

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

MISCELLANEOUS CAUSE NO. 17 OF 2011

JOHN MARY PATRICK MUHEIRWOHA KALASANYI.....APPLICANT

VERSUS

1. ISRAEL KATONGOLE

2. STEPHEN KAGOLO KALASANYI

3. LEIUBEN KISAKYE KALASANYI

4. FLORENCE KAGOLO

(Administrators of the estate of the late G. W. Kalasanyi).....RESPONDENTS

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by Notice of Motion brought under section 177 of the Registration of Titles Act, cap 230, section 98 of the Civil Procedure Act, and Order 52 of the Civil Procedure Rules (CPR) for orders that:-

- (i) *A vesting order in respect of Plot 1032 Block 244, Kyadondo, Diplomat Rise, Muyenga is made in favour of the applicant.***
- (ii) *Costs of this cause be provided for.***

The application is supported by the affidavit of **John Mary Patrick Muheirwoha Kalasanyi** the applicant. The respondents neither filed an affidavit in reply to the application nor were they or their Counsel present at the hearing though the court record indicates they were served through

substituted service in The Monitor newspaper of 20th December 2011 after rejecting service twice through ordinary service. The matter therefore proceeded *ex parte*.

In his submissions, learned Counsel Odokel Opolot for the applicant relied on the evidence as deposed to in the affidavit in support by **John Mary Patrick Muheirwoha Kalasanyi** the applicant. The applicant's evidence, as can be gathered from the said affidavit and the annextures to the same, is that the applicant was renting a house in Rubaga and one time when he went to Nairobi, leaving Israel Katongole one of the administrators of the estate in charge of the house and the children he was caring for. The applicant's rented house got burnt with most of the property in it, hence Israel Katongole transferring the children and a few of the things left to his late father's place in Kabowa. On his return, he organised a function to inform the stakeholders who were the Asian Community in Uganda and the funders of Friends of African Children of what had transpired. At the function, the Asian Community offered him land at Entebbe where the Ganesh Temple is situate. On hearing the offer made to him by the Asian Community, his late father offered him land at plot 1032 block 244 Diplomat Rise. His late father's idea by this offer was that he cannot build in the Asian Community land that had been offered to him but rather on his own land. This is because over time, the Asians would take over the building and would be left with nothing, therefore he preferred that he builds in his own land which he offered in Muyenga.

He seeks this court to grant a vesting order in respect of Plot 1032 Block 244, Kyadondo, Diplomat Rise, Muyenga is made in favour of the applicant.

I have looked at the pleadings and the annextures, together with the submissions of learned Counsel for the applicant.

On the issue of not filing a defence, in this case, an affidavit in reply to the application and its supporting affidavit, Order 9 r. 11(2) of the CPR provides that:-

“Where the time allowed for filing a defence ... the time allowed for filing the last of the defences has expired and the Defendant...has failed to to file his or her defence(s), the Plaintiff may set down the suit for hearing ex parte.”

There are court decisions to the effect that in such circumstances the defendant will not be allowed to participate in the proceedings though he/she could be present in court. In **Kubibaire V Kakwenzire [1977] HCB 37**, court held that since the appellants had been served with summons and failed to enter appearance, they had by that failure put themselves out of court and had no *locus standi*. Also see **Musoke V Kaye [1976] HCB 171**. However, whether a case proceeds *ex parte* or not, the burden of the applicant to prove his or her case on the balance of probabilities remain.

Learned Counsel for the applicant relied on section 77 of the Registration of Titles Act cap 230 to make this prayer. The said section provides as follows:-

“Upon the recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may in any case in which the proceeding, is not herein expressly barred, direct the Registrar to cancel any certificate of title or instrument, or entry or memorial in the Register Book relating to that land, estate or interest, and to substitute such certificate of title or entry as the circumstances of the case require; and the Registrar shall give effect to that order.”

My understanding of the foregoing provision is that it applies to situations where a person has recovered land by any proceedings from a registered proprietor. In the instant case there is nothing to show that the applicant recovered land from the registered proprietor through any proceedings. The applicant’s affidavit evidence is that his late father at one time evicted the applicant from the suit property and filed civil suit no. 488 of 1992, which later became Civil Suit No CU. CS 2514 of 2010. Annexure S to the applicant’s supporting affidavit indicates that the suit was eventually dismissed for want of prosecution. In my opinion, since the case was not heard on the merits, the applicant cannot claim that there was any court order for recovery of the land from the registered proprietor. The prayers made by the applicant are serious, involving transfer of real property namely land comprised in Plot 1032 Block 244, Kyadondo, Diplomat Rise, Muyenga into his names by way of vesting order. The filing of the application under section 77 of the Registration of Titles Act was therefore, in my opinion, misconceived if not an abuse of court process, because the applicant has failed to prove on the balance of probabilities that he has recovered land by way of proceedings against the registered proprietor.

I accordingly dismiss this application.

There will be no order as to costs.

Dated this 25th day of October 2012.

Percy Night Tuhaise

JUDGE.