

UGANDA / JUDGMENT

Tushemereirwe v Yosamu and 3 Others (HCT-05-LD-CS 67 of 2019)

[2024] UGHC 553 (28 June 2024)

[2024] UGHC 553

COURT

High Court of Uganda

BEFORE

Allan Nshimye, J

CASE / FILE NUMBER

HCT-05-LD-CS 67 of 2019

Source: ulii.org · Research copy typeset by Esheria. Not court-issued or certified.

THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT MBARARA HCT-05-LD-CS-0067-2019

| 1.
AIDA TUSHEMEREIRWE BAJUNA | |

|-----|-----|

| 2.
EFURANCE KAPILA ----- | PLAINTIFFS |

VERSUS

- 10 1. YOSAMU RUBYAKANA
- 2. YONASANI RWABIINO
- 3. JOHN TUHAMIZE
- 4. COMMISSIONER LAND REGISTRATION ----- DEFENDANTS
- 15 Before: Hon. Justice Nshimye Allan Paul M.

RULING

20 REPRESENTATION

The Plaintiffs were represented by Advocate Arinaitwe Ambrose from M/s Bwatota Bashonga & Co Advocates/Solicitors, while the 1st, 2nd and 3rd Defendants were represented by Advocate Kandebe Ntambirweki from M/s Ntambirweki Kandebe & Co. Advocates.

25

BACKGROUND

The Plaintiffs commenced Civil Suit No.67 of 2019 through ordinary plaint on 19th September, 2019 against the Defendants for *inter alia*; a declaration that the acts of distributing the estate of the late Erifazi Bikiremire by the Defendants is null

and void, an order cancelling the 1st to 3rd 30 Defendants' proprietorship over property comprised in LRV 3650 Folio 7, Kashari Block 28 Plot 35 at Kashari, FRV MBR 622 Folio 17 Block 7 Plot 369 and FRV 630 Folio 6 Block 7 Plot 369, an order of account against the 1st to 3rd Defendants for all estate property to date, general damages, aggravated damages and costs of the suit.

When this matter came up for hearing on 31st August, 2023,

- 1. Counsel for the Plaintiffs applied for leave of Court to proceed *ex parte* as against the 4th Defendant who after being served with the Plaintiffs' pleadings, summons to file defence and a hearing notice, has neither filed a defence nor entered appearance. Counsel for the 1st and 3rd 5 defendant objected to the prayer by counsel for the plaintiff to proceed *ex parte* against the 4th defendant.
- 2. Counsel for the 1 st to 3rd Defendants raised a preliminary objection to the 10 effect that the Plaintiffs do not have *locus standi* to commence this suit. Counsel for the Plaintiffs prayed to reply through written submissions whereafter this Court gave timelines within which he could do so, and for the 1st to 3rd Defendants to rejoin.

PRELIMINARY OBJECTION BY THE 1 ST, 2ND AND 3RD 15 DEFENDANTS

Counsel for the 1 st to 3rd Defendants argued that under **Section 264 of the Succession Act Cap 162**, only a person holding Letters of Administration or probate is the one that can prosecute a suit as a representative of the deceased. He contended that in this case the letters of administration granted to the 2nd 20 Defendant have neither expired nor been recalled, and as such the Plaintiffs, who are beneficiaries of the estate of the late Erifazi Bikirimire and brothers and sister to the 1st to 3rd Defendants, do not have locus to bring this suit. Counsel prayed for the suit to be struck out with costs.

25 PLAINTIFFS' REPLY TO THE PRELIMINARY OBJECTION

Counsel for the Plaintiffs, in reply to the submissions by counsel for the 1st to 3 rd defendant submitted that **Section 264 of the Succession Act Cap 162** does not apply where a beneficiary seeks to protect their interest, He contended that if it was the case it would imply that beneficiaries cannot sue erring administrators.

Counsel for the plaintiffs relied on **ISRAEL KABWA VS MARTIN BANOBA MUSIGA SCCA No.52/1995** for the position that a beneficiary of the estate of an intestate has locus to sue in their own name to protect the estate without first obtaining letters of administration. It was further contended that since the Plaintiffs are

35 biological children and beneficiaries to the estate of the late Erifazi Bikiremire,

they have a direct and sufficient interest in the deceased's estate and can commence this suit in their individual right. Counsel then prayed for the objection to be overruled and that the plaintiffs be granted leave to proceed *ex parte* against the 4th Defendant.

