THE REPUBLIC OF UGANDA

THE HIGH COURT OF UGANDA PORT PORTAL

CIVIL SUIT NO. DR "O.S" OF 1992

GEORGE TALYEBA NYAKANA…….PLAINTIFF

VERSUS

1. BEATRICE KOBUSINGYE
2. KATALINA NYANJURA NYAKANA **……..DEFENDANTS**
3. DURUSIA NYAKANA
4. SAMUEL KIIZA NYAKANA

BEFORE: The Hon Mr. Justice .I. Mukanza

RULING

Civil Suit No Dr. MFP 6 of 192 was filed by the plaintiff against the defendants under Order 34 of the Civil Procedures Rules originating summons. Before the hearing commenced Mr. Mugamba the learned counsel appearing for the defendants raised a preliminary objection and hence this ruling to resolve the matter. He argued that the summons were inappropriate and incompetent because they were brought under Order 34 of the Civil Procedure Rules. A casual look at order 34 of the Civil procedure Rules shows that the executors and extra may seek remedies as specified in the order for determination. The status of the plaintiff could be found in his affidavit where he averred that he is the plaintiff and the natural son of the Late Ezira Nyakana. With due respect that does not make any impression within the provisions of order 34 rule 1 of the Civil Procedure Rules. So the plaintiff therein had no leeway (locus standi) to take the originating summons.

Secondly Mr. Mugamba contended that he had the occasion to look Odgers on pleadings, and practice 20th Edition at P. 352 on originating summons which provides that where the main point at issue is one for construction of a document or statute or one of pure law then that is the appropriate procedure for the originating summons. He submitted it was not appropriate where

there was likely to be any substantial dispute of facts. It was also inappropriate if the plaintiff thought the action was one in which summary judgment could be obtained. He continued the contention in the originating summons seemed to rest on two limbs. The first being the mismanagement of the Estate by persons entrusted with its administration that is to say the defendants and the other limb was the construction of the will concerning the management of the Estate. I was referred to the case of Eseza Namirembe V Kizito 1973 I ULR Page 88 at 91 where it was decided by Justice Saied J as he then was that 'not withstanding the foregoing and considering what meagre facts that appear in the affidavits it seems clear to me that the deponed based the reliefs which he seeks on imputations of willful default on the part of the defendant in the administration of the Estate, sufficient authority exists to the effect that an enquiry should not be ordered Under order 34 where willful, default is alleged on the part of the administrator The learned Counsel Continued that the said Judge went ahead to quote with approval the case of Bhag Dhasi V Medhi Ichan 1965 EARP. 94 (a Kenyan case) where their lordships were dealing with a case brought under order *36* of the Kenyan CPR originating summons which is similar to our order 34 of the Civil Procedure Rules. Where it was held that the scope of enquiry which could be made on an originating summons and the ability to deal with a contested case was very limited and in the same case it was held that an inquiry should not be ordered Under Order 36 where willful default was alleged on the part of the administrators.

In view of the authorities referred to above the learned Counsel submitted that the application concerning management of the Estate by the Administrator/Executors should not have been brought under the originating summons. The other limb related to the will of Ezera Nyakana submitted that the instant case was functus officio as far as the matter was concerned. All the aspects put in question were the subject of Dr. MFP 84/89 which if any party was aggrieved with that decision could have appealed to the Supreme Court. The originating summons as they therefore appear in the instant case dismissed with costs because the plaintiff had no cause for so acting and there is no merit in the case.

Mr. Nyamutale Counsel representing the plaintiff commenced his submission by a brief review of the facts of this case. That before any proceedings the lawyer had the right to address the Court on a few issues. The deceased Ezera Nyakana died on 30th December, 1988. He left a will which was executed on 10/5/88. The said will is part of the plaintiffs affidavits dated 7th August

