



THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)
5 **MISCELLANEOUS APPLICATION NO. 1132 OF 2020**
[ARISING FROM CIVIL SUIT NO. 685 OF 2020]

MUGASHA RODNEY (LEGAL REPRESENTATIVE /BENEFICIARY OF THE
LATE SAMWIRI MISHAMBI KWESIGA===== APPLICANT

10 **VERSUS**

1. HOUSING FINANCE BANK

2. BALAJI GROUP(EA) LTD===== RESPONDENT

15 **BEFORE: HON. MR. JUSTICE RICHARD WEJULI WABWIRE**

RULING

20 This Application seeks for orders that the Applicant substitutes the Plaintiff in CS 685 of 2020 in place of the deceased Ida May Kwesiga (Administrator of the Estate of the late Samwiri Mishambi Kwesiga). Ida May Kwesiga died on the 27th November 2020 before hearing and disposal of CS 685 of 2020 in which she was the Plaintiff. And further

that as a result of the substitution, necessary amendments be made to the Plaint and Applications. Lastly, that costs of the Application be borne by the Estate of the late Samwiri Mishambi Kwesiga.

The grounds of the Application are that; the late Ida May Kwesiga , widow of the late Samwiri Mishambi Kwesiga and mother of the Applicant obtained Letters of Administration of the Estate of Samwiri Mishambi Kwesiga on 18/1/2006 and she died on the 27/11/2020 predeceasing disposal of CS 685 of 2020 in which she was the Plaintiff .

That the Applicant is one of the beneficiaries of the Estate of the late Samwiri Mishambi Kwesiga and further that while the process to obtain letters of Administrator for the Estate of the late Ida May Kwesiga has commenced, there is imminent threat from the Respondent who wanted to evict the deceased and the beneficiaries of the Estate of the late Samwiri Mishambi Kwesiga from the suit land comprised in FRV212 Folio 22 Plot 35 Kyadondo.

That the Interim Order granted against the threat of eviction of the late Ida May Kwesiga cannot be renewed or extended because of her death and hearing of the temporary injunction has been adjourned *sine die* pending formal appointment and substitution of the Plaintiff by a Legal Representative of the Estate of the late Samwiri Mishambi Kwesiga.

45 That it is in the interest of justice that the Applicant be appointed as
or substituted as the Legal representative of the Estate of the late
Samwiri Mishambi Kwesiga , limited to his interests in CS 685 of 2020
until its final disposal and that it is just and equitable that the
Application be allowed.

50 The Application was supported by the Affidavit of Mugasha Rodney
and accompanied with submissions by his lawyers.

In reply, both Respondents contested the Application. They
contended that the Application was bad and barred in law. That this
Court had no subject matter jurisdiction, that the right Court before
55 which the Applicant ought to have brought the Application is the
Family Division of the High Court. That it is wrong for the Applicant
to apply to be *Administrator ad litem* without any Family meeting
appointing him as a fit and proper person.

That the Applicant has made the Application as a representative of
60 Samwiri Mishambi Kwesiga who is a stranger and without locus in CS
685 of 2020.

That the suit to which the Applicant seeks to be added as substitute
was filed by Ida May Kwesiga in her personal capacity and not as
Administrator of the Estate of the late Samwiri Mishambi Kwesiga
65 which is the capacity in which the Applicant seeks to be added. And
further that the Applicant has neither pleaded nor shown that he is

the duly appointed Executor or that he is entitled to administer the Estate of the late Ida may Kwesiga.

70 The Applicant has not met statutory conditions precedent as he has neither averred nor shown that the Executor of the person entitled to administer the Estate is unable or unwilling to act as a Legal representative of Ida May Kwesiga in Court nor has the Applicant been nominated by any party to the suit.

75 The Applicant has not shown that there is any Application for either probate or letters of administration, as the case may be, in respect of the Estate of the late Ida May Kwesiga pending in any Court in Uganda.

80 That the Applicant has not attached any admissible evidence of his relationship with either the late Ida May Kwesiga or even with Samwiri Mishambi Kwesiga.

That even if it is a fact in the public domain that Ida May Kwesiga is now deceased, the Applicant has not attached any admissible evidence of proof of death as by law required.

85 That the Application having been filed on the 1/12/2020 only 4 days after the death of Ida May Kwesiga is indicative that it was rashly done without having first obtained the concurrence of the other

beneficiaries of the Estate of the late Ida May Kwesiga and of Samwiri Mishambi Kwesiga.

90 That there is no evidence on record that the process leading to issuance of the letters of administration has commenced.

The Applicant was represented by Newmark Advocates and Mpeirwe & Co. Advocates while the 1st Respondents were represented by Kyagaba & Otatina Advocates and the 2nd Respondents by Makada & partners Advocates & Solicitors.

95 When the Application first came up for hearing on the 7th December 2020, Counsel for the Respondents indicated that whereas they, in principal, had no objection to substitution of Ida May Kwesiga, since it was common fact that she had passed on, they wanted time and opportunity to discuss, as officers of Court, some procedural flaws in
100 the Application with Counsel for the Applicants, before the Application could be heard and determined. The request was granted and the matter was adjourned.

On the subsequent occasion, on the 14th December 2020, the Applicants were not ready to proceed on grounds that their Affidavit
105 in Rejoinder was incomplete as they had not been able to obtain the birth certificate and authorization of Family in order to address issues related thereto raised in one of the Respondents' Affidavits in Reply.

The Applicants sought to file an Affidavit in Rejoinder but this was
110 un-procedural since, they had in the first place filed the Application
together with their submissions and, the Respondents had already
filed their submissions as well.

They were however allowed to file submissions in Rejoinder, which
they did and captioned as "*Applicants Supplementary Submissions*". I
115 considered the "supplementary submissions" as submissions in
rejoinder.

