THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI
MISCELLANEOUS APPLICATION NO. 0051 OF 2021
ARISING OUT OF HCCS NO. 0037 OF 2016 FORMERLY HCCS NO. 0049 OF 2013

NYAIKA SAMUEL ::: APPLICANT

VERSUS

1. THE ADMINISTRATOR GENERAL
2. HRH RUKIRABASAIJA SOLOMON IGURU
3. ESTATE OF THE RUGABA MUSA GAFABUSA
4. GODFREY MAGEZI KWIRIGIRA
5. JOAN KABAHANIKA GAFABUSA
6. SAMUEL HARRISON KINTU ::: RESPONDENTS

BEFORE: Hon. Justice Isah Serunkuma.

RULING

This application is brought under Order 9 rule 23 (1), Order 52 rule 1 & 3 of the Civil Procedure Rules as amended, Section 98 of the Civil Procedure Act, and Section 33 of the Judicature Act. The applicant herein seeks orders for that.

a) The order dismissing Civil Suit No. 0037 of 2016 formerly HCCS No. 0049 of 2013 be set aside.
b) Civil Suit No. 0037 of 2016 formerly HCCS No. 0049 of 2013 be reinstated and determined on its merits.
c) Costs of the application be provided for.

A brief background in this matter shows that the applicant instituted a Civil Suit No. 0049 of 2013 on 23rd February 2013 as per the amended plaint at the Family Division in Kampala, against the respondents jointly and severally for revocation of the grant of letters of administration of the estate of the late Sir Tito Winyi Gafabusa (hereinafter referred to as the deceased) obtained by the 1st respondent vide High Court

Administration Cause No. 158 of 1972, an order directing the respondents to give a comprehensive account of how the estate has been handled since the above said grant and or recovery of properties or value thereof lost/destroyed as a result of the acts or omissions of the defendants, nullification of the purported renunciation of the above said grant/ issuance of certificate of no objection to the 2nd, 5th, & 6th respondents.

The facts constituting the cause of action according to the applicant briefly state that; the applicant is the last son of the deceased who died on the 19th of June 1971 and was survived by 41 children and 06 widows. That the 1st respondent without any consultations applied for letters of administration (allegedly with a will annexed) to the deceased's estate vide High Court Administration Cause No. 158 of 1972 and has since been in charge. That upon obtaining the grant, the 1st respondent in connivance with others including the 2nd, 3rd, and 4th respondents distributed the properties belonging to the estate of the deceased in utter disregard of the interest of the applicant and other beneficiaries, thereby giving a lion's share to the 2nd and the 3rd respondents.

The 2nd respondent neither identified nor separated the properties that belonged to the personal estate of the deceased from those that belonged to the institutional estate of the kingdom and thus has since used the mix-up to sell some properties that belonged to the estate of the deceased. The applicant and other beneficiaries who were minors at the time of the death of the deceased were completely ignored and did not benefit from the distribution of the 1st respondent despite several demands and reminders made. That in 1988, the 1st respondent fraudulently involved the 4th respondent who is not a beneficiary to administer part of the estate including land comprised in FRV 38 Folio 22, situated at Kyesiga and the same has been fraudulently used as security to secure loans from financial institutions.

Furthermore, the 1st respondent has since failed to file any comprehensive inventory and thus has since purported to renounce the grant and issue a certificate of no objection to

the 2nd, 5th, and 6th respondents to petition for a grant to them without rendering any comprehensive inventory even after lodgment of a caveat. Since the lodgment of the caveat, the 1st respondent is understood to have continued to intermeddle with the estate by paying out proceeds of compensation for Kyesiga land from UNRA. The applicant as well as other beneficiaries have since been deprived of their share of the estate and have suffered lack of necessities of life for which the respondents are jointly and severally liable.