REJOINDER BY THE 1ST, 2ND AND 3RD DEFENDANTS

Counsel filed submissions in rejoinder, contending that under paragraph 4 of the *Plaint*, the Defendants were not sued as "administrators of the estate," but in their individual capacities. It was further contended that the authorities of

10 **ISRAEL KABWA** does not apply when letters of administration have already been granted, and thus Section 164 of the Succession Act stops none holders of letters of administration from suing. Counsel further prayed that no interlocutory judgment should be entered and that the suit be struck out with costs.

15 DETERMINATION

I have read the submissions and considered all authorities relied upon by both parties. The two issues for courts determination are

- 1. Whether the plaintiffs have locus to file the suit.
- 2. Whether the Plaintiff's application to proceed *ex parte* against the 4th

20 defendant should be granted

Issue 1

Whether the plaintiffs have locus to file the suit.

- 25 The law has different provisions relating to filing of suits linked to estates of deceased persons. I will first produce the provisions in the statutes and case law for guidance. They are;
- 1) **SECTION 5 OF THE CIVIL PROCEDURE ACT** states that Courts to try all civil 30 suits unless barred. It provides that.

"Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognisance is either expressly or impliedly barred."

My understanding of this provision is that a party can institute a suit unless it is barred by law. In respect to property that is part of an estate or was formally part of an estate, a beneficiary can sue an administrator or executor who unlawfully converts estate property as his own (See **BABUMBA AND ORS V**

5 SSALI BABUMBA HIGH COURT CIVIL SUIT NO.78 OF 2012)

***2)* SECTION 234 (1) OF THE SECESSION ACT AS AMENDED** relates to revocation or annulment for just cause. It provides.

10 ***(1)**The grant of probate or letters of administration may be revoked or annulled for just cause.**(2)**In this section, "just cause" means— (a)that the proceedings to obtain the grant were defective in substance; (b)that the grant was obtained fraudulently by making a false* 15 ***suggestion**, or by concealing from the court something material to the case; (c)that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though the allegation was made in ignorance or inadvertently;* 20 ***(d)**that the grant has become useless and inoperative through circumstances; or (e)that the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with Part XXXIV of this Act, or has exhibited* 25 ***under that Part an inventory or account which is untrue in a material respect. (f) the person to whom the grant was made has mismanaged the estate."**(emphasis mine)*

30 My understanding of this provision is that a beneficiary of an estate can file a suit against an administrator or executor for mismanagement of the estate among other things.

3) **SECTION 264 SUCCESSION ACT** relates to suits by administrators or holders of probate. It provides.

***(After any grant of probate or letters of administration, no person other* 5 ***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."** (emphasis mine)**

- 10 My understanding of this provision is that once letters of administration or probate is granted, it is only the court appointed administrator or executor that can act as a representative of the deceased, and shall have power sue or prosecute any suit in respect of the estate.
- 15 4) **ORDER 2 RULE 6 OF THE CIVIL PROCEDURE RULES** relates to Claims by or against executor, administrator or heir. It provides;

***(6. No claim by or against an executor or administrator, as such, shall be joined with claims by or against him or her personally, unless the last* 20 ***mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator, or are such as he or she was entitled to, or liable for, jointly with the deceased person whom he or she represents"** (*emphasis mine)**

25 My understanding of this provision is that a claim brought against an administrator or executor in their capacity as appointed by court can be joined with another claim against them in their individual capacity in limited circumstances outlined in **ORDER 2 RULE 6 OF THE CIVIL PROCEDURE RULES**.

30 5) **ORDER 31 RULE 1 OF THE CIVIL PROCEDURE RULES** relates to SUITS BY OR AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS. It provides:

"*1. In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially* 35 *interested in the property and a third person, the trustee, executor or*

*administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit but the court may, if it thinks fit, order them or any of them to be made parties."(*emphasis mine)

My understanding of this provision is that when property is vested in the administrators or executors duly appointed by Court, the said administrators or executors can sue a third party on behalf of the beneficiaries.