Having carefully applied my mind to the pleadings and the affidavit
evidence on record and to the submissions by Counsel for the parties.
I will first address myself to the issue of jurisdiction raised by Counsel
120 for the 2nd Respondents, which is whether this Court has jurisdiction
to entertain and determine the Application.

The Application seeks to have the Applicant substitute Ida May
Kwesiga (Administrator of the Estate of the late Samwiri Mishambi
Kwesiga) who died before disposal of HCCS 685 of 2020.

125 Counsel for the 2nd Respondents contended that the Application
ought to have been filed in the Family Division of the High Court of
Uganda where all Family issues must be filed and not in the
Commercial Division. He submitted that the creation of Divisions was
intended for proper administration of justice and not simply for fun.

130 He cited the case of **Balikudembe & 2 Others V Jjagwe MA 976 of 2013** which was on all fours with the facts in the instant Application. In that case, riding on the unlimited jurisdiction of the High Court, a Family matter was filed in the Land Division, instead of the Family Division. Court held that the unlimited jurisdiction of the high Court
135 cannot be cited to clothe a wrong Division of the High Court with a matter supposed to be in another Division.

In his “Supplementary submissions”, Counsel for the Applicant addressed Court on the issue as to whether the Application is tenable under the laws it was instituted. He did not directly address the issue
140 of jurisdiction of this Court but dwelt on the parameters to be fulfilled for grant of orders as in the instant Application and cited the case of **Okway John Kimbo (Legal Representative of the late Anna Ayeyotho) V Oddia Nuru & Jamadda Oddia MA 39 of 2016** to support his submissions.

145 Issues of jurisdiction once raised, take precedence over any other issue raised in the matter. This is the long established position of the law - see **LILIANS V. CALTEX OIL (KENYA LTD) [1986-1989] 305 CAK** per **Justice Nyarangi** that:

150 *“..... It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything”*

I have reviewed the cases sighted and as submitted by Counsel for the 2nd Respondents, the circumstance of this case are distinguishable from those of the case of **Okway John Kimbo (Legal Representative of the late Anna Ayeyotho) V Oddia Nuru & Jamadda Oddia MA 39 of 2016** in that the case of Okway (supra) was in a Circuit Court in Arua where there are no Divisions.

“Jurisdiction” as defined in Words and Phrases Legally Defined, Volume 3, I-N at page 13 means:

“Authority which a Court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the Court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters which the particular Court has cognizance or as to the areas over which the jurisdiction shall extend, or it may partake both these characteristics.

The Chief Justice has in exercise of his powers under the constitution established different Divisions of the High Court to handle different subject matter and type issues. These include, the Family Division, the Commercial Court Division and others. The Divisions have distinct mandates stipulated by Statutory Instruments.

175 An Application for appointment of a Legal Representative in a suit is predicated on the fact that there is in existence, a known Executor or a person entitled to administration of the Estate.

A Legal Representative under the Succession Act, Section 1 (r) means a person appointed by law to administer the Estate or any part of the
180 Estate of a deceased person.

Section 222 of the Succession Act requires that Court satisfies itself that there is an Executor or person entitled to administration, who is unable or unwilling to act or that indeed the Applicant is the duly nominated or designated Legal representative.

185 Addition of a party to a suit as a substitute or Legal representative in a suit in the Commercial Court is subject to presentation of evidence of either having been prior granted the status of Legal Representative or being Executor of the will of the deceased party.

A party seeking to be added as a substitute of a deceased person
190 under Order 24 rule 3, under which the instant Application is brought, ought to therefore already be in possession of these credentials which then makes them eligible for consideration by the Commercial Court in an Application such as the instant one.

No such evidence was adduced that the Applicant possessed the pre-
195 requisite status.

Whereas this Court has the mandate to substitute a deceased party,

the absence of those credentials takes away this Courts mandate to substitute the deceased Plaintiff with the Applicant. It has no jurisdiction to grant the status of Administrator *ad litem*, which is a preserve of the Family Division or circuit Courts sitting as a Family Court.

Where a suit is filed in a Court without jurisdiction, it is a non-existent suit. Whatever is decided in such a suit amounts to no decision.” See **Umar Asuman v. Olila Moses HCCR No. 1/2006**, and where the Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing”. See **Words and Phrases Legally Defined, Volume 3, I-N at page 13**.

In the circumstances, I am constrained to refrain from delving into the merits of this Application as this Court is devoid of the jurisdiction to entertain an Application for appointment of a Legal Representative of a deceased person.

However, mindful of the fact that the Respondents do not, in principal, oppose substitution of the deceased Plaintiff by a rightfully designated party and in the interest of justice and out of abundance of caution, I order as follows;

1. The status quo regarding the suit property pertaining at the time of death of the Ida May Kwesiga be preserved until a duly appointed Legal Representative substitutes her as Plaintiff in

220 the Main suit and as Applicant or Respondents, as the case may
be, in Applications thereunder.

2. All evictions or any form of transaction that may culminate in
the change of title of the suit property from the status as at the
time of the death of Ida May Kwesiga be stayed until a duly
appointed Legal Representative substitutes her as Plaintiff in
225 the Main suit and as Applicant or Respondents, as the case may
be, in Applications thereunder.

3. This Application be transferred forthwith to be heard and
determined by the Family Court Division of the High Court.

4. The costs shall be determined by the Family Court when dealing
230 with the Application on transfer of the matter as directed in
Order No. 3 above.

I so order.

Delivered at Kampala by email to Counsel for the respective parties
and signed copies for the parties placed on file this 29th day of
235 December, 2020.

RICHARD WEJULI WABWIRE

JUDGE