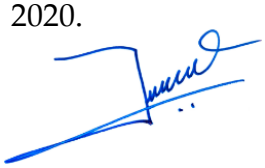
In their respective replies, the 1st respondent admits being an administrator of the deceased's estate but denied having intermeddled with the same. The 2nd respondent denied ever conniving with the 1st, 3rd, and 4th respondents to distribute the property of the deceased in utter disgrace of the applicant and other beneficiaries since the estate was at all material times under the administration of the 1st respondent. The 4th respondent denied ever being an administrator to the estate of the deceased but only got involved when he was given powers of attorney by the 1st respondent to distribute land comprised in FRV 38 Folio 22 situated at Kyesiga. The 4th respondent further denied having mortgaged the whole land as alleged by the applicant but rather part of the property which comprised his home. The 5th respondent denied ever managing the estate of the deceased save for the fact that she as well as the 2nd and 6th respondents were issued with a certificate of no objection to apply for letters of administration.

Grounds of the application

The applicant laid out the grounds upon which the application is premised in his affidavit in support, and they state as follows.

1. When the above suit came up for hearing on the 23rd of May 2019, this court directed the parties to file a joint scheduling memorandum, trial bundles and witness statements.

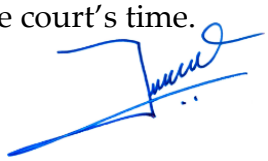
2. That the applicant duly filed his witness statements as had been directed by the court on the 13th day of June 2019.
3. That on the 25th day of August 2019 when the matter came up for hearing, the 1st respondent was directed to deliver copies of the will to this court and the land titles of the estate of the deceased.
4. On the 24th of September 2019, the court further gave directions to the 1st respondent to hand over the certificate of title to the other respondents by the 31st day of October 2019.
5. That because the 1st respondent had not complied with the court's directive of 24th September 2019, on the 22nd of January 2020, when the matter came up for hearing, the suit was adjourned to the 24th of February 2020 to enable the 1st respondent to appear in court with the certificates of title.
6. On the 24th of February 2020, the applicant was undergoing treatment at All Saints Medical Center Gayaza where he had been admitted due to hyperglycemia sickness that rendered him unable to move, and as a result, he could not attend court. **(Copies of the medical records marked "A" and "B" respectively are attached)**.
7. That the applicant entrusted his lawyer, Daniel Byaruhanga who was in personal conduct of the matter to appear in court on his client's behalf.
8. That the applicant tried to reach his lawyer on the 24th of February 2020 but could not reach him.
9. That the applicant was later informed by the 5th respondent that the suit had been dismissed for want of prosecution.
10. That the applicant's suit was dismissed due to the negligence of his former lawyer counsel Daniel Byaruhanga who failed to appear in court on the 24th of February 2020.



11. That the applicant has always attended the court sessions each time the suit was called up for hearing and that he has always been ready and willing to have the matter prosecuted to its logical conclusion.
12. That the suit raises serious issues relating to the intermeddling, mismanagement, and unequal distribution of the estate of the deceased by the respondents that this court should investigate and have the same determined on its merits.
13. That the respondents will not be prejudiced in any way if this application is granted.
14. That it is just and equitable that the court grants this application to set aside the dismissal order and reinstate Civil Suit No. 0037 of 2016.

In reply, only the 1st and 4th respondents deponed their respective affidavits. Mr. Robert Bogere, the **Assistant Administrator General,** deponed an affidavit in reply on behalf of the 1st respondent stating.

1. That the 1st respondent associates himself with the averments in the affidavit in reply to the 4th respondent that the application is misconceived, a waste of court's time, vexatious, and brought after undue delay.
2. That the matters in the suit sought to be reinstated are res judicata since this honorable court made orders that the Administrator General produce the certificates of title in his possession.
3. That the 1st respondent produced the same titles in court and the court directed that a photocopy be made and given to both the plaintiff/ applicant and the respondents.
4. That this court sitting as the Family Division in Makindye, Kampala, has already issued orders and made a decision that makes the applicant's civil suit moot and a waste of the court's time.



5. That the applicant's suit raises issues of accountability by the 1st respondent but all those were handled and disposed of in Civil Suit No. 140 of 2018 (Family Division, Kampala) and in HCT-12-CV-MA-0024/2016 (at Masindi) wherein the applicant was present and participated in the proceedings.
6. Under HCT-12-CV-MA-0024-2016, this honorable court issued the Administrator General with a limited grant of letters of administration to manage only the estate of the property at Kyesiga.
7. That under HCT-12-CV-MA-0024-2016, this honorable court directed the Administrator General to take all beneficiaries as well as the court through the final accounts and distribution of the estate, which was done to the satisfaction of the court and all beneficiaries.
8. That there must be an end to litigation and the 1st respondent intended to raise a preliminary objection that the suit sought to be reinstated was brought more than 40 years after the death of the father of the applicant herein; contrary to the law of limitations.

