

5

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 266 OF 2017

GODFREY SSENTONGO ..... APPELLANT

VERSUS

10 DAVID BALYA KATUMBA ..... RESPONDENT

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Mr. Justice Ezekiel Muhanguzi, JA

Hon. Mr. Justice Christopher Madrama, JA

15

RULING OF THE COURT

This application arises from the ruling and orders of High Court at Masaka delivered by Hon. Justice John Eudes Keitirima in Miscellaneous Application No. 081 of 2017 (Arising from Miscellaneous Application No. 164 of 2016) and Miscellaneous Application No. 164 of 2016 (Arising from Civil suit No. 02 of 2015 (O.S) delivered on 20 11<sup>th</sup> August, 2017).

It seeks the following orders.

a) *Leave be granted to the applicant to appeal the ruling and orders of the learned trial Judge in High Court Miscellaneous Application No. 081 of 2017 (Arising from Miscellaneous Application No. 164 of 2016) and Misc. Application No. 164 of 2016 (Arising from Civil Suit No. 02 of 2015 (O.S) in which the learned trial Judge dismissed Miscellaneous Application No. 081 of 2017 on the basis that it was filed under a wrong procedure and similarly dismissed Miscellaneous Application No. 164 of 2016 on the basis that it was served after 21 days without an application a grant of extension of time to be heard.*

25

30

b) *Costs of the application be provided for.*

5 The grounds for the application are set out in the Notice Motion as follows:-

- 10 i) *This Court and the High Court have concurrent jurisdiction to grant leave to appeal but in the event of leave sought the application must first be lodged in the High Court.*
- 15 ii) *The applicant filed Miscellaneous Application No. 081 of 2017 seeking an order to reinstate Miscellaneous Application No. 164 of 2016 which had been dismissed for want of prosecution and Miscellaneous Application No. 164 of 2016 which was seeking to vary, or to set aside the order requiring the parties to file written submissions before the applicant had been heard on his prayers to cross- examine the plaintiff and the plaintiff's attorney.*
- 20 iii) *At the delivery of the ruling on 11<sup>th</sup> August 2017 the applicant informally informed the Court of his intention to appeal the ruling and order and the learned trial Judge ordered that the applicant be availed a copy of the ruling.*
- iv) *There are issues of law and fact which require serious judicial consideration by the Court of Appeal to clarify the law and issues on the legal procedure.*
- v) *It is in the interest of justice that leave to appeal be granted.*

The application is supported by the affidavit of the applicant expounding on the grounds set in the Notice of Motion.

25 The respondent filed an affidavit in reply deponed by one Kakooza Hamuza Rashid the respondent's duly appointed attorney.

The pertinent parts of the affidavit state as follows:-

30 *4. That the applicant and the respondent together with Margret Nakanjako Mubiru, Ruth Namuddu, Justine Nakato, Elivanson Nantongo and Sarah Nassali are children of the late Namyalo Nalongo formerly of Masaka Municipality who died intestate and left several properties in Masaka municipality and other places worth billions of shillings.*

5 5. That after her death, the applicant together with his sisters Margret  
Nakanjako Mubiru, Ruth Namuddu, Justine Nakato and Sarah Nassali applied for  
and were granted letters of Administration by His Lordship Justice Moses Mukibi  
Judge of the High Court on the 3<sup>rd</sup> day of November 2009 vide Administration  
Cause No. 181 of 2009. (A copy of the grant is hereto attached and marked as  
10 annexure "B").

6. That ever since getting the grant and despite the fact that all the beneficiaries  
who include the respondent are adults the administrator refused to distribute the  
estate to the rightful beneficiaries without lawful excuse.

7. That as a result of the administrators' conduct of refusal to distribute the  
15 estate and generally managing the estate in a manner that was unacceptable and  
detrimental to the interests of the respondent, in 2015 through his lawyers, he  
wrote to them a notice requesting them to distribute the property. A copy of the  
letter is hereto attached and marked as annex "C".

8. That despite the respondent's writing to them the above letter, the  
20 administrators still refused to make the distribution and never assigned any  
reason. This prompted him to file a suit against them by way of originating  
summons vide Civil suit No. 02 of 2015 (O.S) A copy of which is hereto attached  
and marked as annex "D".

12. That when Civil Suit No. 02 of 2015 (O.S) came before court on 5<sup>th</sup> July 2016,  
25 the applicant and his Counsel were not in Court and had not furnished it with any  
reason for their absence. The Honourable trial Judge gave directions on further  
conduct of the case whereby he ordered parties to file written submissions. It's  
only the respondent and Ruth Namuddu the 2<sup>nd</sup> defendant in the main suit who  
filed submissions. The applicant did not do so despite the existence of the above  
30 court order and to-date he has never filed them. Submissions for the respondent  
are hereto attached and marked as annexure "G". On that day the case was fixed  
for judgment on 16<sup>th</sup> September 2016.

