

THE REPUBLIC OF UGANDA
IN THE COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 140 OF 2010
(Arising from Civil Appeal No. 7 OF 2003)

5 **CHELBEI FRED**

SALIMO DAVID.....
APPLICANTS

VERSUS

10 **MASAI LABU.....**

.....RESPONDENT

CORAM: HON LADY JUSTICE FAITH E.K MWONDHA, JA

15 **HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA**

HON. MR. JUSTICE KENNETH KAKURU, JA

20 **RULING OF HON. MR. JUSTICE KENNETH KAKURU, JA**

This is an application brought by way of notice of motion under Rules **43(1)**, **56 (3)** and **97** of the Rules of this court.

At the hearing of this application, counsel sought and were granted leave to file written submissions which they did. It is on
25 the basis of written submission that this application has been determined.

The back ground to this application as I understand it is as follows;-

Singili Cheminy and Saisi Cheposhak brought an action against one Masai Labu sometime in 1986, claiming ownership of a piece
5 of land in Kapchwora District, occupied by the said Masai Labu.

The suit was filed at the Chief Magistrates Court, Kapchwora-*vide* Civil Suit No. 82 of 1986.

Singili Cheminy and Saisi Cheposhak were unsuccessful in their claim as the suit was dismissed by the Chief Magistrate. Being
10 aggrieved by the decision of Chief Magistrate the duo appealed to the High Court of Mbale, *vide*, High Court of Uganda at Mbale *Civil Appeal No. 11 of 1992*. Again they were unsuccessful as the appeal was dismissed. The two then appealed against the decision of the High Court to this Court, *vide* Court of Appeal *Civil*
15 *Appeal No. 7 of 2003*.

At the time the two appellants filed the appeal in this Court they were being represented by M/S Ojambo, Wejuli-Wabwire and Co. Advocates.

On 6th May 2004, the said advocates wrote a letter to the
20 Registrar of this Court withdrawing the appeal.

Sometime in February 2007 the same persons Singili and Saisi appear to have filed *Misc. Application No. 0036 of 2007* at the High Court Mbale seeking to set aside the order of that Court

dismissing *Civil Appeal No. 11 of 1992* referred to earlier in this ruling.

The application was lodged by Ms. Alli Gabe and Co. Advocates.

On 28th July 2010, the current applicants filed this application,
5 seeking to reinstate *Civil Appeal No. 7 of 2003* which had been withdrawn. They do so as legal representatives of both Singili Cheminy and Saisi Cheposhak the appellants who it is contended were deceased by that time.

At the joint scheduling conference before the Registrar of this
10 Court on 7th September 2010 counsel for both parties agreed on the following issues.

(1) *Whether the appeal was properly withdrawn.*

(2) *Whether the present applicants have locus to file the present application. (Sic)*

15 It is contended for the applicants that the appeal was not withdrawn in accordance with the law, because at the time the advocates for appellants wrote a letter of withdrawing the appeal, that both appellants had died and therefore the advocates had no instructions to withdraw the said appeal.

20 For the respondent it is contended that, the then advocates for the appellants M/S. Ojambo, Ojuli-Wabwire & Co. Advocates had

instructions to withdraw the appeal and that, at the time of withdrawal of the appeal both appellants were still alive.

I agree with counsel for the applicants that if indeed both appellants were dead at the time the withdrawal letter was written by their advocates, that withdrawal was of no effect as the advocates would have had no instructions.

Secondly, death of an appellant does not in itself effect the appeal. See;- **Rule 97** of the Rules of this already reproduced in the Judgment of my sister the Hon. Lady Justice Faith Mwendha JA provides that *“An appeal shall not abate on the death of any appellant or respondent”*.

The respondent contends that, counsel had been duly instructed by the appellants to withdraw the appeal, and that at the time the letter of withdrawal was written both appellants were in fact still alive.

The law governing withdrawal of appeals in this court is set out in **Rule 94** of the Rules of this Court.

That Rule stipulated as follows;-

94. “Withdrawal of appeal.

(1) An appellant may at any time after instituting his or her own appeal in the court and before the appeal is called on for hearing, lodge in the registry notice in writing that he or she does not intend

further to prosecute the appeal. (Emphasis added).