1992. That will is annexture of which is before this court according to Court records. The said will was proved valid ex. HCCS NO. DR/MF 84/89 which case was between the plaintiff and the defendant parties herein the summons. Subsequently probate of the will was granted to Beatrice Nyakana Kobusinge, D Nyakana, Samuel Nyakana which powers were granted on 20th February 1991 vide probate Administration Cause .No. DR MFP 9/1989. In the circumstances Paragraphs 1, 3, and 4 of the first defendants affidavit dated 10/9/92 were admitted therefore the preliminary objection raised by Counsel as to the validity of the will be overruled because they have abandoned that ground. He continued clause 3 of the will dated 10th May 1985 empowers the executor to administer the estate in the names known as ED Nyakana & Sons Limited to which Company the testator bequeathed and devised all his properties movable save those which were expressly excluded by the will. Therefore paragraph 5 of the first defendants affidavit dated 15/9/92 was conceded to. If the learned Counsel had addressed himself to these issues the preliminary objection could not have arisen. A regards the validity of the will that was not going to be contested because it was proved as already submitted to.

As regards the first objection by his learned brother that clearly pointed out that a devises could bring out originating summons. That was mentioned by him. As already submitted the plaintiff affidavit was accompanied by the will of the deceased dated 10/5/88. Any annextures attached to an affidavit becomes part of the pleadings. In the circumstances he submitted that the plaintiff had the locus standi for reasons that clause 6 of Ezera Nyakana's will dated 10/5/85 which is admitted valid today the testator directed that all his children shall be allocated 10 shares of Shillings 100 each in M/S EB Nyakana and sons limited. So immediately after his death all the children were supposed to take off their shares. They were devisee and equipped with those shares. The testator if he went to heaven at all he knows that all his children had taken off their shares. The plaintiff was one of those children and therefore he is a devisee. He is named as No. 8 in the will. So the issue of having no locus standi does not arise. He prayed that the preliminary objection be overruled. Even then under order 3, 4 and 5 of the Civil Procedure Rules Summons may be taken out by any person interested in the will. One need not be advisee so the objection could be over ruled under that order. He conceded however with the submission of Mr. Mugamba where he referred to Odgers and pleadings that where the issue is about the construction of a will or document or statute or one of pure law the proper procedure was to

obtain originating summons. Having abandoned those grounds as referred to above the summons purely rest on the implementation of the Will. Both parties had sworn to their facts and there was nothing contentious. They complied with the testators will. So there was no substantial dispute at all. Fore example it is the plaintiffs contention that clause 6 of the will has not been implemented by the executors and the defendant says she had distributed part of the estate. Such matter should be shown by the will. If one looked at the will she had no power to distribute. She had only the power to implement. The learned counsel gave another example where the plaintiff alleged that the first defendant sold a motor vehicle UXM 272. In para 8 of the affidavit dated 15/9/92 the said sale of the motor vehicle could not have been done by anybody let alone the plaintiff she did that improperly. And according to clause 12 of the will the said clause appointed guardians and the executors are not supposed to do anything without consulting the guardian and the testator emphasized that in clause 14. He need not call witnesses because the will speaks for itself. The case could be dealt with summarily and, that was the purpose of the originating summons. They should not allow the properties to go that way when there has been a failure to implement the will. That the first defendant was killing the whole state and thus the need for the originating summons to be argued summarily because Pars 2 thereof inclusive of annexture A & B. The annextures show that the first defendant should obey the will changing the two titles annextures in the names of EB Nyakana as directed they put them in their names as executors. If the Court looked at lease hold Register Folio 9.in respect of Plot No /3/14 Kahiuju Fort Portal the court would observe that the title was mortgage in the bank. That was a matter of urgency with regard to the issue of functus 0fficio on the determination of the will. They were not in fact contesting the will. He prayed that the objection be overruled and the matter be proceeded with.

In reply Mr. Mugamba submitted that he stood by his earlier submission which was undiluted. It was amazing how a party makes “uturn” to suit its own needs. They had the pleadings an solely sworn affidavit and it was his submission when the Court came to decide on any matter regarding the summons it had to study the pleadings submitted. The learned Counsel could not with casual proceedings put aside what was contained in a solemn sworn affidavit and in the summons in order to establish his locus standi. If that were to be done it would be a circus of Court proceedings. He requested the Court to consider his objection in light of the proceedings before the Court. He also prayed the Honourable Court gives due contempt to sentiments so

casually raised regarding the state of the Estate. As regarded what was before Court was not a representative action. Those were summons taken out by the plaintiff in order that he might salvage for himself and not for the Estate. The plaintiff must suffer the costs because be is not representative of the Estate.