- 5           13. That the Judgment was never delivered because the applicant had on 25<sup>th</sup>  
August 2016 filed Miscellaneous Application No. 164 of 2016 by which he was  
asking court for among other things to vary or set aside its orders made on 5<sup>th</sup>  
July 2016 the day the applicant and his counsel never appeared in court. A copy of  
Miscellaneous Application No. 164 is hereto attached and marked as annexure  
10           “I”.
14. That Miscellaneous Application No. 164 of 2016 that was seeking to set aside  
orders that were made by court when the applicant was absent, when it came up  
on 28<sup>th</sup> May 2017 for hearing still the applicant and his counsel were absent as a  
result of which the Court dismissed it.
- 15           15. That upon dismissal of Miscellaneous Application No. 164 of 2016, the  
applicant filed Miscellaneous Application No. 081 of 2017 for its re-instatement.
16. That I made an affidavit in reply where I opposed that application a copy of  
which is hereto attached and marked as annexure “J”.
17. That my affidavit in reply was rejoined by the applicant through an affidavit  
20           in rejoinder a copy of which is hereto attached and marked as annexure “K”
18. That when pleadings were closed the Honourable Court ordered parties to file  
written submissions, which they did. Copies of the applicant’s principal  
submissions, respondent’s submissions and applicant’s submissions in rejoinder  
are hereto attached and marked as “L”, “M” and “n” respectively.
- 25           19. That the trial Court struck out Miscellaneous Application No. 081 of 2107 for  
among others reasons late service of Miscellaneous Application No. 164 of 2016  
that rendered it an illegality and that re-instating it would amount to re-  
instating an illegality. A copy of the Court ruling is hereto attached and marked  
annexure “O”.
- 30           26. That when Miscellaneous Application No 081 of 2017 was dismissed, the  
applicant on 17/08/2017 filed in the High Court at Masaka Miscellaneous

5            *Application No. 177 of 2017 for leave to appeal to this Court against the trial Court's decision in the application No. 081 of 2017.*

27. *That while the Miscellaneous Application No. 177 was still pending in the High Court at Masaka, the applicant again on 25<sup>th</sup> of August 2017 filed this application (Civil Application No. 266 of 2017) in this court where both*  
10 *applications are seeking for the same orders that is to say leave to appeal to this Court.*

28. *That the respondent was served with Miscellaneous Application No. 177 and I opposed it and made an affidavit in reply a copy of which is hereto attached and marked as annexure "P".*

15 At the hearing of this application *Mr. G.S Lule Senior Counsel* appeared for the applicant while *Mr. Bashir Lukawa learned Counsel* appeared for the respondent.

We have not found it necessary to reproduce their submissions as they were simply repeating what was already set out in their respective pleadings before us, which we have carefully studied.

20 Rule 42(1) of the Rules of this Court provides as follows:-

*"42. Order of hearing applications.*

*(1) Whenever an application may be made either in the court or in the High Court, it shall be made first in the High Court."*

The above Rule therefore requires that such an application be brought before the  
25 High Court first.

This was the decision and the guidances provided by the Supreme Court in the case of *Lawrence Musiitwa Kyazze vs Eunice Busingye, Supreme Court Civil Appeal No.18 of 1990*. The Supreme Court observed and held as follows;-

30 *"The practice that this Court should adopt, is that in general application for a stay should be made informally to the judge who*

5           *decided the case when judgment is delivered. The judge may direct  
that a formal motion be presented on notice (Order XLVIII rule 1.),  
after notice of appeal has been filed. He may in the meantime grant a  
temporary stay for this to be done. The parties asking for a stay  
should be prepared to meet the conditions set out in Order XXXIX Rule  
10       4(3) of the Civil Procedure Rules. The temporary application may be  
ex parte if the application is refused, the parties may then apply to the  
Supreme Court under Rule 5(2) (b) of the Court of Appeal Rules where  
again they should be prepared to meet conditions similar to those set  
out in Order XXXIX Rule 4(3). However there may be circumstances  
15       when this Court will intervene to preserve the status quo. In cases  
where the High Court has doubted its jurisdiction or has made some  
error of law or fact, apparent on the face of the record which is  
probably wrong, or has been unable to deal with the application in  
good time to the prejudice of the parties in the suit property, the  
20       application may be made direct to this Court. It may however be that  
this Court will direct that the High Court would hear the application  
first, or that an appeal be taken against the decision of the High Court,  
bearing in mind the interests of the parties and the costs involved. The  
aim is to have the application for stay speedily heard, and delays  
25       avoided”*

It is contended by the respondent in paragraph 27 of the affidavit in reply that the applicant filed at the High Court Miscellaneous Application No. 177 of 2017 seeking leave to appeal the decision of the Court in High Court Miscellaneous Application No. 081 of 2017.

30       The application was filed on 17<sup>th</sup> August, 2017. A few days later on 25<sup>th</sup> August, 2017 the applicant filed this application seeking the same orders, the application at the

5 High Court is still pending. No reason was advanced as to why it has never been determined or pursued.

The dismissal of High Court Miscellaneous Application No. 81 of 2017 on the basis that it was filed under a wrong order and the dismissal of High Court Miscellaneous Application No 164 of 2016 on the basis that the applicant and his Counsel were both  
10 absent when it was called for hearing having been duly served with hearing notice for that day would not render those matters res judicata. The applicant is at liberty to file fresh application in compliance with the law.

It appears clearly to us that the applicant and his advocates were both not vigilant in pursuing their cases before the High Court. The multiplicity of the applications verge  
15 on the abuse of Court process. In the meantime the under laying issues between the parties have not been determined. In the process the estate may be layed to waste.

Since there is a pending application seeking the same orders as this application pending at the High Court the filing of this application at this Court without justifiable cause, as we have found none, amount to abuse of Court process.

20 On that account alone, this application is dismissed with costs.

The applicant is at liberty to pursue his applications at the High Court. In respect of the dismissed applications No 164 of 2016 and No. 081 of 2017 referred to in paragraph (a) of the Notice of Motion herein the applicant is at liberty to file fresh applications at the High Court.

25

We so order.

Dated at Kampala this ..... 30<sup>th</sup> day of ..... May, .....2019.

30

  
.....  
**KENNETH KAKURU**  
**JUSTICE OF APPEAL**

5

.....  
**EZEKIEL MUHANGUZI**  
**JUSTICE OF APPEAL**

10

.....  
**CHRISTOPHER MADRAMA**  
**JUSTICE OF APPEAL**

15