

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

ORIGINATING SUMMONS NO. 020 OF 2009

JANET NTANYA:.....APPLICANTS

VERSUS

SAIDA SEBADDUKA

MASITULA SEBADDUKA

KETI SEBADDUKA:.....DEFENDANTS

BEFORE: HON. LADY JUSTICE MARGARET C. OGULI OUMO

RULING:

The applicant brought an originating summons claiming as a bonafide beneficiary to the estate of the late Musa Sebadduka for the determination of the following questions;

1. Whether or not the respondents are entitled to the Administration of the estate of the late Musa Sebadduka.
2. Whether or not the respondents have made an inventory of the estate of the late Musa Sebadduka since being granted Letters of Administration thereto.
3. Whether or not the Letters of Administration granted to the respondents should be cancelled.
4. Whether or not the respondents have properly administered the estate of the late Musa Sebadduka.
5. Whether or not the applicant is entitled to proceeds from the estate of the late Musa sebadduka?
6. Whether or not the applicant is entitled to any reliefs from court.

At the hearing of the application, the applicant was represented by Mr. Badru Bwangu and the respondents by Mr. Charles Kabugo, assisted by Mr. Musoke.

At the commencement of the hearing, counsel for the respondents raised a preliminary objection.

Counsel for the respondents Mr. Kabugo submitted that, the application raises many issues including fraud and general accounts. That although the plaintiffs said the deceased died testate with a will, it is 30 years since the deceased passed way and no will has been proved.

Secondly, that the applicant raises the issue of the Letters of Administration having been obtained fraudulently, but the application as it is offends the rules of pleading on fraud.

Thirdly, they raise the issue that the estate as a whole is not properly administered. That this is in general form and particulars of such pleadings must be raised

That the applicant has no locus standi under the rules, as the applicant has to be an administrator of the estate, or claiming the estate as a legatee, devisee, heir or legal representative of the deceased or a trustee under a deed or an instrument.

That the applicant is not any of those people and she is only claiming as a beneficiary whose benefits is not special.

In support of his objection, counsel cited the case of *Bagbali v Medican (1965) E.A at p.94*.

The court of Appeal held that, the scope of inquiry which could be made on originating summons and the ability to deal with issues is very limited and the party should not have proceeded by originating summons.

That an inquiry should not be made under Order 36 and now 37, where the defendant was alleged to be part of the administrator.

That the object of the rule was simply to enable the court to order the payment into court of money clearly or admittedly in the hands of an administrator pending the determination of the entitlement to that money, in the hands of the Administrator...”

Counsel submitted further that, accounts can only be costed in particular transactions, not general accounts and the money must be in the hands of the Administrator which is not the case here.

Counsel also cited the case of *Kalusumbhai Ramshen v Abdullah Hussein, 1957 at P.699*, where it was held;

“The questions raised in that case were neither simple nor clear cut and could not be determined with that expedition which the procedure by originating summons were designed for and could not be achieved.”

Counsel submitted that, at P.700, court held that the rule under which the application was quoted as determined is of a question arising out of Administration of the estate in trust.

That these are not the only points to be considered in deciding whether any relief falls in the rule may be obtained upon originating summons or by way of regular action.

Counsel for the defendants submitted further that, Order 37 is simply to determine simple questions and not contentious matters and when you see the questions put forward, they cannot be adjudicated upon by filing affidavits.

Further, that the purpose of pleadings is to give an indication of party's case on defense which will depend or be limited on these pleadings.

Counsel submitted that it is a cardinal principle of the law that once an illegality is brought to the attention of the court, it cannot be ignored as it overrides all rules of leadings.

That in the instant case, the procedure adopted by the applicant in bringing this application is defective and will not help the litigants involved in this matter, it will not bring any justice as it will not solve the matters of the estate.