I have carefully considered the forceful submissions by the learned Counsel appearing for the parties and I have at the same time had the occasion to peruse the affidavit sworn by the plaintiff in support of the originating summons and the affidavit in reply sworn by the defendant. It is my firm view that I am being called upon to decide on three issues. The first was whether the plaintiff had the locus standi to institute the instant case and the second point was whether the suit was properly filed under the originating summons order 34 of the Civil Procedure Rules and whether I was functions 0fficio on this case.

As to whether the plaintiff had the locus standi when he instituted this present case I am of the view that it is pertinent at this juncture to reproduce the provision of order 34 rule 1 of the Civil Procedure Rules. That order provides:-

The executor or administrators of a deceased person or any of a deceased person or any of them and the trustees under any deed or instrument or any of them and any person claiming to be interested in the relief sought as creditors devisee, legatee, heirs, or legal representative of a deceased person or as cestui que trust under the terms of any deed or instrument or as claiming by assignment or otherwise, under any such creditor or other person as aforesaid, may take out as of course an originating summons., returnable before a Judge sitting in Chambers, for such relief of the nature, or kind following as may by the summons be specified, and the circumstances of the case may require, that is to say the determination, without the administration of the estate or trust of any of the following question.

(a) Any question affecting the rights or interest of the person claiming to be creditor, devisee heir of cestui que trust.

(b) the ascertainment of any class of creditors devisees, legatees, heirs and others.

(c) the furnishing of any particular accounts by the executors, administrators or trustees and the vouching when necessary of such accounts.

(d) the payment into account of any money in the hands of the executors, administrators or trustees.

(e) the approval of sale purchase compromise or other transaction and finally.

(f) the determination of any question arising directly out of the administration of the Estate or trust.

In the instant case the plaintiff swore an affidavit in support of the originating summons and there were annextures accompanying the said summons. In clause 6 annextures B which is the will of Nyakana EB the testator the plaintiff as one of the children of the testator was bequeathed some shares in EB Nyakana and Sons Limited. And also appears as No. 8 on the list of children of the said testator. The plaintiff as a devisee or as person who has got interest in the will would apply by originating summons for the determination of any question regarding the administration of the state as enumerated above from a respectively. The preliminary objection by Mr. Mugamba that the plaintiff had no locus standi to bring this suit is not sustainable. It is overruled.

As to the second matter whether the instant suit should have been instituted by originating summons. the case of Nakabugo vs Francis Drake Serujongi HCC No. 52 of 1981 reported 1981 HCB Page 58 at p. 59, It was held that the procedure by originating summons was intended to enable simple matters to be settled by the Court without the expenses of bringing an action in the usual way but not to involve matters which involve a serious question. It was further held in the same case that it was trite law that when the dispute at facts are complex and involve considerable amount of oral evidence an originating summons is not the proper procedure. And normally originating summons is a suitable procedure where the main point at issue is the construction of document or statute or one of pure laws. See also Odgers Principles of pleading and Practice in Civil Actions in the High Court of Justice 22nd Edition P. 325

And in Bhagh Bhai V Medhi Khan supra it was held that an enquiry should not be ordered under originating summons where willful default was alleged on the part of the Administrator.

At this juncture it in relevant to point a few of the salient points deponed to by the plaintiff in his affidavit accompanying the originating summons

Para1. That he was the plaintiff and the natural son of the late Ezera Nyakana and did swear in that capacity.

Para2. That the petition was not duly verified in respect of the will dated 5th July 1985.

Para3. That the said Will was not duly executed and attended to.

Para4. That the alleged will was not proved in Court as required by laws.

Para6. That the defendants have not made a true and correct account of deceased estate.

Para7. That the defendants had intermeddled with the estate by selling Motor vehicle UXM 272. That the defendants have failed to pay school fees for children. By getting a loan from the bank and then unnecessarily encumbering the deceased's Estate. By chasing away the deceased children from Plot No. 7 Babiiha Road and by not complying with the alleged will.

