

UGANDA / JUDGMENT

Sembayita and Another v Sande

(Miscellaneous Application 1951 of 2022)

[2024] UGHCLD 255 (22 October 2024)

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COURT

HC: Land Division (Uganda)

BEFORE

Nabakooza, J

CASE / FILE NUMBER

Miscellaneous Application 1951 of 2022

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA LAND DIVISION

MISC. APPLICATION NO. 1951 OF 2022**(ARISING FROM CIVIL SUIT NO. 331 OF 2009)****1. JAMES JOEL SEMBAYITA**

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2. DANIEL BANJA ::::::::::::::::::::::::::::::**VERSES****SANDE ABDU NOOR ::::::::::::::::::::::::::::::****BEFORE: HON. LADY JUSTICE NABAKOOZA FLAVIA. K. RULING**

This Application was brought under Section 33 of the Judicature Act (Cap 13), Sections 37 and 98 of the Civil Procedure Act and Order 52 rule 1 & 2 of the Civil Procedure Rules SI -71-1 for orders that:

- a. The Respondent be substituted as a legal representative of the Late Sekyaya Mohammed *(hereinafter referred to as the deceased)* who was the 1st Defendant/Judgement debtor in the main suit but passed on.

- b. A consequential order be granted to the Applicants to cause eviction of the Respondent as well as his agents and demolition of their structures so that the Applicants can take vacant possession of the suit land.
- c. Costs of the Application be provided for. 10

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The grounds of the application are contained in the notice of motion and supported by the affidavit deposed to by Daniel Banja (the 2nd Applicant herein) with written authority from the 1st Applicant. They are, briefly that; - the Applicants are the successful parties in CS NO. \$331/2009\$ in which the Respondent was the 2nd **defendant**. It was declared that the Applicants are the lawful owners of the suit land comprised in Busiro Block 364 Plots 199 and 238 land at Bulenga but the court did not issue an order of vacant possession against the Respondent and his father/the deceased. That after judgement, the Respondent's father passed on and the Respondent has since refused to hand over vacant possession but instead brought

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on the land more trespassers to the detriment of the Applicants. That it is necessary that the court issues an order to substitute the deceased with the current respondent who is his biological son to enable the applicants take possession of their land and also complete the process enforcing the judgement.

The application was opposed by the Respondent through his affidavit in reply and one deposed to by Bisaso Luyimbazi Edward Fredrick (Chairperson LCI **Bulenga**). The Respondent denied being son to the deceased and averred that the deceased married his mother when he was already born and she died in 1988 before telling him his father. That he is neither a son or Administrator of the deceased's Estate. That he has never sold or mortgaged the suit land and that he has been wrongly sued in this application. He deposed further that he owns only \$50 \times 50\$ which was given to him by the deceased where he has lived since 1996 without disturbance. That the deceased bought the suit land from the late Namyalo in 1982 who was a mailo holder and only daughter of a one Erukana Mirundi. That the deceased lived on the land till his death and it is where he left his family.

Further, that the deceased never sold his land to the Applicants and that the judgment in CS No. 331 of 2019 which was in favor of the Applicants has been appealed. That court did not issue eviction orders against the Respondent or any other person and that the same was not prayed for nor proved in court since it requires evidence. That he was not authorised by the deceased to deal in his estate be it in a will or any document left behind by him.

Furthermore, Bisaso Luyimbazi Edward Fredrick deponed that he has known the 45 Applicants for over 20 years but was not aware that they were the owners of the suit land until the judgment in CS No. 331 of 2009. That he has never sold or helped anyone to occupy the suit land.

I take note of the Applicant's affidavit in rejoinder.

Representation: The Applicants were represented by Counsel Musimenta Sam while the Respondent was represented by Counsel Vincent Mugisha. Both counsel filed written submissions which I have considered.

Counsel for the Applicants raised the following issues for determination.

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- i. Whether the Respondent should be substituted as a legal representative?
- ii. Whether a consequential order should be granted to the Applicants to cause eviction of the Respondent as well as his agents and demolition of their structures so that the Applicants take vacant possession?

submissi nchw th ADN liCantst Corrnsl.

Counsel objected to the admission of the l{cspondent's affidavit in rcply. He contended that by this court's directive, the l{cspondent was supposed to file a rcply by 16/04/2024 but chose to file the same on 18/04/2024. I have ruled on the case of

65 Uganda Revenue Authority Vs Uganda Consolidated Properties Limited Civil Appeal No. 31 of 2000 where the Court of Appeal held that, time limits as set out are matters of substantive law and not mere technicalities and must be strictly complied with. That the respondent's reply is improperly before court and that it should be disregarded.

70 Counsel for the Respondent did not dispute this objection.

It is true that this court directed the Respondent to file the reply by 16/04/2024. However, the Electronic Court Case Management Information System (ECCMIS) shows that the Respondent, through Counsel & Co., deposes, upgraded his affidavit in reply on 18/04/2024 at 03:43pm, and thereafter; 2 days late. This was contrary to the directive of court.

