the Applicant substitutes the Plaintiff in CS 685 of 2020 in place of the deceased Ida May Kwesiga

²⁰ (Administrator of the Estate of the late Samwiri Mishambi Kwesiga). Ida May Kwesiga died on the 27th November 2020 before hearing and disposal of CS 685 of 2020 in which she was the Plaintiff. And further

that as a result of the substitution, necessary amendments be made to the Plaint and Applications. Lastly, that costs of the Application be ²⁵ borne by the Estate of the late Samwiri Mishambi Kwesiga.

The grounds of the Application are that; the late Ida May Kwesiga , widow of the late Samwiri Mishambi Kwesiga and mother of the Applicant obtained Letters of Administration of the Estate of Samwiri Mishambi Kwesiga on 18/1/2006 and she died on the 27/11/2020

³⁰ predeceasing disposal of CS 685 of 2020 in which she was the Plaintiff

.

That the Applicant is one of the beneficiaries of the Estate of the late Samwiri Mishambi Kwesiga and further that while the process to obtain letters of Administrator for the Estate of the late Ida May ³⁵ Kwesiga has commenced, there is imminent threat from the Respondent who wanted to evict the deceased and the beneficiaries of the Estate of the late Samwiri Mishambi Kwesiga from the suit land comprised in FRV212 Folio 22 Plot 35 Kyadondo.

That the Interim Order granted against the threat of eviction of the ⁴⁰ late Ida May Kwesiga cannot be renewed or extended because of her death and hearing of the temporary injunction has been adjourned **sine die** pending formal appointment and substitution of the Plaintiff by a Legal Representative of the Estate of the late Samwiri Mishambi Kwesiga.

- ⁴⁵ That it is in the interest of justice that the Applicant be appointed as or substituted as the Legal representative of the Estate of the late Samwiri Mishambi Kwesiga , limited to his interests in CS 685 of 2020 until its final disposal and that it is just and equitable that the Application be allowed.
- ⁵⁰ The Application was supported by the Affidavit of Mugasha Rodney and accompanied with submissions by his lawyers.

In reply, both Respondents contested the Application. They contended that the Application was bad and barred in law. That this Court had no subject matter jurisdiction, that the right Court before ⁵⁵ which the Applicant ought to have brought the Application is the Family Division of the High Court. That it is wrong for the Applicant to apply to be **Administrator ad litem** without any Family meeting appointing him as a fit and proper person.

That the Applicant has made the Application as a representative of ⁶⁰ Samwiri Mishambi Kwesiga who is a stranger and without locus in CS 685 of 2020.

That the suit to which the Applicant seeks to be added as substitute was filed by Ida May Kwesiga in her personal capacity and not as Administrator of the Estate of the late Samwiri Mishambi Kwesiga ⁶⁵ which is the capacity in which the Applicant seeks to be added. And further that the Applicant has neither pleaded nor shown that he is the duly appointed Executor or that he is entitled to administer the Estate of the late Ida may Kwesiga.

The Applicant has not met statutory conditions precedent as he has ⁷⁰ neither averred nor shown that the Executor of the person entitled to administer the Estate is unable or unwilling to act as a Legal representative of Ida May Kwesiga in Court nor has the Applicant been nominated by any party to the suit.

The Applicant has not shown that there is any Application for either

⁷⁵ probate or letters of administration, as the case may be, in respect of the Estate of the late Ida May Kwesiga pending in any Court in Uganda.

That the Applicant has not attached any admissible evidence of his relationship with either the late Ida May Kwesiga or even with ⁸⁰ Samwiri Mishambi Kwesiga.

That even if it is a fact in the public domain that Ida May Kwesiga is now deceased, the Applicant has not attached any admissible evidence of proof of death as by law required.

That the Application having been filed on the 1/12/2020 only 4 days ⁸⁵ after the death of Ida May Kwesiga is indicative that it was rashly done without having first obtained the concurrence of the other beneficiaries of the Estate of the late Ida May Kwesiga and of Samwiri Mishambi Kwesiga.

That there is no evidence on record that the process leading to ⁹⁰ issuance of the letters of administration has commenced.

The Applicant was represented by Newmark Advocates and Mpeirwe & Co. Advocates while the 1st Respondents were represented by Kyagaba & Otatina Advocates and the 2nd Respondents by Makada & partners Advocates & Solicitors.

⁹⁵ When the Application first came up for hearing on the 7th December 2020, Counsel for the Respondents indicated that whereas they, in principal, had no objection to substitution of Ida May Kwesiga, since it was common fact that she had passed on, they wanted time and opportunity to discuss, as officers of Court, some procedural flaws in ¹⁰⁰ the Application with Counsel for the Applicants, before the Application could be heard and determined. The request was granted and the matter was adjourned.

On the subsequent occasion, on the 14th December 2020, the Applicants were not ready to proceed on grounds that their Affidavit ¹⁰⁵ in Rejoinder was incomplete as they had not been able to obtain the birth certificate and authorization of Family in order to address issues related thereto raised in one of the Respondents' Affidavits in Reply.

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The Applicants sought to file an Affidavit in Rejoinder but this was ¹¹⁰ un-procedural since, they had in the first place filed the Application together with their submissions and, the Respondents had already filed their submissions as well.

They were however allowed to file submissions in Rejoinder, which they did and captioned as "***Applicants Supplementary Submissions***". I ¹¹⁵ considered the "supplementary submissions" as submissions in rejoinder.

Having carefully applied my mind to the pleadings and the affidavit evidence on record and to the submissions by Counsel for the parties. I will first address myself to the issue of jurisdiction raised by Counsel

¹²⁰ for the 2nd Respondents, which is whether this Court has jurisdiction to entertain and determine the Application.

