

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL DIVISION**

**MISCELLANEOUS APPLICATION No. 373 OF 2017**

*(Arising from Miscellaneous Application No.166 of 2017  
(Arising from Civil Suit No. 102 of 2009))*

1. JOSEPH BAMWEBEHIRE ..... APPLICANTS  
2. JACK NDYAHABWE }

**VERSUS**

1. NAREEBA DAN  
2. TWIJUKYE RICHARD  
3. BIRYAHU VICENT  
4. KOBUSINGYE TEOPISTA ..... RESPONDENTS  
5. BYAMUKAMA  
6. BAHIREIRWA ATHANASI  
7. KAMUSIIME ROBERT }

**BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA**

**RULING.**

This is an application by the applicants to be added as respondents in Miscellaneous Application No. 166 of 2017. It is brought under Section 33 of the Judicature Act cap13, section 98 of the Civil Procedure Act Cap 71, order 1 rule 10 (2) and order 52 rules 1 & 3 of the Civil Procedure Rules.

The grounds for the application are briefly stated in the application and supporting affidavits as follows;

- i) The applicants are plaintiffs in civil Suit No.102 of 2009.
- ii) That the respondents have filed Miscellaneous Application No. 166 of 2017 to be added as plaintiffs in Civil Suit No. 102 of 2009 which was completed on the 22<sup>nd</sup> August 2013.
- iii) That the applicants being the lead plaintiffs are not party to Miscellaneous Application No. 166 of 2017 yet the said application substantially affects their interests as plaintiffs in Civil Suit No. 102 of 2009.

- iv) That it would be in the interest of Justice that the applicants be allowed and be given an opportunity to be heard on the allegations raised against them by the respondents in Miscellaneous Application No. 166 of 2017

The application is supported by the affidavit of the 1<sup>st</sup> applicant dated 6<sup>th</sup> January 2017 and a further affidavit in support of application dated 28<sup>th</sup> June 2017. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> respondents filed affidavits in reply. The 6<sup>th</sup> respondent didn't file any reply.

This court allowed the parties to file written submissions. The applicants filed on 5<sup>th</sup> July 2017, the respondents filed 14<sup>th</sup> July 2017 and the applicants submitted in rejoinder on 20<sup>th</sup> July 2017.

Mr. Mamawi appeared for the applicants while Mr. Mpumwire appeared for the respondents.

In summary, the applicants' case is that they are representatives by representative order granted to them to file a suit on behalf of 3942 former evictees of Mpokya, Kabarole District which they filed and entered a consent where each evictee was entitled to UGX.6,000,000/=. That therefore after the case was completed, there should not have been any further proceedings but the respondent filed an application to be added as parties to the suit where the consent judgment was made. That for that reason they too are entitled to be added as parties to protect their interests.

Six respondents, to wit, Nareeba Dan, Kamusiime Robert, Twijukye Richard, Kobusingye Teopista, Byamukama, and Biryaho Vincent opposed the application and each filed an affidavit in reply. The respondents claim that the applicants herein are not beneficiaries under ***High Court Civil Suit No. 102 of 2009***. That the execution proceedings in the said suit are not complete and the continued delay in realizing the fruits of judgment has caused the respondents injustice and loss. That the applicants are not affected since they are not beneficiaries. That this application is an afterthought intended to frustrate the respondents' right to property. That the Attorney General who is a party to Miscellaneous Application No.

166 of 2017 has not been made a party to this application which makes it incompetent and moot.

The only issue in this case is whether or not in the circumstances of this case the applicants should be added as parties to the application?