Counsel for the applicant contended that, the issues raised by counsel are by pleadings and he cited the case of *ANS Airport Services vs Attorney General of Kenya, 1953 AECA at P. 53* the East Africa Court of Appeal stated that, preliminary objections can be raised and adopted on points of law which cannot be decided on. That the court held, the object of enabling

preliminary objections is expedition but to achieve that end, the part of law must be one which can be decided squarely and fairly on facts of law or not in issue on the pleadings.

Counsel contended that, a party cannot raise a preliminary objection if he has not filed any pleadings and that the respondents have not filed any pleadings and cannot therefore benefit from the rule of preliminary objection.

Order 37(1) point out the categories of people who can benefit from an originating summons

It lists them as follows;

- Executors , or
- Administrators of a deceased person,
- Trustees under and deem or instrument, and any person claiming to be interested in the relief sought as a creator, devisee, legatee, heir, legal representative of a deceased person or claiming by assignment, or otherwise, under any such creditor or otherwise aforesaid may take out as a matter of course an originating summons,... may be or require, that is to say, the determination of the following questions.
 - a) Any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir, cestui que trust.
 - b) The ascertainment of any class of creators, devisees, legatees, heirs or others.
 - c) The furnishing of any particular accounts by executors, Administrators, trustees and the vouching when necessary of such accounts.
 - d) The payment into account any money in the hands of executors, administrators, trustees.
 - e) Directing the executors, administrators or trustees, to do or abstain from doing any particular acts in their character as executors, Administrators, trustees;
 - f) The approval of a sale, purchase, compromise, or other transaction or

- g) Any question arising directly out of the Administration of the estate or trust arising directly out of the Administration of the estate or trust.

In the case of *Humphrey Opio vs. Jasfer Okot, HCCM 051/02* Justice Kagaba held that, originating summons deal with matters which are not contentious. That an application to have a grant of Letters of administration revoked is a contentious matter requiring evidence and an application by originating summons is wrong.

- a) He went on to say, the suit brought under O34 r 1 now O37 r 1, is for the court to determine whether or not to determine whether to revoke the Letters of Administration to the plaintiffs and
- b) whether the defendant is guilty of gross misconduct and has willfully wasted and misappropriated monies and should be ordered to render an account of the monies due in the estate, that has come to his possession on account of being an administrator of the estate or
- c) Whether cost of the proceedings be met by the defendant personally.

The Learned Justice submitted held that the procedure in O34 (now 37) of the Civil Procedure Rules is created and intended to deal with simple and non contentious matters. That it is intended in situations where there would be no need of rendering or taking evidence in order to arrive at the relief prayed for. It deals with reading and interpreting a document on its face value without resource to supplementary evidence.

That where the matter is contentious and would need to receive or take evidence to prove or disapprove the allegations in the Originating summons, then the particular procedure is not applicable.

In the case of *Kaggwa and 10 others HCCS NO. 175 of 1993*, arising from Miscellaneous No. 27/85, J. Ntabugoba held that, since the application for revocation was based on fraud, it is not enough to rely on O34 r 10, now O.37 r 1, affidavits allows court to proceed by ordinary suit to prove allegations of fraud.

The applicant in his Originating Summons raises issues including whether the defendants are entitled to administer the estate, filing of an inventory, fraud, cancellation of the grant to the respondents, proper administration of the estate and the applicant's entitlement to the estate.

All the above are questions that can't be resolved by mere affidavits but will require calling evidences that can't be done in Originating Summons but a suit.

In view of the above, court concurs with earlier rulings of this court that, the application for revocation cannot be by Originating Summon but the plaintiff must file a suit.

Consequently, the preliminary objection is upheld and the applicant is ordered to proceed by way of filing a suit and he is to pay the costs of this preliminary objection.

Applicant is directed to proceed by ordinary suit.

Margaret C. Oguli Oumo

JUDGE

8/10/2010

Present;

1. Badru Oumo for the Applicant
2. Charles Kabugo for the Respondent
3. Assisted by Mr. Musoke Suleiman
4. Betty Lunkuse, court clerk
5. Nantamu Oliver, Research Assistant.