

UGANDA / JUDGMENT

Nakanjako & Another v Tamale & 3 Others (Miscellaneous Application 124 of 2022) [2023] UGHC 403 (7 August 2023)

[2023] UGHC 403

COURT

High Court of Uganda

BEFORE

Katamba Nkwanga, J

CASE / FILE NUMBER

Miscellaneous Application 124 of 2022

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT MASAKA
MISCELLANEOUS APPLICATION NO.124 OF 2022 (Arising out of Civil Suit No.40 of 2011)

1. NAKANJAKO TEOPISTA

2. NANTONGO CONSTANCE::APPLICANTS

VERSUS

- 1. TAMALE FRANCIS

- 2. NANSUBUGA JULIET

- 3. NALULE MARY IMMACULATE

- 4. PETER GODFREY SENTONGO::RESPONDENTS

Before; Hon. Lady Justice Victoria Nakintu Nkwanga Katamba

RULING

This Application was brought under Article 28(12) of the 1995 Constitution of the Republic of Uganda, Section 98 of the Civil Procedure Act and Order 52 Rule 1, 2 and 3 of the Civil Procedure Rules SI 17-1, where the Applicants seek the following;

- 1. A declaration that the Respondents are in contempt of Court for violation of the decree issued by this Court vide HCCS. No.40 of 2011.

- 2. An order that the Respondents be detained in Civil Prison for 6 months.
- 3. An order for the demolition of the house constructed by the 1st Respondent on the suit land after the Judgement in Civil Suit No.40 of 2011.
- 4. An order against the 1st Respondent for payment of exemplary or punitive damages amounting to Ugx.60,000,000/= (sixty million shillings).
- 5. An order against the 2nd, 3rd and 4th Respondents for payment of exemplary or punitive damages amounting to Ugx.40,000,000/=.
- 6. Interest on 4 and 5.
- 7. Costs of the Application.

The Application is supported by an affidavit deponed by the 1st Applicant, where she states that:

- 1. Judgement was passed in the Applicants' favor as Plaintiffs in HCCS. No.40 of 2011.
- 2. Among the orders in the decree, the Respondents (Defendants) or their representatives were restrained from transferring, alienating, selling or tampering with the suit property.
- 3. The judgement was delivered in presence of all the Respondents.
- 4. There is no other Court order varying or altering the decision in HCCS. No.40 of 2011.
- 5. On 15th July 2020, the 1st Respondent embarked on construction of structures on the suit land contrary to Court's orders.
- 6. The Applicant and other beneficiaries informed him to stop the construction but he did not comply with the Applicant's demands and the structures thereon are nearing completion.
- 7. A notice to vacate cum notice of intention to sue was served on the Respondents on 20th August 2020 by the Applicants' lawyers but the Respondents remain in occupation of the land.
- 8. The Respondents also lease 45 acres of the suit land to a one, Kalungi Abbas after the pronouncement of the judgement.
- 9. The Respondents continue to cultivate on the suit land while denying the Applicants access to the land which is contrary to the Court's orders in HCCS. No. 40 of 2011.

There were two affidavits in reply. One deponed by Peter Godfrey Sentongo on his own behalf and on behalf of the 2nd and 3rd Respondents. The Second affidavit in reply was deponed by Tamale Francis, the 1st Respondent.

In considering the affidavit deponed by Peter Godfrey Sentongo, he states as follows, that;

- 1. The orders in HCCS. No.40 of 2011 were stayed by the Court.
- 2. The Respondents have never alienated, sold or transferred the suit property.
- 3. The 2nd,3rd and 4th Respondents are not aware of any construction by the 1st Respondent on the suit land.
- 4. There was never an order for delivery of vacant possession and the notice to vacate issued on behalf of the Applicants was illegal.

- 5. There was never an order issued against the Respondents denying them continued occupation of the suit land.
- 6. The Respondents have never leased out the land to any one and it is in fact the Applicants utilizing the 45 acres where on, they planted tomatoes and coffee.
- 7. The Respondents have never denied the Applicants access and it is the Applicants that want to evict the Respondents in absence of a Court order.

