

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT JINJA**

**ORIGINATING SUMMONS NO. 03 OF 2013**

5

**1. ZALWANGO ELIVASON  
2. NAKALEMA MARIAM ..... PLAINTIFFS  
(Administrators of the estate of late  
Basima and Waluke)**

10

**VERSUS**

**1. DOROTHY WALUSIMBI  
2. HENRY BIJJUMUKO ..... DEFENDANTS  
(Administrators of the estate of late  
Evairini Alisi Zalwango & Mary Nakalema**

15

**BEFORE: THE HON. JUSTICE GODFREY NAMUNDI**

20

**RULING**

This matter is brought by way of Originating Summons under Order 37 Rules 1 and 8 of the Civil Procedure Rules and Section 140 (2) of the Registration of Titles Act and Section 98 of the Civil Procedure Rules.

25

The Plaintiffs/Applicants claim to be Administrators and Beneficiaries of the Estates of the late Basima and Waluke of Kyetume and Wabulongo, Nagojje, Mukono District.

30

The Defendants/Respondents claim to be Administrators of the Estates of late Princess Mary Nakalema formerly of Kasubi and Evairini Alisi Zalwango formerly of Mulungu Salama, Wakiso District and have lodged a caveat on

the land comprised in Kyaggwe Block 132, Plot 2, claiming interest therein, in their capacity as Administrators of the Estates for which they hold Letters of Administration.

5 Right from the start, it is clear that both parties have interest in the said property for which each party claim to have Letters of Administration.

For all intents and purposes therefore this is a very contentious matter.

10 The Plaintiffs/Applicants seek Court to determine the following questions:

(1) Whether the Defendants have caveatable interest in the suit land of late Basima and Waluke.

(2) Whether a Court Order should not issue to the Registrar of Titles Mukono to vacate the Caveat lodged by the Defendants on the suit land.

15 (3) Costs of the suit.

When this matter came up for hearing, due to the constraints of time, this Court directed the parties to file written submissions and ensure service to each party by the other with the whole process over by 31/01/2014.

20

The record shows that the Plaintiffs filed theirs on 27/1/2014 while the Defendants did so on 31/1/2014 (According to the endorsements of receipt on the file copies).

25 I have also seen a letter by Counsel for the Plaintiffs dated 3/2/2014 claiming that by end of 31/1/2014 the Defendants had not filed their submissions.

However I have found both submissions on record and received by the same person as per the endorsements on receipt.

- 5 There is however a rejoinder to the Defendants' submissions which has been filed on 4/2/2014.

I have looked at the pleadings on record and the submissions.

- 10 The Defendants have in their submissions raised three Preliminary objections which in my view will determine the direction of this matter and especially as to whether it is competently before this Court.

15

They are:

- (1) That the affidavit in rejoinder should be struck out/off for having been filed out of time without leave of court and is therefore incompetent and bad in law.

20

- (2) That the 1<sup>st</sup> Plaintiff has not filed a supporting affidavit and her claim is consequently incompetent.

25

- (3) That proceedings by way of Originating Summons which relies solely on affidavit evidence, in light of allegations of fraud by both parties is not the proper procedure to dispose of this matter.

Under Order 6 Rule 28 CPR, the Court may dispose of points of law that may be raised before the hearing. While the first two preliminary points of law/objections are valid, I have opted to deal with objections No.3 which puts into question the procedure adopted for bringing a contentious matter for determination by way of Originating Summons. Determining this point will resolve the issue of whether the matter is competently before Court or not and therefore render the other objections either necessary or not.

It has been submitted that Order 37 of the CPR is intended to solve simple matters which do not require investigations and that should only be used in situations where there are no substantial disputes as to facts but rather on legal consequences of the set of facts. **Misc. Application No. 221/2011 Janet Ntanya Vrs. Saida Sebbaduka & 2 Others** was cited. Therein, it was held that Originating Summons deal with matters which are not contentious.

15

Order 37 Rule 1 provides that the Executors or Administrators 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 creditor, devisee, legatee, heir or legal representative of a deceased person – under the terms of any deed or Instrument or as claiming by assignment.....may take out 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.....of any of the following questions:-

25 (The list from (a) to (f) as laid out is not relevant to this application).

(g) The determination of any question arising directly out of the administration of the Estate or Trust.

The Plaintiffs/Applicants did not specify under which paragraph of Rule 1 they are proceeding but I have assumed that they must be relying on paragraph (g) which gives wide coverage and may also cover the specific questions laid out in the originating Summons for determination.

The affidavit in support deposed by Nakalema Mariam then delves into the details of the dispute that culminated into the Defendants filing a Caveat on the suit property and hence making it impossible for the Plaintiffs to make any transactions on the suit property.

This in my view is a very contentious matter that can only be resolved by a host of evidence by both parties other than affidavit evidence first to determine who of the parties are the rightful Administrators of the Estate.

Secondly who are the genuine decedants/beneficiaries as each party have names that are so similar and yet different and from the affidavits each obtained Letters of Administration in different sets of circumstances.

I have had the benefit of looking at various authorities on commencement of proceedings by originating Summons as opposed to ordinary Plaintiff.

In a Zanzibar High Court case, reported in the **Eastern Africa Law Reports**, viz; **Kulusumbai Vrs. Abdul Hussein (1975) EA 708**. It was held that the

procedure by Originating Summons was intended to enable simple matters to be settled by the Court without the expense of bringing an action in the usual way, not to have Court determine matters which involve a serious question. Similarly in **Nakabugo Vrs. Serunjogi (1981) HCB 58**, it was held that it is  
5 trite law that when disputed facts are complex and involve a considerable amount of oral evidence, an Originating Summons is not the proper procedure to take.

Originating Summons are intended to enable simple matters without the expense  
10 of bringing an action in the usual way but are not meant to determine matters which involve a serious question.

It is meant to be a simple and speedy procedure and its merits are based on the fact that there are no pleadings involved or in general no witnesses the questions  
15 for decision being raised directly by the summons itself and the evidence given by affidavit.

The above position has been applied in other cases for example:

1. **Vincent Kawunde t/a Oscar Associates VRs. Damian Kato – HCCS-  
20 OS-04/2007.**
2. **Nagem Vrs. Semakula – Civil Suit (OS) 08/2013**

The suit sought to be resolved by the instant Originating Summons is based on factual controversy requiring evidence much more comprehensive than the  
25 supporting affidavits filed herein.

In the circumstances, it is my decision that the Plaintiff subject to time limitation and other aspects of procedure file an ordinary suit to claim and prove his rights to the estate.

- 5 The objection regarding appropriateness of the Originating Summons is accordingly upheld.

That being the case, it is not necessary to deal with the other objections neither is it in order to go into the merits of the questions sought to be determined here  
10 in.

The originating Summons is accordingly dismissed under Order 37 rule 11 CPR. The dismissal of the Originating Summons is not a dismissal of the merits of the suit but on the appropriateness of the procedure.

15

Costs are awarded to the opposite party.

**Godfrey Namundi**

20 **Judge**

**11/02/2014**