The **4th respondent** also deponed an affidavit in reply stating.

1. That the 4th respondent shall raise preliminary objections to the effect that.
   a. This application abated as provided under the civil procedure rules as the applicant failed to serve the same on the respondents within 21 days without being granted an extension of time to serve out of time.
   b. This application was filed after unreasonable delay, having been filed on the 21st of May 2021, and seeks to set aside an order issued in February 2020.
   c. The suit sought to be reinstated has since been overtaken by events.
   d. That the application is frivolous, has no merit, and merely seeks to waste the court's time, thus ought to be dismissed with costs.

2. That based on the advice of his lawyers, this application was filed on the 21st day of May 2021, endorsed by the registrar on the 1st day of June 2021, and was served unto the 4th respondent's lawyers on the 16th of December 2022 which is almost two years later.
3. That the applicant has been negligent in filing this application seeking to set aside an order for February 2020 and that there has been an unreasonable delay in applying.
4. That on many occasions when the suit would come up for hearing, the applicant had a habit of missing court days which accounted for the delayed conclusion of the matter.
5. That the applicant's claim of the negligence of his lawyers is baseless as the applicant was never interested in the prosecution of his suit and he was notorious for missing court dates and seeking adjournments as the court record shall reflect.
6. That the suit was overtaken by events due to the execution of a consent judgement in another case affecting the same subject matter, vide Civil Suit No. 140 of 2018 in the High Court Family Division. **A copy of the consent judgment is marked as "A"**
7. That before execution of the consent, the court (Family Division) had specifically directed that the applicant be a party to the same because within those proceedings we had intended to settle all the disputes concerning the estate of the late Sir Tito Winyi Gafabusa.
8. That the suit the applicant seeks to reinstate was challenging the grant of letters of administration to the 2nd, 5th, and 6th respondents, which the applicant eventually agreed to vide paragraph 4 of the consent that was entered at the family division.
9. That in specific reply to paragraph 3 of the applicant's affidavit, the prayers contained in the amended plaint were essentially addressed and overtaken by execution of the consent judgement.

10. That having executed the consent judgement in the family division, when the matter came up, the 1st respondent was only to hand over the certificates of title for the remaining properties of the estate, to the new administrators and put an end to everything entirely.

11. That in reply to paragraph 8, on the dates of 24th September 2019, 22nd January 2020, and 24th February 2020, the 1st respondent was on both occasions in court more than ready to hand over to the three newly appointed administrators the certificates of title for the remaining properties listed in the petition for letters of administration.

12. That the applicant's lawyer was aware of all the circumstances of both cases Civil Suit 140 of 2018 and Civil Suit No. 37 of 2016 as he was representing the 5th and 6th respondents then.

In rejoinder, the applicant stated as hereunder.

1. That despite the application being filed on the 21st day of May 2021, and endorsed on the 1st day of June 2021, the same was never given a hearing date till the 8th day of December 2022 when it was fixed for hearing on the 31st day of January 2023.

2. That based on the advice of the applicant's lawyers, they on several occasions approached the court registry for a hearing date but they were informed that the main suit file was missing and as such the application could not be fixed without the mother file. **(A copy of the letter requesting for the matter to be fixed is attached and marked "D").**

3. That it was not until the 8th of December 2022 that the mother file was eventually discovered, the hearing date was issued for 31st January 2023 and issued to the respondents on 16th December 2022.

4. That based on the advice of the applicant's lawyers, the preliminary objection raised by the 4th respondent that the suit sought to be reinstated has been

overtaken by events, was already dealt with, and dismissed by this honorable court on the 24th of September day of 2019 to which an appeal has never been filed by the respondents.