In considering the affidavit deponed by Tamale Francis, the 1st Respondent, he states as follows, that;

- 1. He was never aware of the decision in HCCS. No.40 of 2011.
- 2. He has been in occupation of part of the suit land since his child hood without any disturbance since his father was utilizing the same in various ways from the 1970s till the date of the Judgement.
- 3. He was never served with the Judgement or the decree or any Court order to vacate the land.
- 4. The photos attached to the affidavit in support of the application do not in any way indicate that the house under construction is his house.
- 5. He has never let out the suit land to any other person.
- 6. The Applicants are utilizing part of the suit land and he has never denied the Applicants access to the suit land.

In both affidavits in reply, the Respondents sought to cross examine the 1st Applicant on her affidavit in support. The 1st Applicant was duly cross examined on the said affidavit and the details there from shall be considered later on in the ruling.

In rejoinder the Applicant, Nakanjako Teopista stated as that;

- 1. The 1st Respondent never served the Applicants with the affidavit in reply having filed the same on 16th August 2022 until the Applicants lawyers on 1st September 2022 followed up with Court and discovered that the 1st Respondent had filed an affidavit in reply however, to date, the Applicants or their lawyers have never been served with the affidavit in reply.
- 2. The judgement was delivered in the 1st Respondent's presence and he is therefore aware of the Judgement.

- 3. The 1st Respondent was aware of the judgement because he always attended Court with the other Respondents and he was also witness DW4 in the main suit.
- 4. There is no other Court order varying, reviewing, setting aside and or over turning the contents of the Judgement in Civil Suit No.40 of 2011.
- 5. The 1st Respondent was aware of the judgement and that he embarked on construction on the suit land on 15th July 2020 but even after being informed of the Court order via a notice to vacate cum notice of intention to sue on 20th August 2020, he continued constructing.
- 6. The 1st Respondent was duly served with the judgement and the orders of Court.
- 7. The house in the photos belongs to the 1st Respondent.

The Parties filed written submissions.

Two issues where raised for determination;

- 1. Whether the Respondents are guilty of contempt of Court was raised.
- 2. What remedies are available to the Parties.

Counsel for the Respondents raised preliminary objections that is;

- 1. The affidavit in support of the Application is incompetent.
- 2. The Application is incompetent because the Applicants lack locus standi and there is also an existing Court order staying the orders in HCCS. No.40 of 2011.

I shall consider the preliminary points of law raised before delving into the merits of the Application.

Submissions for the Respondents.

1. The Affidavit in support of the Application is incompetent thus rendering the entire Application incompetent.

Counsel submitted that the Applicant did not appear before the Commissioner of Oaths as required by Section 5 and 6 of the Oaths Act which renders the affidavit incurably defective. That during cross examination, the deponent, Nakanjako Teopista stated that she made the affidavit in her lawyer's office where in there were only three (3) people that is; herself, her lawyer, Jamir Mugalula and her sister, Constance Nantongo and she further stated that upon making the affidavit, she gave it to her lawyer and left for

Masaka. Having been asked whether she knows of any Lubulwa Peter, indicated as a Commissioner of Oaths, she stated that she did not any person by that name.

Counsel submitted that from the above, the deduction that can be made is that the Deponent never appeared before the Commissioner of Oaths which is a mandatory requirement and the effect of default is that the affidavit is rendered inadmissible, fatally defective and not curable under Article 126(2)(e) of the Constitution. Counsel relied on the case of Kakooza John Baptist versus Electoral Commission and Another, SCCA. No.11 Of 2007 to support his submissions.

Since the affidavit incurably defective, the Application ought to be dismissed because an application cannot stand its own without an affidavit in support. Counsel relied on Kasala Growers Cooperative Society versus Kakooza and Another, SCCA. No.19 Of 2010 to support his submission. Counsel then submitted that the Affidavit does not possess a valid certificate of translation. That during cross examination, the Deponent stated that there were only 3 people when she made that affidavit and none of them was Mwebe Umar who appears as the translator on the affidavit. The said Mwebe Umar is therefore none existent. Counsel further submitted that the signatures of the said Mwebe Umar on the affidavit in support and the affidavit in rejoinder are different. He argued that in the result, the affidavit was sworn in absence of the said Mwebe Umar and it therefore offends provisions of Section 2 and 3 of the Illiterate Protections Act. On the signatures differing, Counsel submitted that this alludes to forgery.