Counsel for the applicants submitted that the application which the respondents filed made allegations against him in paragraphs 4-11 of the affidavit in support of the application in Miscellaneous Application No. 166 of 2017 sworn by the 1<sup>st</sup> respondent in this application. That these paragraphs show that if the applicants herein are not added as parties the application will be determined without the applicants being given an opportunity to defend themselves on allegations made against them. That the right to fair hearing is a non-derogable right and the applicants being the lead plaintiffs in Civil Suit No. 102 of 2009 and allegations of impropriety being made against them should be added as parties. That to deny a party a hearing should always be the last resort as per **National Enterprise Corporation Vs Mukisa Foods Ltd Civil Appeal No. 42 of 1997.** That the respondents having failed to apply to be joined as parties before or at the commencement of the Civil Suit No. 109 of 2009, they cannot seek to join as plaintiffs as they are stopped from applying to join the suit at this stage as court is already functus officio in the matter. For this submission counsel heavily relied on the case of **Goodman Agencies Ltd Vs Attorney General and Another Constitutional Petition No. 03 of 2008** where the issue was constitutionality of proceedings before court after the signing of a consent judgment on the 2<sup>nd</sup> September 2005. That the court held that the consent judgment was a constructive final judgement so the judge acted ***functus officio*** in joining ***Hassa*** to the settlement after that judgment. That ***'functus officio'*** means ***"Without further authority of legal competence because the duties of the original commission have been fully accomplished."*** That court should respect the finality of consent judgements except in cases fraud illegality or mistake. That the Goodman Agencies case is on all fours with the current case since the respondents are at this late stage seeking to be added as parties which cannot be done.

Counsel further submitted that Order 1 rule 8 (2) of the Civil Procedure Rules allows beneficiaries of a suit filed by representative Order to be added as parties, but this rule envisages a situation where the trial has not yet commenced. That this is further supported by Order 1 rule 13 of the Civil Procedure Rules. That these rules do not allow for a party to be added after trial. That paragraph 2 of the 1<sup>st</sup> respondent's affidavit in support of the application in ***Miscellaneous Application No. 373 of 2017*** annexure "AA" shows that the reasons why the respondents have brought the application seeking that the firm of Bashasha & Co. Advocates continue being their lawyers to pursue the claim for payment and have the proceeds of the judgment divided in several percentages to several persons is illegal. For this submission counsel relied on ***Attorney General Vs Goodman Agencies Miscellaneous Application No. 361 of 2015***. That this court at page 3 of the ruling held that advocates are not entitled to the fruits of a judgment. That advocates only act as agents in a given suit as long as they still have instructions. Further that advocates being in a case for a longtime does not entitle them to fruits of judgment. That in this case the said firm of Bashasha & Co. Advocates was awarded a taxed bill of costs already. That the resolutions were motivated by the fact that the applicants/plaintiffs withdrew instructions from Bashasha & Co. Advocates.

That even the agreement between the said firm of Bashasha & Co. Advocates and the respondents is illegal in as far as they are seeking to share in the proceeds of the claim at 16% which means that the remuneration agreement is champertous in nature so it is illegal and unenforceable and the 1<sup>st</sup> respondent cannot seek to enforce it. That the consent judgment was in respect of 3730 claimants but the resolution was signed by only 701 persons. Further that the applicants being the lead plaintiffs in ***Civil Suit No. 102 of 2009***, their presence is necessary to determine the real issues in ***Miscellaneous Cause No. 166 of 2017*** especially as to whether a party can seek to be added after judgment and the legalities regarding the said resolutions referred to by the respondents as this has a bearing on the claims of all the claimants represented by the plaintiffs/applicants.

For this submission counsel relied on the criteria laid down by Justice Eva Luswata that an applicant to be added as party must prove. This was in the case of ***Murisho & Ors Vs Kalisa Kalangwa Moses & Anor***. A party must be added if the addition would facilitate the determination of the real issues in the suit. Learned counsel also relied on ***Reliable African Insurance Vs National Insurance Corporation 1979 HCB*** per Odoki J.

Regarding the allegation by the respondents that the applicants are not beneficiaries under the same suit, counsel submitted that the applicants are the plaintiffs and decree holders and section 2 (d) of the Civil Procedure Act define a decree holder as a person in whose favour the decree has been passed or an order made capable of execution and includes an assignee of such decree or order. On the claim by the respondents that the proceedings are not yet complete counsel submitted that relying on the definition of a decree under section 2 (c) it is clear that the decree in Civil Suit No. 102 of 2009 was final. That the execution process is a differently completed matter and a step after judgment not a continuation of proceedings.