5 **(2) The appellant shall, before or within seven days after lodging the notice of withdrawal, serve copies of it on each respondent who has complied with rule 80 of these Rules.**

10 **(3) If all the parties to the appeal consent to the withdrawal of the appeal, the appellant may lodge in the appropriate registry the document or documents signifying the consent of the parties; and the appeal shall then be struck out of the list of pending appeals.**

15 **(4) If all the parties to the appeal do not consent to the withdrawal of the appeal, the appeal shall stand dismissed with costs, except as against any party who has consented, unless the court, on the application of the appellant, otherwise orders.**

20 **(5) An application under subrule (4) of this rule shall be made within fourteen days after the lodging of the notice of withdrawal.”**

25 This rule is mandatory for every appellant who seeks to withdraw an appeal from this court.

30 On 6th May 2004, Ojambo, Wejuli-Wabwire & Co. Advocates wrote to the Registrar of this court as follows:-

“THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL IN KAMPALA AT KAMPALA

CIVIL APPEAL NO. 7 OF 2003

**SAISI CHEPOSHAK.....
APPLICANTS**

5

VERSUS

**MASAI LABU.....
.....RESPONDENTS**

**To: Registrar
Court of Appeal**

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WITHDRAWAL OF APPEAL

This is to notify you that the Appellants do not intend to prosecute the above appeal and hereby withdraw the same.

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Yours faithfully,

Ojambo, Wejuli-Wabwire & Advocates

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**.....
COUNSEL FOR APPELLANTS**

c.c M/s Owori & Co. Advocates

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There is nothing in this letter that suggests that the appeal was being withdrawn because the appellants had died. On the

contrary it is clearly indicated that they had lost interest in the appeal implying that the appellants were in fact still alive.

At a glance, the above letter does not appear to comply with
5 **Rule 94** (Supra). The Rule requires the appellant to lodge a
'NOTICE OF WITHDRAWAL' and the above letter is not such a
notice, at least in form. Such notice of withdrawal having been
lodged the appellant is required to do the following things-

10 **(1) Serve the notice upon the respondent within
seven days (Sub Rule 2).**

**(2) Have the respondent or other parties to the
appeal consent to the notice (Sub Rule (3)).**

The result of failure to comply with Sub Rules 2 and 3 is that the
appeal stands dismissed with costs.

15 It appears that all the parties to this application assumed that
Civil Appeal No. 7 of 2003 had been withdrawn. Since there is no
evidence that the appellant complied with Sub-Rules 2 and 3 of
Rule 94(Supra) the appeal would have stood dismissed with costs.

Be that as it may, **Rule 94 (1)** (Supra) permits an appellant to
20 withdraw an appeal only *before it has been called for hearing*.
Once the appeal has been called for hearing it cannot be

withdrawn by the appellant or his counsel lodging in Court a notice of withdrawal.

It can only be withdrawn with leave of Court. See;- **Geoffrey Gatete and Angella Maria Nakigonya versus William Kyobe**
5 **(Supreme Court Civil Appeal No. 7 of 2005 and Edith Nantumbe Kizito and others versus Mariam Kuteesa Court of Appeal Civil Application No. 294 of 2013).**

I have not been able to access the court record in respect of *Civil Appeal No. 7 of 2003* and as such I am unable to ascertain
10 whether or not at the time the letter withdrawing the said appeal was written, the appeal had already been called for hearing.

However, Salimo David the 2nd applicant in his affidavit in rejoinder paragraph 4 depones that;-

15 ***“Civil Appeal No. 7 of 2003 was fixed for hearing on the 17th day of May 2004 but surprisingly the former lawyers withdrew the appeal on the 6th of May 2004.....”***

It appears that the appeal had already been called for hearing, therefore it could only have been withdrawn with the leave of the
20 court.

There is nothing on record to suggest that leave to withdraw the appeal was ever sought or granted by this Court. In that case the appeal still subsists.

Since the applicants have presented their letters of administration, I would have ordinarily invoked the power of this court under **Rule 97** to cause the legal representatives of the deceased persons to be named as parties to this appeal in the
5 place of the deceased appellants.

However, I am not satisfied that the applicants hold valid letters of administration.

The letters of administration relied upon by the applicants are annexed to the affidavit of Salimo David deponed to in rejoinder
10 to the respondent's affidavit in reply.

