

UGANDA / JUDGMENT

Muyanja Kafeero v Ssemuyinde (Civil Suit No. 126 of 2013) [2015] UGHCFD 47 (10 November 2015) [2015] UGHCFD 47

COURT

HC: Family Division (Uganda)

BEFORE

Tuhaise, J

CASE / FILE NUMBER

Civil Suit No. 126 of 2013

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

FAMILY DIVISION

CIVIL SUIT NO 126/2013

JUSTINE MUYANJA KAFEERO (The Administrator of the estate of the late Kafeero)

..... PLAINTIFF

VERSUS

SSEMUYINDE TOEFFIL (The Executor of the will of the late Ssezi Musoke

Ssalongo).....DEFENDANT

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE

RULING ON PRELIMINARY OBJECTION

When this matter was called for hearing, learned counsel Patrick Bugembe for the defendant raised a preliminary objection that the defendant was sued in his capacity as executor of the estate of Musoke Ssalongo and that the prayers in the suit are essentially seeking court to have the defendant perform his duties as executor of the estate of the late Musoke Ssalongo. He submitted that there is a judgement by Hon Mr. Justice Billy Kainamura in **Mugerwa V Ssemuyinde Civil Suit No 06/2009** which revoked the defendant's grant of probate. Learned Counsel contended that the said revocation puts the defendant in a capacity that he can no longer perform any duties as administrator of the estate of the late Musoke Ssalongo. He submitted that if the defendant's grant of probate was revoked and the reason the plaintiff is in court is because

of duties he can no longer perform, then the suit cannot be sustained. He further submitted that the defendant lodged an appeal against the judgement in the Court of Appeal but an appeal **per se** does not amount to a stay of execution of a judgement. He prayed that in light of the judgement in Civil Suit No 06/2009, the instant suit be struck out with costs.

Learned Counsel Emmanuel Ilukor, in response, submitted for the plaintiff that there were other prayers besides the prayer calling upon the defendant to perform his obligations under the will of Musoke Ssalongo; that even in absence of the prayer calling upon the defendant to perform his duties as executor under the will, the plaintiff still has other prayers where she seeks this court's indulgence. He argued that the mere reason the defendant chose to appeal, as opposed to having the judgement reviewed, shows that he is dissatisfied with the judgement, and, for that reason, is still the substantive executor of Ssezi Musoke's estate and still the right defendant. He contended that judgement **per se** does not estopp the defendant from furnishing accountability over the said estate. He prayed court to find no merit in the defendant's prayers; that in respect of costs, the plaintiff had no control on delivery of the said judgement; that the judgement came after the civil suit had been filed; that the reason the plaintiff came to court is because the defendant refused to perform his duties as executor as stated in the will; and that the plaintiff should instead be granted the costs.

The defendant's counsel submitted in rejoinder that the reason the defendant's counsel was not performing his duties was because of civil suit no. 06/2009 where his siblings challenged the grant he had obtained; that upon nullification of the grant he could not perform any other duties. He submitted that the appeal does not take away the orders of the Judge in civil suit no. 06/2009 since an appeal **per se** does not in any way act as a stay of orders issued in a trial court; that if the defendant goes ahead to execute his duties as executor, it will amount to contempt of court; and that he was specifically sued as executor, which means no suit can be sustained against him in that capacity. He reiterated his prayers.

Section 264 of the Succession Act cap 162 states that after grant of any probate or letters of administration, no person other than the person to whom the same has been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, until the probate or letters of administration has or have been recalled or revoked.