On the issue of not adding the Attorney General as party to this application counsel submitted that the Attorney General is not a necessary Party since the respondents in their application to be joined as plaintiffs only mention the Attorney General once. That this application can be disposed of without the Attorney General and so the Attorney General is necessary party it can add him as per its powers discussed in the case of **Goodman Agencies Ltd Vs Attorney General and Another Constitutional Petition No. 03 of 2008** by the Constitutional Court.

In conclusion counsel submitted that this court cannot add parties to a suit after judgment especially consent judgment as the court is functus officio. That the applicants are seriously prejudiced by the respondents being added as parties because from the evidence available on record, their sole purpose of being added as plaintiffs is to distribute the proceeds of the judgment to various persons which is both illegal and champertuous. That an illegality brought to the attention of court takes precedence over all pleadings. Counsel then prayed that this application be allowed.

In reply the respondents submissions were more focused on following the issues;

**1. Whether the applicants are necessary parties to Miscellaneous Application No. 166 of 2017 to warrant their addition as parties?**

**2. What remedies are available to the parties?**

On issue 1 the respondents' counsel submitted that the respondents filed the application to be added to Civil Suit No. 102 of 2009 because as beneficiaries they have legal and priority rights to safe guard their fruits of judgment/property. That in **Shah Vs Attorney General [1970] EA 523 No. 2** property was defined to include benefits of judgment. That the rationale for addition of parties to any suit is premised on the need to prevent multiplicity of suits by interested parties over the same subject matter. That in **Yahaya**

**Kariisa Vs Attorney General SCCA No. 7 of 1994 [1997] HCB 29** it was noted that the main purpose of joining parties to as case is to enable the court to deal with the matter brought before it and to avoid multiplicity of proceedings.

That in this case the applicants do not hold any interest and will not be prejudiced in any way by the prayers sought and so do not merit being added as parties to Miscellaneous Application No. 166 of 2017. That the applicants have no interest in the fruits of judgment because they were only granted Power of Attorney which was followed by a representative order to represent the beneficiaries. That a Power of Attorney according to the **Osborn's Concise Law Dictionary 11<sup>th</sup> Edition page 315** is a deed by which one person empowers another to represent or act in his stead either generally or for specified purposes. That the applicants claim to have obtained Power of Attorney but this did not pass title to them. For this counsel relied on **Mubiru Vs Cairo International Bank Ltd & Anor HCMA No. 316 of 2010** where it was held that a Power of Attorney has no effect of passing title to the Grantee thereof and that to hold that the applicants are holding the land in trust for the Grantee of a Power of Attorney will be defeating the essence of a Power of Attorney. That therefore the applicants herein have no proprietary interest in the fruits of judgment.

Counsel further submitted that the Article 28 (1) which the applicants rely on to submit that they are entitled to be added as parties does not apply to them. That Article envisages a person who has rights to protect which extends among others to property which the applicants do not have in this case. Therefore they are not necessary parties to the Miscellaneous Application No. 166 of 2017. That the applicants played their role by prosecuting the suit to the point of the decree and cannot be prejudiced in any way whatsoever by individual claimants seeking to protect, pursue and realize their entitlements in execution of the decree.

Counsel also relied on order 1 rule 8 (2) of the Civil Procedure Rules for the submission that the respondents as beneficiaries of the fruits of judgment are entitled to be added as parties. That this rule does not give any time restriction as to when the application to be made a party must be filed.

On the issue of Champerty, counsel submitted that in the **Osborn's Concise Law Dictionary 11<sup>th</sup> Edition page 78** Champerty is defined as a bargain between a party to legal proceedings and another who finances the proceedings that the latter will take as a reward for the

assistance a portion of anything which may be gained as a result of the proceedings". That in this case there is no agreement as yet. That a resolution does not amount to an agreement so the arguments on Champerty do not suffice as they have failed to prove the existence of an agreement.

Counsel for the respondents also submitted that the claim by the applicants at this court is *functus officio* is erroneous and not backed by any law. That execution proceedings have given rise to certain issues which need to be resolved so the execution proceedings are not yet complete. That under section 34 of the Civil Procedure Act Cap 71 all questions arising in a matter relating to the execution of the decree should be determined by the court executing the decree and therefore this court has jurisdiction to handle the matters arising from the execution process and cannot be *functus officio*.