All the annextures to that affidavit are not certified by the commissioner for oaths before whom the affidavit was sworn. This offends the provisions of the Commissioner for Oaths Act (CAP 5). See; **Third Schedule, Rule 9 of the Commissioner
15 for Oaths Rules.**

Those annextures therefore cannot be relied upon as evidence by this court.

Even if the said annextures had been duly certified as true copies of their respective originals I would still have declined to rely on
20 annexture 'B' to the said affidavit the Letters Of Administration.

For clarity I am constrained to reproduce the said Letters Of Administration below.

"THE REPUBLIC OF UGANDA

**IN THE MAGISTRATE'S COURT OF
KAPCHORWA
AT KAPCHORWA
(PROBATE AND ADMINISTRATION) RULES, 1972**

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***In the Chief Magistrate's Court of Kapchorwa
Magisterial Area At Kapchorwa***

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ADMINISTRATION CAUSE NO. 0012 OF 2010

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***I MUKANZA ROBERT Magistrate of Kapchorwa
Magisterial Area, hereby make known that on this 15th
day of July, 2010 letters of Administration (without
the will annexed) of the property and credits of Saisi
Chemushak & Singili Salimo late of Chesoyen Village,
Munarya Parish, Chema Sub County, Tingey County,
Kapchorwa District deceased are hereby granted to
Salimo David and Chelibei Fred the sons of the
deceased Saisi Chemushak & Singili Salimo they
having undertaken to administer the same, and to
make a full and true inventory of the said property
and credits to this Court within six months from the
date of this grant or within such further time as this
Court may from time to time appoint and also to
render to this Court a true account of the said
property and credits within one year from the same
date or within such further time as the Court may
from time to time appoint.***

Dated at Kapchorwa this 15th day of July 2010.

***MUKANZA ROBERT
MAGISTRATE GRADE I"***

The above letters of administration are issued in respect of estates of two deceased persons, namely the estate of Saisi Chemushak and the estate of Singili Salimo. This is an illegality.

5 Letters of Administration can only be issued in respect of the estate of one deceased person.

Every application, petition, grant of letters of administration or probate must be in respect of the estate of only one deceased person. In this case as already stated the said letters of administration were issued in respect of estates of two deceased persons. To that extent they are a nullity. I hereby declare them to be so. See;- ***Makula International vs Emmanuel Cardinal Nsubuga and Another (1982) HCB 11.*** The parties if they so wish may apply for a fresh grant of letters of administration in respect of the estate of each of the deceased persons.

The death certificates which are annexed to the said affidavits also appear not to be genuine, I will however not delve into that.

Suffice it to say, whereas, Salimo Singili is said to have died on 15th April 2010 as set out in the death Certificate annexure 'C' to the affidavit of the 2nd applicant Salimo David dated 7th September 2010, the same Salimo Singili is stated to be a party in the Notice of Motion Mbale High Court *Miscellaneous Application No. 0036 of 2007* which reads in part as follows;-

“The grounds of this application are set out in the affidavit of the 1st appellant Salimo Singili ...”

That notice of motion is dated 18th February 2007 and is drawn and filed by M/s. Alli Gabe and Co. Advocates. The applicants
5 contented in their pleadings and submissions that the said Advocates had been instructed to represent them after death of the appellant. Salimo could not have signed an affidavit and filed a motion in 2007 if he had died in 2004.

It is my finding that the applicants do not possess valid letters of
10 administration in respect of the estates of the two deceased persons who stated to be the appellants in Court of Appeal Civil Appeal No. 7 of 2003 from which this application arises.

Only legal representatives of a deceased person can be made a party in place of a deceased person, although an order for
15 substitution under Rule 94(Supra) may be made upon an application by any interested person or on the Courts own motion.

I am not satisfied that evidence on record proves that Saisi Chemushak and Singili Salimo are deceased as contended by the
20 appellant, for the reasons I have already given. The applicants therefore lack *locus standi* to bring this application.

I therefore find that this application is bad at law, incompetent and has no merit whatsoever.

It is clearly wanting both in form and substance. It is accordingly struck out with costs.

This decision also disposes of Court of Appeal *Miscellaneous Application No.134 of 2010* also arising from *Civil Appeal No. 7 of 2013* between the same parties in respect of the same subject matter which is also struck out for the same reasons but with no order as to costs.

Dated at Kampala this **6th** day of **February** 2015.

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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