The defendant in her affidavit dated 15th day of September, 1992 refuted all that was deponed to by the plaintiff. For instance she averred that she was an executrix in the Estate of Ezira Binondo Nyakana (deceased) and one of the defendants. That this Honourable Court in Civil Suit No. DR MFP 84/89 held that the will had been proved.

That she was informed by her advocate and believed him that while it is desirable for the partition to be verified its non verification was not parse fatal and the court considered the issue. That she was advised by his lawyers that it was possible and legal to devisee and bequeath property to accompany. That where possible the Estate Ezira Binondo Nyakana the estate had been distributed but what had not been distributed had remained so because of interference by the plaintiff there in who for example on 29th March 1991 was part of a mob that dispersed the meeting where formal distribution was to be made. That the allegation by the plaintiff that there had been intermeddling with the estate was not correct because the defendants were duly appointed executors of the Estate. That the sale of motor vehicle UXM 272 should not have been done by anybody let alone the plaintiff other than the executors. That there has been no case of

failure by the executors to pay school fees for the children as alleged or at all. That the deceased's children named were never chased from any property that belong to late Ezira Nyakana at the time of his death but rather property that belong to her. That because of the attitude of the plaintiff herein and others of like attitude it has not been possible to consider the feasibility of implementing clause 6 of the will as exemplified in para 6 above. And finally none of the executors had implemented a repugnant clause.

From what has been explained above the affidavits sworn in support of the originating summons by the plaintiff and the affidavit in reply deponed to by the defendant are controversial. It is my considered opinion that the facts mentioned therein are complex and involve considerable amount of oral evidence. The defendant was accused of intermeddling in the estate of the deceased in which willful default was alleged on her part as an administrator. Moreover the points at issue in the instant case were not connected with the construction of say a statute, document or one of pure laws. See Odgers on Principles of Pleadings, Eseza Namirembe's case and Nakabugo's case supra. In the premises this was not a proper case to be filed by originating summons even, if grounds 1, 3, and 4 of the affidavit were dropped as submitted by Mr. Nyamutale learned Counsel appearing for the plaintiff. There still remain other matters which are controversial.

As to whether the Court was functus officio to handle the instant case. Osborne's Concise Law Dictionary 7th Edition had this to say about functus officio (having discharged his duty). That once a magistrate has convicted a person charged with an offence before him, he is a functus officio and cannot rescind the sentence and retry the case. Since the Court was not handling a criminal case I am of the firm view that the question of Functus officio was inapplicable in the circumstances and the reference to it by the learned counsel was erratic to say the least and a misdirection to the Court. I am of the view that its equivalent in Civil Suit would have been the doctrine of resjudicata as defined in section 7 of the Civil Procedure Act. The requirements of the doctrine are as follows:—

1. The parties must be the same or suing through the same parties.

2. The subject matter directly or substantially in issue between the parties in the two, cases must be substantially the same and finally the issue must have been heard and finally concluded in the earlier case. See Kamuye and others vs. The Pioneer General Assurance Society Limited. In High Court Civil Suit No. 84/89 and the present case the parties were the same. The subject matter in HCCS No. 84/89 was the annulment and removal of caveat lodged by the defendant against the grant of probate to the plaintiff and four others. In that case the caveat lodged against the grant of probate to the plaintiff was annulled and removed and the said executors including the defendant proceeded and were granted probate. Where as in the instant case the plaintiff was claiming that the grant was defective and that the defendant obtained the same fraudulently and the defendant have not within six months from the date of grant exhibited in Court a proper and true inventory and extra. In essence the subject matter directly or substantially in issue between the parties in the two cases was not substantially the same. And finally the issues in the instant case have not been heard and finally concluded in the earlier case.

In the end the doctrine of resjudicata does not come into play here.

From what has been explained above the preliminary objection raised by Mr. Mugamba that the instant case would not have been V brought by originating summons under order 34(I) of the Civil Procedure Rules is upheld with to the defendants.

I. MUKANZA

JUDGE

21/12/1992