That a person who is represented under a representative suit to which he or she is a beneficiary seeking to be made a party under Order 1 rule 8 (2) of the Civil Procedure Rules is totally different from addition of parties under order 1 rule 10 and rule 13 of the Civil Procedure Rules which requires the presence to be necessary. That under rule 8 (2) the respondents seek to protect their proprietary interests in a decree, not to merely be present as necessary parties. That it is surprising that a person who was given mandate to represent and sue on behalf of several others can wish to block and barricade them from pursuing their benefits. That this should not be condoned by this court. That this application has no merit, does not disclose any prejudice or injustice if the **Miscellaneous Application No. 166 of 2017** is determined by this court without the presence of the applicants herein and it is a mere abuse of court process intended to frustrate the respondents' efforts to realize the fruits of this court's decree.

Further counsel submitted that the said **Miscellaneous Application No. 166 of 2017** has been heard and is pending decision of court. That however, the Attorney General who is a party thereto is not a party in this matter and so he invited this court to find that the application is a moot and dismiss the same with costs.

On issue 2, counsel for the respondents prayed that this court declares that the applicants are not necessary parties to Miscellaneous Application No. 166 of 2017 and therefore ought not to be added as parties to it and the application should be dismissed with costs.

As I was about to complete writing this ruling the applicants filed submissions in rejoinder. These were supposed to be filed on the 17<sup>th</sup> July 2017 but instead were filed on 20<sup>th</sup> July 2017 three days beyond the set schedule without leave of court. I shall therefore disregard them since they are not properly before court having been filed in violation of this court's directives.

I have considered the pleadings and submissions of counsel. The respondents in their submissions submitted that the application is moot. On whether or not this application is moot in as far as the Miscellaneous Application No. 166 of 2017 has already been heard and is pending decision of court, this court finds that this application is not moot because as per **Human Rights Network for Journalists & Anor Vs Uganda Communication Commission & 6 ors HC Miscellaneous Cause No. 219 of 2013** the doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. The applicants are in court over an existing issue of seeking to be made parties to the Miscellaneous Application No. 166 of 2017. I therefore find that this application is not moot. However, since trial of the application to which the applicants seek to be added to ended, then they cannot be added as parties.

This court does not agree with the applicants' submission that Order 1 rule 8 (2) and 13 of the Civil Procedure Rules apply to the case before me because if the rule envisages a situation before trial, can it be said that where a consent judgment is entered the suit was tried? Does a consent agreement amount to a trial? I am afraid it does not because according to **Wikipedia** the only online encyclopaedia.

***“In law, a trial is a coming together of parties to a dispute, to present information (in the form of evidence) in a tribunal, a formal setting with the authority to adjudicate claims or disputes. One form of tribunal is a court.”***

In this case there was no presentation of information in the form of evidence for the court to adjudicate. Therefore there was no trial. In my view the rules sought to prevent a party from causing a retrial and presentation of more evidence which would consume a lot of court's time.



This court also finds the **Goodman Agencies** case cited by the applicants to be distinguishable from the instant case in as far as **Hassa Agencies** was not a party to the suit or beneficiary there under, and the suit in that case was not a representative suit. Therefore the circumstances in that case were different from the case before this court.

I also agree with the submissions of counsel for the applicants that an advocate whose instructions have been withdrawn has no right to continue representing a party except if his fees have not been cleared and the agency of the advocate on behalf of client expires the day instructions are effectively withdrawn. In this case the applicants concede in their submissions and pleadings that they withdrew the instructions from the firm of Bashasha & Co. Advocates. What this means is that they are free to represent any other person and in this case they represent the respondents.

Therefore it cannot be said that they have brought the application to add the respondents as parties to the main Civil Suit because they were fired. So this case cannot be compared with **Attorney General Vs Goodman Agencies & Ors** since in that case the counsel whose instructions were withdrawn kept claiming that he represents Goodman Agencies which is not the case here. In this application the fired counsel have found new clients.