However, this court shall not disregard the l{csponder's reply despite the late filing; and invoke its inherent powers under Section 98 of the Civil Procedure Act for the ends of justice especially since the time within which to file was fixed by court and no prejudice has been occasioned to the applicants. In doing so, I am satisfied

80 by the decision in Pan African Papet Mills Limited vs. Silvester Nyarango Obwocha Civil Appeal No, 118 of 2002 rvhcr it rvas obscned that "(ourts .rhould l/iue lo tuslain ralhcr than disnir wit upuially wlurc fltlti* aouLl .tti/l bc lone und a.fair lial lwd, de:pin the dela1"

Resolution of Issue 1.

85 Whethet the Respondent should be substituted as a lcal representative?

Counscl for the \pplicant relied on Section 37 of thc Civil Procedure Act and the case r>f Kamlega S. Twodwong V Ongom Marko Tuda Civil Appeal No. 35 of 20L7 (2019) UGHC 74 and submittccl that rvhcr a judgcn'rcnt clcbtor dics bcforc

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execution is effected, the judgement creditor has to bring an application to substitute the judgement debtor's name with that of his or her successor in title. That the 90 Applicant instituted CS No. 331 of 2009 against the Respondent together with his father (the late Sekyaya Muhammed) and judgment was in their favor. That the Respondent swore on oath that the deceased was his father and this made him suitable to be substituted as a legal representative of the deceased. That the Respondent refused to hand over vacant possession and has brought more 95 persons/ trespassers on the land to the detriment of the Applicants.

In reply, it was Counsel for the Respondent's argument that deceased has never been the Respondent's father nor a member of his clan but a man who married his mother 100 after he had been born. That the Respondent referred to the deceased as father because of the Buganda culture. That the deceased took care of the Respondent from a tender age and later provided him with a piece of land. That the witness statement relied on by the Applicants to claim that the Respondent is a son to the deceased was drawn and drafted by Bazilengende & Co. Advocates who also believed that such a man *(the deceased)* would be a father whereas not. That the 105 Respondent was not guided in his witness statement to state that Sekyaya Muhammed was not his father but a husband to his mother. I take note of the Applicants' submissions in rejoinder.

- Section 37 (1) of The Civil Procedure Act, provides that where a judgment debtor 110 dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the decree against the legal representative of the deceased, or against any person who has intermeddled with the estate of the deceased.
- In the case of Kamlega S. Twodwong V Ongom Marko Tuda (supra) my 115 learned brother Mubiru J pointed out that:

It follows that when the judgment debtor dies before execution is effected, the judgment creditor ought to bring an application to substitute the judgment debtor's name with that of his or her successor-in-title and serve the successor in-title with all the processes in the suit. The legal representative should come on record to continue the suit within the time allowed by law. It will not be possible for the Court to do anything in the way of execution until and unless the legal representatives have been brought on the record.

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Further, in Amrit Goyal v Hari Chand Goyal & 3 others, Court of Appeal Civil Application No. 109 of 2004 Kikonyogo DCJ (as she then was) pointed out that, It is a requirement of the rule to substitute a deceased party with his legal representative on the application of any interested person or on the Court's own motion'.

- In this case, the deceased (Ssekyaya Muhammed) was the 1st defendant in Civil Suit No. 331 of 2019 while the Respondent was the 2nd Defendant. The Respondents in 130 that suit sought for a permanent injunction against the Defendants on land comprised on Block 364 Plot 199 and 238 at Bulenga, general damages for trespass and costs of the suit. In his judgement, the trial judge held in favor of the Applicants.
- Upon perusal of the Respondent's witness statement received in this court on 135 \$07/08/2018\$, he had earlier stated under paragraph 2 and 3 that he entered on the suit land in 1982 with his father while still a child; and that in 1996, his father gave him part of the suit land. He alluded to the same evidence under cross-examination on \$7/03/2019\$ that the deceased is his father. This then means that the Respondent 140 is a beneficiary of the late Sekyaya and has the capacity to obtain letters of administration for his father's estate. The submission that the Respondent is not a son of the late Sekyaya cannot be entertained at this juncture, considering his previous admission to court and absence of evidence to the contrary.
- Under Section 2 (k) of the Civil Procedure Act Cap 71, it defines a "legal representative" as a person who in law represents the estate of a deceased person, and 145 where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued. In this case though, the Respondent is not a legal representative in the aforesaid terms since he holds no letters of administration or probate for the said estate. Nevertheless, Sections 222
- 150 of the Succession Act provides that:

Where it is necessary that the representative of a deceased person is made party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in a suit, limited for the purpose of representing the deceased in that suit or in any other such cause until a final decree is made.

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The fact that letters of administration to the estate of the late Sekyawa have not been 155 granted to any person, inclusive of the Respondent, implies that none of the persons entitled to administration is willing to act. For that cause, this court has the power to grant letters of administration to a nominated party limited to the purpose of representing a deceased party to a pending proceeding so that the matter can proceed (Balikuddembe Jumba Peter & Others vs. Kiwalabye Expedito & 160 Others HCMC No.11 of 2015).

