THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

(FAMILY DIVISION)

MISCELLANOEUS APPLICATION NO.482 OF 2022

(ARISING FROM CIVIL SUIT NO.32 OF 2021)

NASSANGA CATHERINE :::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. **SEKITTE CATHERINE**
2. **ROBERT SSEBUUNYA**
3. **GLADYS KYABANGI**
4. **ASHA YAHAYA**
5. **HUSSIEN KAWANJI :::::::::::::::::::::::::::::::::::::: RESPONDENT**

Before: Lady Justice Ketrah Kitariisibwa Katunguka

Ruling:

1. Nassanga Catherine brings this application by chamber summons against Sekitte Catherine, Ssebuunya Robert, Gladys Kyabangi, Asha Yahaya and Hussein Kawanji for orders that; the 1st respondent produces original purchase agreement, certified copies of the duplicate certificate of title and a copy of application for special certificate of title comprised in Block 92B plot No.372 land at Matuga by a one Budhala Sepuya and his particulars for inspection, a certified consent to transfer; and transfer of title instruments for change in proprietorship from Budhala Sepuya to Sekitte Ketty for land comprised in Block 92B Plot 372;

2. The 1st and 5th respondents jointly and severally to produce certified copies of the certificates of titles, mutation forms of the subdivided land comprised in block 92B plots 1994, 1995, 1996,1997,1998, 1999 land at Matuga registered in the names of the respondents and for costs to be provided for.

3. The grounds for the application are in the affidavit deposed by Nassanga Catherine and briefly that; the 1st respondent is the administrator for the estate of the late Stanley Kosea Sekitte, who in her defence stated that she purchased the suit land from Budhala Sepuya; she fraudulently dealt in the estate property as though the suit was her personal property with ill intent and by conniving with one family member of the late Budhala Sepuya to defeat the interests of the beneficiaries; she failed to disclose evidence as to how she acquired and land

herself registered on the said title; subdivided several plots and transferred them into the names of the rest of the respondents;

4. That the documents are necessary as evidence during trial to help court determine the extent of dishonesty by the 1st respondent and the 2nd-5th respondents; it is just and fair for the respondents to disclose the documents in order to show that the respondent fraudulently acquired ownership of the suit land and title from the purported Budhala Sepuya when the deceased had already transferred his interests to the late Stanley Kosea Sekitte.

The respondents did not file replies.

Representation:

5. The applicant is represented by counsel Kiyemba Grace while the 1st respondent is represented by counsel Muganga; the 2nd and 3rd representatives are represented by M/s Ssebunya Turyagunda & Co. Advocates.

6. Counsel Kiyemba informed court that they had failed to trace the 4th and 5th defendants; when the matter first came up on 28/9/2022, the 2nd and 3rd respondents requested for time to file a reply; court ordered that the 4th & 5th respondent be served by substituted service by advertising the notice to file in the Bukedde Newspaper within 3 weeks which was 20/10/2022; for all the respondents to file their replies by 2/11/2022; any rejoinder by the applicant by 16/11/2022. Ruling was to be delivered by email by 23/2/2023.

7. There is an affidavit of service filed on 21/11/2022 showing that the chamber summons was advertised in Bukedde on 10/11/2022; there are no replies that were filed; the position of the law is that failure to file a defence/affidavit in reply means admission of facts laid out in the application and supporting affidavit; (see **Samwiri Massa vs Rose Achen [1978] HCB 297** where it was held that where certain facts are sworn to in an affidavit, the burden to deny them is on the other party and if he does not, they are presumed to have been accepted and the deponent need not raise them again);

8. The failure by the respondents to file an affidavit in reply means that they are agreeable to what is being alleged/ claimed against them otherwise they should have responded. Courts have indeed held that in an application proceeding by affidavit evidence, lack of opposing affidavit means that the affidavit in support of the application stands unchallenged (see also **Prof. Oloka Onyango & Ors vs Attorney General (Constitutional Petition No.6 of 2014** where it was held that every allegation in a plaint if not specifically or by necessary implication denied in a pleading by an opposite party, shall be taken to be admitted. (See also **Makerere University vs St. Mark Education Institute LTD & ors (1994) KALR 681** and

Mufumba Fredrick versus Waako Lastone Revision Cause No. 006 of 2011*;Sengendo versus Attorney General (1972) 1 EA 140** and ***Kanji Devji versus Damor Jinabhai & Co. (19340) 1 E. A.C.A. 87.

9. *T*he application however, must pass probity because court orders should not be made without substantial proof of relevance, need or cause;

The issue for consideration is whether the application should be granted.

10. It is submitted for the applicants that the proposal for discovery was made during summons for directions hearing and the 1st respondent refused vide letter written by counsel for the 1st respondent and court ruled that a formal application be made hence this application; counsel contends that discovery at this stage and not later will avoid multiplicity of suits; Order 10 rule 12 of the Civil Procedure rules provides;

'(1) Any party may, without filing any affidavit, apply to the court for an order directing any other party to the suit to make discovery on oath of the documents, which are or have been in his or her possession or power, relating to any matter in question in the suit.

(2) On the hearing of the application the court may either refuse or adjourn the hearing, if satisfied that the discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit; except that discovery shall not be ordered when and so far as the court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs'

11. I have considered the fact that the basis of the 1st respondent's defence is that she had the right to deal in the estate the way she did and that she bought land comprised in Block 92 B land at Matuga; and rightly dealt with it as she wished; this matter has not gone through scheduling where issues for determination should be framed; I have considered the case of John Kato vs Muhlbauer AG & Anor. MA 175/2011(arising out of CS No. 186/2010) relied upon by the applicant and I appreciate the principles therein annunciated; discretion of court, necessity/relevance, existence of the documents which the other has not disclosed and that the said documents are in the other party's possession or custody or it is in her power to produce; and I shall add timing as well;

12. Summons for direction is a process where a matter is prepared for scheduling and hearing before a judge; at that point the issues to be determined are not known; a person who brings a case must know it and must prepare to defend it; it should not be the duty of the defendant to assist the plaintiff prove what their

case is;(section 101 of the Evidence Act); I believe that is why courts have said discovery should not be a fishing expedition by the applicant; In John Kato vs Muhlbauer AG)supra; court was referring to ' **issues agreed** and the **joint scheduling memorandum signed by counsels for both parties and filed in court….**' at a page 7 of that ruling; I believe the right timing for discovery is after scheduling and not before;

13. I am not convinced that the discovery has been justified because no triable issues requiring evidence have been framed; In the premises, the application is premature. It is hereby dismissed; since the respondents did not file replies there is no order as to costs.

Ketrah Kitariisibwa Katunguka

Judge

21/02/2023

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