The judgement in ***Mugerwa V Ssemuyinde Civil Suit No 06/2009***, among other things, granted the plaintiffs' prayers in that suit by revoking the grant of probate issued to the defendant **vide** **Administration Cause No 205/2001**. This would, in my humble interpretation of section 264 of the Succession Act, mean that the defendant ceased to hold the grant the moment the same was revoked by a competent court in the said suit. In that regard I do not agree with the plaintiff's counsel's submissions that the defendant remains the substantive executor of the estate even after the grant that was issued to him was revoked by court. In my opinion, as correctly submitted by the defendant's counsel, the revocation of the grant tied the defendant in that, until or unless it is reversed by court by review or appeal, there is no way the said defendant can perform his duties under the revoked grant without being in contempt of a court order or being an executor of his own wrong. The mere fact that the defendant appealed, as is well laid out in

the rules concerning civil procedure, does not act as a stay of execution of the judgement appealed against.

The record shows that the instant suit was filed on 30/07/2013 while the judgement in ***Mugerwa V Ssemuyinde Civil Suit No 06/2009*** was delivered on 27/05/2014. This confirms the plaintiff's counsel's submissions that civil suit no. 126/2013 (the instant suit) was filed before the delivery of the judgement in ***Mugerwa V Ssemuyinde Civil Suit No 06/2009***. In such circumstances, the position is that, much as the instant suit was rightly filed against the right party (defendant) in his capacity **then** as executor of late Ssezi Musoke Ssalongo's estate, the said **locus** of the defendant was subsequently overtaken by events, specifically the revocation of his grant **vide** ***Mugerwa V Ssemuyinde Civil Suit No 06/2009*** while the instant case was still pending.

It was also the submission of the plaintiffs' counsel that even in absence of the prayer calling upon the defendant to perform his duties as executor under the will, the plaintiff still has other prayers where he seeks this court's indulgence. The prayers in the instant suit include declarations that the late Fred Kafeero was a beneficiary and heir of the late Ssezi Musoke Ssalongo, and that the late Fred Kafeero was entitled to his share in the estate of the late Ssezi Musoke Ssalongo; that the executor of the late Ssezi Musoke Ssalongo (defendant) does execute his mandate in accordance with the will of the late Ssezi Musoke Ssalongo; that the same defendant transfers the late Fred Kafeero's entitlements/shares to the plaintiff/administratrix to Kafeero's estate; that the same defendant furnishes accountability and inventory on how he managed and disbursed the estate forming part of the late Kafeero's entitlements; among others.

On the prayer for the defendant to file inventories and accounts of how he distributed the estate of the late Ssalongo Musoke, I note that this court, in ***Mugerwa V Ssemuyinde Civil Suit No 06/2009***, granted the order against the defendant to exhibit to court and the plaintiffs a true and update inventory and accountability of all the properties in the deceased's estate. This was on basis that this was a statutory requirement since the defendant had run the estate for over ten years. It would be duplicity to grant similar orders in another suit.

On all the prayers in the instant suit, without prejudice, the fact is that the suit was instituted against the defendant in his capacity then as administrator of the estate of the late Ssezi Musoke Ssalongo. As stated above, the defendant ceased being administrator of the said Ssezi Musoke Ssalongo's estate the moment his grant of probate was revoked. Thus if the defendant is no longer administrator of the estate of Ssezi Musoke Ssalongo's estate, existing suits against him in his capacity as administrator of the said estate, save for acts or omissions already committed by him like failure to file inventories and accountability for distribution of an estate, would be overtaken by events since he no longer holds that capacity. Besides, as stated above, by virtue of the grant having been revoked by a competent court, the defendant would not have capacity to oblige orders, for instance, of transferring or distributing the estate when the grant empowering him to do so is revoked.

For the foregoing reasons, I agree with the defendant's counsel that the suit cannot be sustained since the plaintiff seeks the defendant to perform duties he can no longer perform by virtue of a court order which revoked his grant, and also because he is sued in a capacity which he no longer holds by virtue of the same court order.

The preliminary objection is in that light sustained. The suit, with all applications brought under it, is accordingly struck out. There will be no order as to costs since the plaintiff filed the suit before the revocation of the defendant's grant.

Dated at Kampala this 10th day of November 2015.

Percy Night Tuhaise

Judge.

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