5. That in response to paragraphs 7 and 8 the applicant has on all occasions appeared in court save for the 24th day of February 2020 when he did not appear and instructed his lawyer Mr. Daniel Byaruhanga to appear on his behalf.
6. That the court record clearly shows it is the respondents who were never consistent in attending court hearings, hence the delayed conclusion of the matter.
7. That High Court Civil Suit No. 140 of 2018 was filed by the 5th and 6th respondents against the 4th respondent and the applicant was not a party and thus the consent judgment did not dispose of the issues raised in the current suit against the respondents.
8. That the 4th respondent's assertions are without merit and are simply raised as a desperate attempt to avoid being held accountable for his misdeeds to the estate of the late Sir Tito Winyi Gafabusa.
9. That to date the 1st respondent has never handed over the said titles to the 2nd, 5th, & 6th respondents as alleged and no accountability as to how the estate was distributed has ever been provided by the 1st respondent.
10. That to date even the current administrators cannot administer the estate since the 1st respondent has never given an account of how the estate was administered ever since he was appointed administrator of the estate of the late Sir Tito Winyi Gafabusa.

Representation

The applicant was represented by Counsel Amos Mushaija of M/s Kakuru & Co. Advocates whereas the 1st respondent was represented by Robert Bogere, and the 4th respondent was represented by Counsel Semambo David of M/s Mugarura, Kwarisiima

& Co. Advocates. All parties were directed to file their respective written submissions which have been considered herein. However, upon perusal of the pleadings and other court documents therein, it is only the applicant who filed his written submissions.

Applicant's submissions

Counsel for the applicant submitted that in opposition to the application, the 1st and 4th respondents raised preliminary objections which he wished to first deal with before proceeding into the merits of the application. Counsel raised four preliminary objections which I shall state hereunder and for the avoidance of repetition, their submissions have been considered in this court's final analysis of this application. The preliminary objections raised therefore include.

1. *The application abated as provided under the civil procedure rules, as the applicant failed to serve the same on the respondents within 21 days and has not been granted an extension of time to serve out of time.*
2. *The application was filed after unreasonable delay, having been filed on the 21st day of 2021, and seeks orders to set aside an order issued in February 2020.*
3. *The suit to be reinstated has since been overtaken by events/ the matters in the suit which is sought to be reinstated are res judicata.*
4. *The suit sought to be reinstated was brought more than 40 years after the death of the father of the applicant contrary to the law of limitation.*

Submissions on the merits of the application.

Counsel based his submissions on one issue namely, ***Whether the applicant has shown sufficient cause to warrant grant of the orders sought.***

Counsel submitted that the law on setting aside a dismissal order and reinstatement of a suit is provided for under Order 9 rule 23 of the Civil Procedure Rules which requires the applicant to satisfy the court that there was sufficient cause for non-appearance when the suit was called on for hearing. Counsel added that once sufficient cause is shown to the satisfaction of the court, this rule makes it mandatory for the court to make orders setting aside the dismissal upon such terms as to costs or otherwise as the court thinks fit. Counsel stated that for an application under this rule to succeed, an applicant must satisfy the court that there was sufficient cause for non-appearance, that is; that he had an honest intention to attend the hearing and did his best to do so, and he was diligent in applying.

Counsel further submitted that the term sufficient cause has received extensive adjudication on its meaning and is usually used interchangeably with the phrase "good cause" as explained in several authorities. Counsel relied on the case of ***Nicholas Roussos Vs Gulam Hussein Virani and Another; Supreme Court Civil Appeal No. 09 of 1993*** where the Supreme Court held that ……. courts have attempted to lay down some of the grounds or circumstances which may amount to sufficient cause. A mistake by an advocate though negligent may be accepted as sufficient. Ignorance of procedure by an unrepresented defendant may amount to sufficient cause. Illness by a party may also constitute sufficient cause. But failure to instruct an advocate is not sufficient cause. Counsel also relied on other several authorities which I have herein been considered.

Counsel further submitted that in the instant case, the applicant has demonstrated in his affidavit in support that he was unable to attend court on the 24th day of February 2020 when the suit was called for hearing due to illness where he lost his limb and instructed his former lawyer Mr. Daniel Byaruhanga who did not appear and didn't also inform the applicant. Counsel added that the applicant only got to learn about the dismissal of the case from the 5th respondent hence the dismissal of the suit was not the fault of the applicant, but it was purely the fault of his lawyer with whom he had entrusted to handle

the case on his behalf. Counsel argued that from the court record, it is demonstrated that from the onset of the suit, the applicant has never missed any court hearing indication that the applicant has always been willing to have the suit prosecuted to its logical conclusions.