Therefore, in this case, the court shall grant letters of administration to the Respondent under Section 222 of the Succession Act to bring him within the ambit of Section 37 and Section 2(k) of the Civil Procedure Act in order to ensure that Civil Suit No.331 of 2009 is brought to finality (or that a final decree in the sense of a consequential order, if any, is made). For that intent and purpose, leave is hereby granted to substitute the name of Ssekyaya Muhammed, the 1st Defendant/Judgement debtor in Civil Suit No.331 of 2009 with the Respondent/2nd Defendant as his representative limited to that suit.

Consequently, I resolve issue one in the affirmative. 170

Issue 2. Whether this is a proper case for grant of consequential orders? Counsel for the Applicants relied on Section 98 of the Civil Procedure Act and the case of **Odd Jobbs Vs Mubia 1970 EA 476** to contend that, the Plaintiffs were declared the rightful owners of the suit property subject to 0.15 acres of kibanja interest, and a permanent injunction, among other orders, was issued against the 175 Defendants. That if an eviction order is not granted, the judgment in CS No. 331 of 2009 will be rendered un-executable. That an order of vacant possession although not pleaded becomes a natural consequence of the declaration of the plaintiff as the rightful owner of the suit land and that court orders should not be issued in vain.

180 In reply, the Respondent's Counsel argued that eviction orders cannot be granted since no counter-claim was filed in court in regards to eviction of the people on the suit land. That the Respondent is legally on the suit and he is not responsible for any person on the land. That court should hear evidence of each party on the suit land

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and their witnesses. FIC relied on the case of Talwango Elivason & Anor Vs Dorothy Walusimbi (OS No. 3 / 20L3) and the case of Adam Yakob & Anor Vs Madaya Rodgers HCMISC No. 14 of 2013 where it was pointed out that where a matter is contentious and involves a considerable need to call evidence, then proceedings by affidavits becomes improper. The applicant has an option of filing a fresh suit against the people occupying the suit land by an ordinary plaint than to get eviction orders.

In the case of Kalibala Vincent & others Vs Attorney General H. C. M. ANo. 70 of 2016 Njusu (as he then was) defined consequential orders to mean, an order of court giving effect to the judgment to which it is consequential or resultant therefrom. The trial judge further observed that consequential orders are always applied for where the court hands out a judgment but the implementation of the judgment is impossible except with further orders of court.

200 In this case, the Applicants are the judgment creditors in (S No. 331 of 2009. Judgment was delivered by my learned brother I (Arvosa -I on 1.1/03/2020; and he declared the respondents as the rightful owners of the suit property subject to the 0.15 acres of ICbanja interest by the respondents; and also issued a permanent injunction to that effect, among others.

205 270 275 Respondent's counsel argued that the application cannot be granted on the basis that the Applicants made no prayer of eviction in their pleadings. However, I respectfully disagree with that argument. In my view, the remedy of declaration of ownership and a permanent injunction were final and conclusive as regards a subject matter of the suit. In the essence, the judgment to that effect was in rem, thus binding not only the parties to the suit but also the whole world (Mansukhalal Ramji Karia & Anor vs. Attorney General SCCA NO. 20 OF 2002; George William Katerega vs. Commissioner land registration & others, Misc. Application No. 347 of 2015). Therefore, the matter of ownership of the suit property in the main suit cannot be tried by any court as it was suggested by the Respondent's Counsel who insinuated that the Applicants ought to file another suit seeking for an eviction order.

> It is a fact of the matter that the Defendants in the earlier suit claimed as customary tenants. They entered the suit land and occupied 4 acres. Not the creature of the

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hearing, the court visited the locus in quo on 17/07/2019 and established that the defendants are in occupation of about 4 acres of land, as opposed to 0.15 acres which was eventually decreed to them.

It is also a fact that no eviction order was issued against the Defendants in the suit who are in occupation of more land than they are entitled to. The extra land they are occupying belongs to the Applicants as per the judgment. That said, **Direction**

- 5 (a) of the Constitution (Land Evictions) (Practice) Directions 2021 directs 225 that every eviction ought to be preceded by a valid court order. Therefore, without an eviction order, the said Defendants/Respondent cannot be evicted despite occupying land not belonging to them. This then implies that the aforesaid judgement is incomplete.
- It is undoubted that an eviction order is consequential to the declaration that the 230 Applicant are owners of extra land occupied by Defendants in the main suit. Therefore, since granting the said order would ensure the implementation of the court's judgment, I find that this is an appropriate case for a consequential order. Consequently, the second issue is found in the affirmative as well.
- In conclusion, this application is granted in the following terms; -235
- i. The Respondent is hereby substituted as a legal representative of the late Sekyaya Muhammed limited to Civil Suit No. 331 of 2009.
- ii. The Kibanja interest of 0.15 acres decreed to the Defendants in Civil Suit No.331 of 2009 be ascertained by a surveyor of both parties' choice.
- iii. An order of eviction is issued against the said Defendants in respect of any land extra to 0.15 acres decreed to them on land comprised on Block 364 Plot 119 and 238 at Bulenga.
- iv. Each party to this application shall bear his own costs.

Signed, dated and delivered at Kampala this. \$22 \frac{n\partial}{\partial x}\$ OCFOBEY. 2024. 245

Nabakooza Flavi Judge

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