With the above, Counsel sought that the affidavit in support of the motion be struck out.

2. The Application is incompetent because the Applicants lack locus standi and there is also an existing Court order staying the orders in HCCS. No.40 of 2011.

Counsel submitted that there is an existing order for stay issued by this Court on 11th October 2021 in the presence of all the parties and their Counsel and this makes the current Application incompetent. My understanding of Counsel's position is that there can be no violation of the orders if the orders were stayed.

At locus, Counsel submitted that the authority to administer the estate was vested in the Administrator General and the Administrator General alone has locus to bring the present

Application and not the Applicants. Counsel submitted that the Application by the Applicants was an illegality which this Court should not sanction.

Submissions in reply to the Preliminary objections raised.

1. **Affidavit incompetent for nonappearance before the Commissioner of oaths.** Counsel submitted that the process of commissioning is very complex to a person that is illiterate like the Deponent and it would be very difficult for a person such as the Deponent to know all the steps of commissioning of the affidavit. Counsel submitted that the Deponent should not be expected to remember all the steps including visiting the commissioner of oaths.

Counsel also submitted that though the Deponent stated that she did not know a one, Lubulwa Peter who is named as the Commissioner of Oaths, knowledge of the commissioner oaths is not one of the requirements that have be fulfilled to validate an affidavit and that the affidavit fulfills all requirements of a valid affidavit. He further submitted that the Respondents ought to have cross examined the Commissioner of Oaths to prove whether the Deponent appeared before him or not. That the Respondents should not be allowed to rely on vague statements made by the Deponent in cross examination. Nonappearance before the Commissioner cannot be reached without the testimony of such commissioner who stated that the said affidavit was sworn before him.

Counsel then submitted that the above explanation would apply to the certificate of translation albeit with necessary modification. Counsel submitted that the Deponent went through all the necessary steps but never paid attention to the same. Counsel submitted that the Deponent's knowledge of the contents of the affidavit were never challenged.

Regarding the differences in signature on the certificate of translation on the affidavit in support and that on the affidavit in rejoinder, Counsel submitted that there is no law that bars an individual from having more than one signature.

2. On existence of an order of stay and the Applicant lacking locus standi.

Counsel submitted that an order of stay in itself does not act as an alteration or variation of the contents of the Judgement. Counsel submitted that as long as the Court order was

stopping the Respondents herein from tampering with the property that belongs to the estate, an order of stay does not serve to say that they are authorized to tamper with the land. It was his submission that an order for stay simply delays the execution of the orders but does not alter them.

On the Applicants not possessing locus to bring this Application, Counsel quoted Section 192 of the Succession Act Cap 162 and submitted that the applicants being administrators of the estate of the late Tadeo, have a right to bring this Application. He submitted that even though the Court put the Administrator General in charge, this does not mean that the statutory rights of the Administrators of the estate were taken away and the Applicants are within their rights to bring the present Application.

Having carefully considered the submissions, I now proceed to determine the preliminary points of law as raised by Counsel for the Respondent.

Determination of Preliminary points of law.

A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. (see; *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696*).

1. That affidavit in support of the Application is incompetent.

To address this issue, it is my view that the relevant laws are; the *Oaths Act Cap 19* and the *Commissioners of Oaths (Advocates) Act Cap 5*.

When considered together, Sections 5 and 6 of the Oaths Act are to the effect that a Deponent must appear before the Commissioner of Oaths personally and reads out his/her affidavit on oath, or in the alternative the affidavit is read out to the Deponent on oath. Thereafter, the Deponent signs the affidavit and the Commissioner of oaths thereafter certifies that the deposition was done before him or her. (See also; *Musa Nsimbe versus Joseph Nanjubi and others, HCMA. No.23 of 2014*)

In *Musa Nsimbe versus Joseph Nanjubi (supra)*, it was observed that where any of the steps in process of deposition is lacking, the purported deposition is invalid for being incomplete and is therefore unlawful.