Counsel submitted that the applicant honestly intended to attend the hearing of Civil Suit No. 0037 of 2016 on the 24th day of February 2020 but was deprived from doing so as he was undergoing treatment at All Saints Medical Center Gayaza but entrusted his lawyer a one Mr. Daniel Byaruhanga who was in personal conduct of the matter to appear in court on his behalf. Counsel added that the act of the applicant's former lawyer shouldn't be visited upon the applicant since the nature of the case alone raises triable issues relating to the intermeddling mismanagement and unequal distribution of the estate of the late Sir Tito Winyi Gafabusa by the respondents.

Counsel relied on the case of ***Asaba Charles and Another Vs Kafeero Andrew and Another*** where it was noted that the administration of justice should normally require that the substance of the dispute should be investigated and decided on the merits and any errors and lapses should not necessarily debar a litigant from pursuing his rights. In conclusion, counsel stated that given the nature of Civil Suit No. 0037 of 2016, it ought to be heard and determined on its merits and as such, it is in the best interest of this court to set aside the dismissal order and reinstate the said suit.

Court Analysis

Preliminary objections

Whereas the 4th respondent intended to raise preliminary objections as per paragraph 3 of his affidavit in reply, he did not file any submissions to that effect to espouse the alleged preliminary objections. However, counsel for the applicant made his arguments

about the would-be raised preliminary objections and I believe that it would be prudent to consider them at the earliest possible time.

1. ***The application abated as provided under the civil procedure rules, as the applicant failed to serve the same on the respondents within 21 days and has not been granted an extension of time to serve out of time.***

It was the 4th respondent's averment in paragraph 5 of his affidavit in reply that the application was filed on the 21st day of May 2021 and endorsed by the registrar on the 1st day of June 2021 hence it had to be served unto him within 21 days from the date of endorsement by the registrar but that he was served with the application on the 21st day of December 2022. On the other hand, counsel for the applicant submitted that despite the application being filed on the 21st day of May 2021 and endorsed on the 1st day of June 2021, it was never given a hearing date until the 8th day of December 2022.

Order 5 rule 1(2) of the Civil Procedure Rules provides for a general rule that.

> ***"(2) Service of summons issued under sub-rule (1) of this rule shall be effected within twenty-one days from the date of issue; except that the time may be extended on application to the court, made within fifteen days after the expiration of the twenty-one days, showing sufficient reasons for the extension".***

Whereas ***Order 5 of the Civil Procedure Rules*** provides for summons and service of summons of suits in general and that in defining a suit, it constitutes a notice of motion.

It is crucial to note that ***Order 52 of the Civil Procedure Rules*** provides for motions and other applications specifically. It is not in doubt that a notice of motion is a pleading and that if instituted constitutes a suit in general. What is in contention is the nature and mode of service of the summons where one is instituted. A notice of motion by its nature constitutes the following.

"NOTICE OF MOTION

Under …….

TAKE NOTICE this honorable court shall be moved on the ……. Day of ……. at ……. O'clock in the fore/afternoon or soon thereafter by counsel for the applicant who will be heard on the application for orders that;"

It is also not in dispute that a notice of motion is a suit, service of summons must be effected within a period of 21 days from the date it is endorsed by the registrar. However, by its nature, its endorsement by the registrar should be done after a hearing date has been extracted for when the matter in contention is coming up for hearing. In cases where a registrar endorses a notice of motion before extracting a hearing date, I believe leads to injustice against the applicant in whose favour it is being filed. In the case of ***Nabanjala v Nabukalu; (Miscellaneous Application No. 0250 of 2015) [2016] UGHCFD 17 (15 July 2016)*** it was held that.