- 10 6) In **ISRAEL KABWA VS MARTIN BANOBA MUSIGA SCCA 52 OF 1995** , the supreme court held that a beneficiary of the estate of an intestate has locus to sue in his own name to protect the estate of the intestate for his own benefit, without having to obtain letters of administration.
- 15 My understanding of the principle in this case is that, if a person dies intestate and no one has obtained letters of administration, any beneficiary can sue in his or her own name to protect the estate based on the holding of the supreme court in **ISRAEL KABWA VS MARTIN BANOBA MUSIGA SCCA 52 OF 1995**.
- 20

The court record shows that;

- A. The plaintiffs in paragraph 1 of the plaint, state that they are "biological daughters and beneficiaries to the estate of the late Erifazi Bikirimire", and "they bring the current suit in that capacity to protect and preserve the 25 estate" (emphasis mine).
- B. The plaintiffs in in paragraph 2 of the plaint describe the 1st to 3rd Defendants are all "male adults who all brothers and siblings of the Plaintiffs..."
- C. The plaintiffs in paragraph 4 of the plaint state that they bring the suit 30 against the defendants jointly and severally for intermeddling with the estate of the late Erifazi Bikirimire, unlawfully and fraudulently distributing and sharing the property of the estate without letters of administration among other claims.

- D. The 1st to 3rd Defendants' state in paragraph 1 of their written statement 35 of defence that "paragraphs 1,2 and 3 of the plaint are admitted....."
- E. The 1st to 3rd Defendants' state in paragraph 4(e) of their written statement of defence the 2nd defendant is a holder of letters of administration of the estate of the late Bikirimire.
- 5 Firstly, it can be deduced from the party's pleadings that the plaintiffs and 1 to 3 rd defendants are siblings, and as such are all beneficiaries of the estate of the late Erifazi Bikirimire.
- Secondly the plaintiffs are suing in their individual capacity for among others 10 allegedly sharing the property without letters of administration as averred in paragraph 4 of the plaint and also seeking declarations that some titled land formerly owned by the estate was illegally and fraudulently converted into the defendants' names (see prayer no 4 of the plaint)
- 15 I find that the plaintiffs are framing their case partly based at a time when no one had letters of administration of the estate, alleging that the plaintiffs shared the estate illegally. The plaintiffs are also alleging that estate property was fraudulently and illegally transferred to the defendants. This will have to be proved by the evidence adduced in court by the plaintiffs, for now the court is 20 alive to the principle that a beneficiary can file a suit if estate property is illegally alienated (see **BABUMBA AND ORS V SSALI BABUMBA HIGH COURT CIVIL SUIT**

NO.78 OF 2012). The court is also alive to the principle in **ISRAEL KABWA VS MARTIN BANOBA MUSIGA SCCA 52 OF 1995** that a beneficiary can sue without letters of administration, in order to protect their interest in the estate.

I also realise that the 1 st to 3rd defendants claim that the 2 nd defendant is said to be the administrator of the estate. This will have to be proved by the evidence adduced in court by the defendants, for now the court is alive to the principle in the law that even an administrator can be sued, as witnessed in the provision in

30 SECTION 5 OF THE CIVIL PROCEDURE ACT, SECTION 234 (1)(F) OF THE SUCCESSION ACT, and ORDER 2 RULE 6 OF THE CIVIL PROCEDURE RULES.

I find that basing on the allegations in the pleadings and the orders sought by the parties, it is in the interest of justice and within the law that the suit is heard. In that regard I accordingly overrule the preliminary objection by the \$1^{\text{st}}\$ to \$3^{\text{rd}}\$ defendant.

Issue 2

\$25\$

Whether the Plaintiff's application to proceed ex parte against the ⁴th 5 defendant should be granted

In principle a court may order that a suit proceed ex-parte against a defendant who has not filed a defence, despite being served, as is provided in ORDER 9 RULE 11 OF THE CIVIL PROCEDURE RULES.

The evidence on court record shows that the ⁴th defendant was even served with hearing notices, and they affixed a receipt stamp dated 15 August 2023. on 31 August 2023, the plaintiffs filed on court record an affidavit of service made by Nuwabiine Joshua. The ⁴th defendant has to date not fled a defence or entered appearance. I therefore find that the behaviour of the ⁴th defendant falls within the cases where the court can make an order for the suit to proceed ex parte against the ⁴th defendant.

In conclusion. I order that. 20

- 1. The preliminary objection raised by the ¹st , ²nd and ³rd defendants is overruled.
- 2. The suit will proceed ex-parte as against the ⁴th defendant.

NSHIMYE ALLAN PAUL M. JUDGE 28-06-2024

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://ulii.org/akn/ug/judgment/ughc/2024/553/eng@2024-06-28>

CASE PAGE <https://chat.esheria.ai/case-law/uganda/tushemereirwe-v-yosamu-and-3-others-hct-05-Id-cs-67-of-2019-2024-ughc-553-28-june-2024-unknown-topic-unknown-court-2024--6a3ea4db3b1caa91297e7a0e>

Prepared on 14 October 2026 · Esheria