The Application seeks to have the Applicant substitute Ida May Kwesiga (Administrator of the Estate of the late Samwiri Mishambi Kwesiga) who died before disposal of HCCS 685 of 2020.

¹²⁵ Counsel for the 2nd Respondents contended that the Application ought to have been filed in the Family Division of the High Court of Uganda where all Family issues must be filed and not in the Commercial Division. He submitted that the creation of Divisions was intended for proper administration of justice and not simply for fun.

¹³⁰ He cited the case of **Balikudembe & 2 Others V Jjagwe MA 976 of 2013** which was on all fours with the facts in the instant Application. In that case, riding on the unlimited jurisdiction of the High Court, a Family matter was filed in the Land Division, instead of the Family Division. Court held that the unlimited jurisdiction of the high Court ¹³⁵ cannot be cited to clothe a wrong Division of the High Court with a matter supposed to be in another Division.

In his "Supplementary submissions", Counsel for the Applicant addressed Court on the issue as to whether the Application is tenable under the laws it was instituted. He did not directly address the issue ¹⁴⁰ of jurisdiction of this Court but dwelt on the parameters to be fulfilled for grant of orders as in the instant Application and cited the case of **Okway John Kimbo (Legal Representative of the late Anna Ayeyotho) V Oddia Nuru & Jamadda Oddia MA 39 of 2016** to support his submissions.

¹⁴⁵ Issues of jurisdiction once raised, take precedence over any other issue raised in the matter. This is the long established position of the law - see **LILIANS V. CALTEX OIL (KENYA LTD) [1986-1989] 305 CAK** per Justice Nyarangi that:

***"..... It is reasonably plain that a question of jurisdiction ought* 150 *to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything*"**

I have reviewed the cases sighted and as submitted by Counsel for the 2nd Respondents, the circumstance of this case are distinguishable ¹⁵⁵ from those of the case of **Okway John Kimbo (Legal Representative of the late Anna Ayeyotho) V Oddia Nuru & Jamadda Oddia MA 39 of 2016** in that the case of Okway (supra) was in a Circuit Court in Arua where there are no Divisions.

"Jurisdiction" as defined in Words and Phrases Legally Defined, ¹⁶⁰ Volume 3, I-N at page 13 means:

"Authority which a Court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the Court is constituted and may be ¹⁶⁵ extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters which the particular Court has cognizance or as to the areas over which the jurisdiction shall extend, or it may partake both these characteristics.

¹⁷⁰ The Chief Justice has in exercise of his powers under the constitution established different Divisions of the High Court to handle different subject matter and type issues. These include, the Family Division, the Commercial Court Division and others. The Divisions have distinct mandates stipulated by Statutory Instruments.

¹⁷⁵ An Application for appointment of a Legal Representative in a suit is predicated on the fact that there is in existence, a known Executor or a person entitled to administration of the Estate.

A Legal Representative under the Succession Act, Section 1 (r) means a person appointed by law to administer the Estate or any part of the ¹⁸⁰ Estate of a deceased person.

Section 222 of the Succession Act requires that Court satisfies itself that there is an Executor or person entitled to administration, who is unable or unwilling to act or that indeed the Applicant is the duly nominated or designated Legal representative.

¹⁸⁵ Addition of a party to a suit as a substitute or Legal representative in a suit in the Commercial Court is subject to presentation of evidence of either having been prior granted the status of Legal Representative or being Executor of the will of the deceased party.

A party seeking to be added as a substitute of a deceased person ¹⁹⁰ under Order 24 rule 3, under which the instant Application is brought, ought to therefore already be in possession of these credentials which then makes them eligible for consideration by the Commercial Court in an Application such as the instant one.

No such evidence was adduced that the Applicant possessed the pre-¹⁹⁵ requisite status.

Whereas this Court has the mandate to substitute a deceased party,

the absence of those credentials takes away this Courts mandate to substitute the deceased Plaintiff with the Applicant. It has no jurisdiction to grant the status of Administrator *ad litem,* which is a ²⁰⁰ preserve of the Family Division or circuit Courts sitting as a Family Court.

Where a suit is filed in a Court without jurisdiction, it is a non-existent suit. Whatever is decided in such a suit amounts to no decision." See **Umar Asuman v. Olila Moses HCCR No. 1/2006**, and where the ²⁰⁵ Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing". See **Words and Phrases Legally Defined, Volume 3, I-N at page 13**.

In the circumstances, I am constrained to refrain from delving into the merits of this Application as this Court is devoid of the jurisdiction

²¹⁰ to entertain an Application for appointment of a Legal Representative of a deceased person.

However, mindful of the fact that the Respondents do not, in principal, oppose substitution of the deceased Plaintiff by a rightfully designated party and in the interest of justice and out of abundance ²¹⁵ of caution, I order as follows;

1. The status quo regarding the suit property pertaining at the time of death of the Ida May Kwesiga be preserved until a duly appointed Legal Representative substitutes her as Plaintiff in

the Main suit and as Applicant or Respondents, as the case may ²²⁰ be, in Applications thereunder.

- 2. All evictions or any form of transaction that may culminate in the change of title of the suit property from the status as at the time of the death of Ida May Kwesiga be stayed until a duly appointed Legal Representative substitutes her as Plaintiff in ²²⁵ the Main suit and as Applicant or Respondents, as the case may be, in Applications thereunder.
- 3. This Application be transferred forthwith to be heard and determined by the Family Court Division of the High Court.
- 4. The costs shall be determined by the Family Court when dealing

²³⁰ with the Application on transfer of the matter as directed in Order No. 3 above.

I so order.

Delivered at Kampala by email to Counsel for the respective parties and signed copies for the parties placed on file this 29th day of ²³⁵ December, 2020.

RICHARD WEJULI WABWIRE

JUDGE

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