> ***"In the given premises, the applicant's failure to serve the respondent within the time stipulated under Order 5 rule 1(2) of the CPR was not of her making. In my opinion, Order 5 rule 1(2) of the CPR and all the cases cited by the respondent's counsel would not be appropriate in the circumstances of this case where the file got misplaced and where the hearing date of the application was fixed long after the same had been signed and sealed by the Registrar of the court. The omissions of the court should not be visited on the litigant."***

Paragraphs 3, 4, 5, and 6 of the affidavit in rejoinder of the applicant indicate that having applied, the mother file could not be seen to fix the matter for hearing despite the several visits by the counsel of the applicant to the court registry. In this instance, blame cannot be vested on the litigant who diligently filed his application only to be endorsed by the

registrar before the extraction of a hearing date. This preliminary objection is therefore overruled.

2. ***The application was filed after unreasonable delay, having been filed on the 21st day of 2021, and seeks orders to set aside an order issued in February 2020.***

According to the 4th respondent under paragraph 6 of the affidavit in reply, claimed that the applicant was negligent in filing this application seeking to set aside an order of February 2020 in an unreasonable manner. In response, the applicant submitted that there was no unreasonable delay in applying but rather an act of God where the period when the matter was dismissed was the same period that the whole country was under lockdown due to the COVID-19 pandemic.

Unreasonable delay means the period within which a party to a suit must act. Although it was claimed by the 4th respondent that there was an unreasonable delay by the applicant in bringing this application, I think not. Based on the circumstances elaborated by the applicant through his evidence, an unforeseen pandemic cannot amount to an unreasonable delay. This preliminary objection too is overruled.

5. ***The suit to be reinstated has since been overtaken by events and the matters in the suit which is sought to be reinstated are res judicata.***

Res judicata is defined under ***Section 7 of the Civil Procedure Act*** to mean.

"7. Res judicata.

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in

which the issue has been subsequently raised, and has been heard and finally decided by that court."

The 4th respondent under paragraph 9 of his affidavit in reply stated that the suit sought to be reinstated was overtaken by events due to the execution of a consent judgment in another case affecting the same subject matter vide Civil Suit No. 0140 of 2018 in the High Court Family Division. In paragraph 11, the 4th respondent deponed that the suit the applicant seeks to reinstate was challenging the grant of letters of administration to the 2nd, 5th, and 6th respondents which the applicant agreed to, vide the consent that was entered at Family Division.

In response, the applicant's counsel submitted that civil suit no. 0037 of 2016 formerly HCCS No. 0049 of 2013 against the respondents raises several issues among others including; intermeddling in the deceased's estate by the 4th respondent, unequal distribution of the deceased's estate, and failure to give the applicant his share of the estate, failure to give a comprehensive account of the administration of the estate by the 1st respondent with the intent of depriving the beneficiaries of their share of the estate, renunciation of the administration of the estate by the 1st respondent and subsequent appointment of the 2nd, 5th and 6th respondents without giving accountability of the distribution of the estate by the will of the late Tito Winyi Gafabusa, fresh proof of the original will of the deceased in respect to personal properties owned by the deceased, among others.

Counsel for the applicant had also argued that the 1st respondent had never handed over the said titles to the 2nd, 5th, and 6th respondents as alleged and no accountability showing how the estate was distributed has ever been provided by the 1st respondent. Counsel also added that the 4th respondent raised this similar issue before his Lordship Justice Wilson Masalu Musene in his ruling dated 23rd day of 2019 where he overruled the

preliminary objection and further held that the suit should proceed to be heard and decided on its merits.

I have perused the record of proceedings and noted that the preliminary objections raised by the 4th respondent were the same preliminary objections he raised before this court on the 24th day of April 2019 before Justice Wilson Masalu Musene who overruled it and held that.

> ***"The main point of contention by the plaintiff is that since the 1st defendant/1stRespondent by a limited grant of the letters of administration again administers the estate of the deceased, then he could not be said to have accounted. Secondly, the 4th respondent colluded and participated in making sure that the 1st defendant/ 1st respondent regains the administration of the estate under the limited grant, then the 1st defendant cannot be said to have renounced. The other factor was that there was no equal distribution of the estate and that the 4th defendant/4th respondent allegedly intermeddled in the estate of the deceased by fraudulently obtaining powers of attorney from the 1st defendant/ 1st respondent.***
>
> ***The above allegations by the plaintiff are very grave and serious and need to be supported by evidence if any. They cannot be disposed of by way of preliminary objection……the preliminary objections are accordingly overruled. Main case to proceed on the merits."***

I believe that the above excerpt is persuasive and self-explanatory. It is thus on this basis that the preliminary objection is overruled.