I also agree with the submissions of counsel for the applicants that advocates are not entitled to the fruits of judgment. But the firm of Bashasha & Co. Advocates in this case has not claimed any portion of the proceeds of judgment. The percentages in the resolution which counsel for the applicants seeks to challenge are not even enforceable as yet because the respondents as of now do not have the authority to determine how the proceeds of the suit should be distributed. It is also clear that the respondents do not seek to have the applicants removed from being plaintiffs. They seek to be added as plaintiffs because they have lost confidence in the manner in which the applicants are handling the execution process. Consent judgment unlike trial judgment are different in nature. That is why even the grounds for setting them aside are different. Therefore they must be handled differently.

Counsel for the applicants have cited the case of **Attorney General Vs Goodman Agencies & Ors** claiming that counsel are not entitled to the proceeds of judgment. That is correct. However in that case during the process and negotiations for enforcement of judgment the said Goodman Agencies agreed with the lawyers from whom she later withdrew instructions that they would take all the taxed costs of the suit in all courts. This was an agreement made

after the consent judgment had been entered. I therefore find no illegality in the agreement between the respondents and their counsel and that is not the concern of this court in this application.

On the issue of whether or not the respondents can be added as plaintiffs after judgment, I think they can. The authorities and orders of the Civil Procedure Rules that the applicants have cited relate to judgments after trial and not consent judgment. The cases also refer to ordinary judgment and not judgments arising from representative suits. In fact like the applicants as representatives withdrew instructions from the firm of Bashasha & Co. Advocates to represent them, the respondents also had the right to withdraw from them instructions. The dissatisfied beneficiaries in this case who are over 700 of them did exactly that (to withdraw the applicants' authority to represent them). In fact the case of **Attorney General Vs Goodman Agencies & Ors** could apply to the applicants as well. Being a representative in a suit does not entitle you to the entire proceeds of the suit. It appears that the applicants believe they must not be directed on how to handle the process of execution and that they have absolute powers to do as they wish with the fruits of the judgment.

I do find that what the applicants submitted to this court is very dangerous since giving absolute powers to a representative who holds a Power of Attorney would expose the beneficiaries to loss of their entitlement. It is a principle of equity that a wrong shall not be left without a remedy. I therefore find that a beneficiary of a consent judgment arising from a representative suit is entitled to be added as a party to the suit where there are reasons for such a prayer. It would appear that the applicants did not consult the beneficiaries when changing advocates. The beneficiaries never at any one time objected to the services of Bashasha & Co. Advocates until now so the change of advocates could have triggered the turn of events and the filing of the application by the respondents. This impresses upon this court that the beneficiaries had confidence in their previous counsel that is why 700 or so beneficiaries agreed to sign the resolution which counsel for the applicants casts in bad light.

On issue of champerty this court observed that there was no proof of agreement which would require being registered with Law Council. In this case the figure payable to the firm of Bashasha & Co. Advocates is ascertainable since the amount to be recovered is known and the suit ended in a consent judgment. Therefore it cannot be champerty. The definition of champerty on the **Wikipedia** the online encyclopaedia is as follows:-

***“an illegal agreement in which a person with no previous interest in a lawsuit finances it with a view to sharing the disputed property if the suit succeeds.”***

This is not the situation in this case. I therefore find that there is no champerty.

This court finds that the applicants have not demonstrated how their interests will be affected by the orders of this in Miscellaneous Application No. 166 of 2017 and if at all what interest that is.

For the reasons in this ruling the applicants are not necessary parties to Miscellaneous Application No. 166 of 2017 and therefore ought not to be added as parties to it. This court is therefore inclined to find no merit in this application and accordingly dismisses the same with costs.

I so order.

**Stephen Musota**

**J U D G E**

**15.08.2017**

**15.08.2017 AT 11.12A.M.:-**

Mr. Mamawi Billy for applicants.

Ms. Grace Atuhaire on brief for Mr. Mpumwire.

Abraham for respondents.

1<sup>st</sup> applicant present.

2<sup>nd</sup> applicant absent.

Respondents absent.

Ejang Court Clerk.

**Counsel for applicant:-**

The matter is for ruling and we are ready to receive the ruling.

Counsel for respondent:-

I am ready to receive the ruling

**Court:-**

Ruling read and delivered in open court.

.....  
**Sarah Langa Siu**

**DEPUTY REGISTRAR**

**15.08.2017**

RULING