In *Mohammed Majyambere v Bhakresa Khalil, HCMA. No.727 OF 2011*, it was held that the provisions of the Oaths Act require an affidavit to be made before a Commissioner of Oaths. It was further observed that the requirement is strengthened by *Rule 7* of the *Commissioner of Oaths Rules* which provides that; a commissioner before taking an oath must satisfy himself or herself that the person named as the Deponent and the person appearing before him or her are the same and that the person is outwardly in a fit state to understand what he or she is doing.

From the above authorities, it is clear that it is a mandatory requirement of law that a deponent must appear before a Commissioner of Oaths and take oath on the contents of his or her affidavit in order for it to be valid.

In the instant application, the Applicant was cross examined on her affidavit. During cross examination, the Applicant (Deponent) stated that the affidavit was made in her lawyer's office in Kampala and that at the time of making it, only her lawyer, her sister Constance and herself were present. She further stated that only the three of them were present at the time and nobody else. She then stated that after signing the affidavit, she handed it over to her lawyer and returned to Masaka. In reexamination, she stated that she does not remember going anywhere after signing the affidavit and handing it over to her lawyer.

It is Counsel for the Applicant's submission that the Applicant is illiterate and is therefore not expected to understand the complexities associated with commissioning of an affidavit. He further submitted that the Applicant should not be expected to remember having visited the Commissioner of Oaths.

I respectfully disagree with Counsel's submissions. The questions put forward during cross examination were not intended to illicit information concerning the complexities of commissioning the affidavit but rather, whether the Deponent ever appeared before a Commissioner of Oaths at any point during the making of the affidavit. There was

nothing complicated about the questions and her answers were direct and honest. By the Deponent's own testimony, during the making of the affidavit, there were only three people in the office being herself, her sister Constance and her lawyer and no one else. After she made the affidavit, she left the office and returned to Masaka. At no point did she attend before a Commissioner for Oaths and in fact did not know Lubulwa Peter, the said Commissioner of Oaths. Counsel was of the view that the Deponent cannot be expected to remember whether she appeared before the Commissioner of Oaths. As I have stated already, the questions put to the Applicant were plain and simple and she narrated to the court exactly what she remembered. In re-examination, she stated that she did not remember going anywhere else after handing over the signed affidavit to her lawyer. It is my opinion that the evidence strongly suggests that the Applicant (Deponent) never appeared before the Commissioner of Oaths as is indicated on the affidavit and it was not even necessary to call the Commissioner of oaths to give evidence as suggested by Counsel for the Applicant.

Important to note is that the affidavit has four signatures on it, that is; the Deponent's signature, the Commissioner of oaths, the translator and her lawyer's signature as well. It therefore defeats logic that the Applicant would properly remember making the affidavit in her lawyer's office, and not remember the presence of the purported translator who translated the contents of the affidavit to her or the Commissioner who administered the Oath before certifying the affidavit. It is therefore my opinion that the only logical conclusion is that even though the affidavit possesses a seal and signature of a Commissioner of Oaths, the Deponent never appeared before any such Commissioner thereby making the affidavit in support of this Application invalid for noncompliance with provisions of Section 5 and 6 of the Oaths Act and Rule 7 of the Commissioner of Oaths Rules.

In **Kakooza John Baptist versus Electoral Commission and Another, Supreme Court Election Appeal No.11 of 2007**, it was held that where an affidavit was not sworn before a Commissioner of Oaths, such an affidavit should be rejected.

Where there is only one affidavit in support of an Application and the affidavit is found to be invalid, Courts have observed that in such a case, the Application is not supported by any affidavit. The Application cannot stand and it ought to be dismissed. (see: **SSali Samuel versus Gladys K. Rwamwamba, HCMA. No.514 of 2014**).

For the reasons stated above and the law on Commissioning Affidavits, the preliminary point of law succeeds. This Application cannot stand because it is not supported by any affidavit. It is a matter of law that an application is supported by evidence by way of affidavit. In the absence of such evidence, the application is left unsupported and therefore cannot stand. The Application is therefore dismissed with no order as to costs.

I so order.

Dated at Masaka this 7th day of August, 2023.

Signed;.....

Victoria Nakintu Nkwanga Katamba-Judge

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