6. ***The suit sought to be reinstated was brought more than 40 years after the death of the father of the applicant contrary to the law of limitation.***

Counsel submitted that it is trite that the law on limitation will be applicable under the analysis of the pleadings and the prayers made in the suit for the administration of an

estate. Counsel concluded that it is until the 1st respondent files the final accounts with the probate court, which accounts must be approved by the court, that he remains liable to be sued by beneficiaries for either revocation, declarations for breach of statutory duty, or trust as well as recovery of the held property.

Section 20 of the Limitation Act provides that.

> ***"20. Limitation of actions claiming personal estate of a deceased person.***
>
> ***Subject to section 19(1), no action in respect of any claim to the personal estate of a deceased person or any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued, and no action to recover arrears of interest in respect of any legacy or damages in respect of those arrears shall be brought after the expiration of six years from the date on which the interest became due".***

Section 19(1) of the Limitation Act states.

> ***"19. Limitation of actions in respect of trust property.***
>
> ***(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—***
>
> ***(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or***
>
> ***(b) to recover from the trustee trust property or the proceeds of the trust property in the possession of the trustee, or previously received by the trustee and converted to his or her use".***

In the case of ***Katende Sempebwa and Co Advocates & Anor v Nabacwa & 3 Ors (HCT-14-LC-MA 72 of 2019) [2019] UGHCCD 210*** it was held that.

"Given the above, it is my considered opinion that reference of Section 19(1) of the Act provides for Limitation of action in respect of claims to the personal estate of the deceased person or any share of or interest in such estate whether under a will or intestacy, was intended to protect the rights of the beneficiaries against administrators of estate or holders of letters of probate who do manage estate property in trust for the beneficiaries.

Premised on the fact that Administrators of estates of deceased persons whether under probate/Will or intestacy automatically fall under trust law and are accountable to the beneficiaries and the courts that issued them with the grant or letters of probate".

The above-mentioned provisions of the law as well as the cited authority are clear. The matter beforehand involves letters of administration which were granted to the 1st respondent to hold among other duties the estate of the late Sir Tito Winyi Gafabusa on behalf of the beneficiaries. And that while holding such letters certain issues arose because of the alleged mismanagement and unequal distribution as laid out in the facts of this case. It would not be prudent to claim that this issue is one which necessitates to be barred by limitation just because it has been brought 40 years or more by one of the beneficiaries who is the applicant in this case. As such, I am inclined to overrule this preliminary objection.

Merits of the application.

Having considered all the submissions made by the applicant and the respective pleadings of the applicant, 1st respondent, and the 4th respondent, I shall proceed to determine this matter on the following issues as hereunder.

Whether this application is competent before the court.

It is on the court record that the Notice of motion filed by the applicant was brought under Order 9 rule 23 (1), Order 52 rule 1 & 3 of the Civil Procedure Rules as amended, section 98 of the Civil Procedure Act cap 71 and section 33 of the Judicature Act Cap 13 as amended. ***Order 9 rule 23 (10 of the Civil Procedure Rules states.***

"23. Decree against plaintiff by default bars fresh suit.

(1) Where a suit is wholly or partly dismissed under Rule 22 of this Order, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he or she may apply for an order to set the dismissal aside, and, if he or she satisfies the court that there was sufficient cause for nonappearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal, upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit".

Rule 22 of the Civil Procedure Rules states.

"22. Procedure when the defendant only appears.

Where the defendant appears, and the plaintiff does not appear, when the suit is called on for hearing, the court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part of it, in which case the court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder."

It is also on the court record that on the 24th day of February 2020 when Civil Suit No. 0037 of 2016 came up for hearing, the trial judge then held that.

"In the absence of the plaintiff, the suit is dismissed for want of prosecution with costs."

Whereas no provision of the law for the dismissal was indicated by the trial judge then, the facts leading up to the dismissal indicate that the dismissal was a result of the nonappearance of the plaintiff and thus one can assume that it was under Order 9 rule 22 of the civil procedure rules whose remedy is embedded under rule 23 of the civil procedure rules as quoted above. Hence the application is competent before this court.

Whether the applicant has shown sufficient cause to warrant a reinstatement of civil suit no. 0037 of 2016.

Sufficient cause also known as good cause has been defined as per the Black's Law Dictionary 8th edition to mean, ***"The burden placed on a litigant usually by court rule or order to show why a request should be granted or an action excused".*** Several authorities have discussed the considerations that constitute sufficient cause for the non-appearance of a litigant in court on the day his or her case is called for a hearing.

In the case of ***Sam Aniagyei Obeng & Another Vs MTL Real Properties Ltd; HCMA No. 0198 of 2011*** where a court of appeal case of ***National Insurance Corporation Vs Mugenyi & Co. Advocates*** was quoted which established that,

> ***"The main test for reinstatement of a suit was whether the applicant honestly intended to attend the hearing and did his best to do so. Two other tests were namely the nature of the case and whether there was a prima facie defence to that case…."***

Concerning the facts of the present case, the applicant in paragraphs 9, 10, and 19 of his affidavit in support of the application states that he was unable to attend court on the 24th day of February 2020 because of illness for which he was undergoing treatment at All Saints Medical Centre Gayaza as per annexures "A" and "B". Upon perusal of the annexures, they indicate that the applicant was undergoing treatment because of a hyperglycemic diabetic ulcer.

Despite the applicant's illness, he instructed his lawyer, Mr. Byaruhanga Daniel, who was in personal conduct of the matter, to appear in court that day on his behalf but failed to do so. Even upon promising to fix the situation after the lockdown period, the applicant's lawyer then failed to apply for reinstatement of the suit until instructions were given to another advocate by the applicants. It is also noted that it was not until further instructions were given to other lawyers that the applicant was able to know the status of his matter.

In response, the 4th respondent indicated in paragraphs 7 and 8 of his affidavit in reply that the applicant had a habit of missing court days which accounted for the delayed conclusion of the matter from 2013 to 2016. The 4th respondent also rebutted the applicant's claims of negligence of his lawyers as being baseless. However, in his rejoinder, the applicant denied the claims of the 4th respondent and confirmed his reasons as to why he was not in court attendance on the 24th day of February 2020.

Considering the above evidence adduced as well as the respective annexures attached on the court record, I have noted that ever since this matter was transferred from the family division court in Kampala to Masindi High Court hearing of the same began on the 9th of November 2016. On all occasions when the matter came up for hearing that is; ***9th November 2016, 29th March 2018, 24th February 2019, 23rd May 2019, 26th August 2019, 24th September 2019, 31st October 2019, 28th November 2019, 17th January 2020, 22nd January 2020***, and ***24th February 2020***, the applicant was absent on only three occasions that's to say ***29th March 2018, 28th November 2019, and 24th February 2020.*** In my view, this does not in any way indicate that a party is in the habit of missing court hearings since he or she can make an appearance either by himself or herself or through his counsel.

Furthermore, an illness of a litigant has been considered to constitute a sufficient cause in matters such as the current one and according to the applicant, on the 24th day of February 2020 when the matter was called for hearing, the applicant was ill as per the

patient discharge form dated 27th day of February 2020 and the medical form dated 24th day of February 2020 from All Saints Medical Centre, Namavundu-Gayaza. The applicant, having been unable to attend, instructed his lawyer to appear on his behalf but he did not, something that cannot be accounted for by the applicant.

In the result, the applicant has proved on a standard of probabilities that his non-appearance in court on the 24th day of February 2020, was not of his own making but that it was due to an illness and negligence of his counsel for not appearing in court as indicated above. The evidence provided above has indicated that the applicant intended to appear in court and tried his best to instruct his lawyer to appear on his behalf. In the premises, the Order dismissing Civil Suit No. 0037 of 2016 (formerly No. 0049 of 2013), is set aside and Civil Suit No. 0037 of 2016 is reinstated.

That being the position, this application is allowed.

Each party shall bear its own costs.

I so order.

DATED and Delivered on this 29th Day of February 2024.

Isah Serunkuma

JUDGE