

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

HCT-05-CV-CR-001-2017

(ARISING FROM MSK-00-CV-CS-134 OF 2009)

TAREMA JUSTUS ::: APPLICANT

VERSUS

- 1. KITETEIYI ROBINA**
- 2. MUGYEMA FENEKASI**
- 3. BAIGARIRAHU JOVANIS ::::::::::::::::::::::::::::::: RESPONDENTS**

BEFORE:HON. JUSTICE DR.FLAVIAN ZEIJA

RULING

This application was brought under Article 28 of the Constitution of the Republic of Uganda 1995, Section 83 of the Civil Procedure Act Cap 71 and Order 52 rule 1, 2 and 3 of the Civil Procedure Rules SI 71-1 and Section 33 of the Judicature Act Cap 13 for revision against the judgment of Magistrate Grade One at Masaka issued on 26th August, 2016.

The brief background of this matter is that the respondents who are the administrators of the estate of the late **Eldard Hugaho** brought a suit in the Chief Magistrates Court at Masaka on the 22nd day of September 2009 against Enock Mugisha (the applicant's father) and Wilson Kazoora for misappropriation of the estate of their late grandfather a one Tomasi Karwemera which included 400 herds of cattle. The 1st respondent (who was also the 1st plaintiff in the lower Court) is a daughter of the late Tomasi Karwemera and a step sister to Enock and Wilson. The plaintiffs/ respondents herein prayed for orders that the estate of the late Karwemera be redistributed accordingly and a declaration that they were entitled to part of the estate. The matter was heard and judgment was entered in favor of the plaintiffs/ respondents with the following orders;

- i. *Revocation of the purported will of the late Karwemera Tomasi*
- ii. *A declaration that the plaintiffs are entitled to a share of the estate of the late Karwemera Tomasi.*
- iii. *An order for the redistribution of the estate of the late Karwemera Tomasi before the relevant authorities and all the beneficiaries.*
- iv. *General damages to the tune of UGX. 1,500,000/=*

The applicants were dissatisfied with this decision hence this application for revision of Civil Suit No. 134 of 2009. The grounds of this application are stated in the Notice of Motion and supported by the affidavit of the applicant but briefly are that:

- i. **The trial Magistrate acted with material irregularity and injustice when she failed to strike off Enock Mugisha; the 1st defendant after she had become aware that he had since died.**
- ii. **The trial Magistrate Grade One acted illegally and in excess of her jurisdiction when she heard the suit whose subject matter was far above her pecuniary jurisdiction.**
- iii. **The applicant shall suffer irreparable damage/loss which cannot be atoned by way of damages if he is let lose possession and occupation of his personal property to the respondents/plaintiffs through execution of the decree herein, on account of proceedings instituted and determined against a dead person.**
- iv. **It is just, fair, proper, equitable and in the interest of substantive justice that the application for revisional orders setting aside the judgment, decree and all manner of execution orders arising from Civil Suit No. 134 of 2009 be granted in favor of the applicant.**

Before I determine the grounds of this application it is suffice to point out Counsel Frank Tumusiime for the applicant brought to the attention of this Court that the respondent's lawyers M/sMwene- Kahima & Co. Advocates defied the mandatory provisions of Order 12 rule (3) (2) of the Civil Procedure Rules SI 71-1 and filed their affidavit in reply out of time without seeking leave of this Court. He prayed for the same to be struck off with costs. Counsel Mwene- Kahima on the other hand citing the case of the **Ramgarhia Sikh**

Society & 2 Ors Vs The Ramgarhia Sikh Education Society Limited & Ors Civil Division Ma No 352 Of 2015 and Stop & See (U) Ltd Vs. Tropical Africa Bank (U) Ltd MA No. 333/ 2010, submitted that the reasons for the late filing of the affidavit in reply were set out in the same affidavit and the respondents sought the indulgence of this Court to allow and consider their affidavit in the circumstances.

Having addressed my mind on the arguments of both Counsel alongside Order 12 rule 3 and the relevant authorities cited, this Court will exercise its discretionary powers in the interest of justice and overlook the time the affidavit in reply was filed to enable court to effectively dispose of the matters in contention on their merits.

The enabling law for revision is S. 83 of the Civil Procedure Act. It provides that the High Court may call for the record of any case which has been decided by a subordinate court and revise the case. It provides:

83. Revision.

The High Court may call for the record of any case which has been determined under this Act by any magistrate's court, and if that court appears to have—

(a) exercised a jurisdiction not vested in it in law;

(b) failed to exercise a jurisdiction so vested; or

(c) acted in the exercise of its jurisdiction illegally or with material irregularity or injustice,

the High Court may revise the case and may make such order in it as it thinks fit; but no such power of revision shall be exercised—

(d) unless the parties shall first be given the opportunity of being heard; or

(e) where, from lapse of time or other cause, the exercise of that power would involve serious hardship to any person.

The situation at hand is governed by S. 83(a and c) of the CPA.

Ground One

Whether the trial Magistrate exercised jurisdiction not vested in her to hear and determine Civil Suit No. 134 of 2009.

Counsel for the applicant submitted that the jurisdiction of a Magistrate Grade One is restricted to a sum of UGX 20,000,000/= under Section 207(1) (b) of the Magistrates Court's Act Cap 16. Counsel stated that although the exact value of the subject matter was never pleaded in the plaint, Court was duty bound to inquire into the value of the subject matter so as not to exceed its pecuniary limits. He submitted further that the said plaint stated that ***“the late karwemera left over 400 heads of cattle”*** and land of over 220 acres and this was clearly way above the pecuniary jurisdiction vested on the Grade One Magistrate's Court. In reply Counsel for the respondents submitted that first of all the value of the subject matter was never stated in the plaint nor in the respondents' statement of defence and further that the defendants in the lower Court had a right to challenge the jurisdiction of the Court under Order 9 rule 3 of the Civil Procedure Rules SI 71-1 but chose not to. Counsel submitted that having not done this, the defendants in the suit ought to be presumed to have submitted to the jurisdiction of the Court in 2009 and the matter not ought not to be raised now.

I have diligently considered the arguments of both Counsel. First and foremost it is important to note that both Counsel are in total agreement with Section 207 (1) (b) of the Magistrates Courts Act. That the jurisdiction of the Magistrate Grade One is restricted to UGX 20,000,000/=. Secondly neither do both parties disagree that the value of the subject matter was never stated in the plaint. That is settled. The argument here is that the plaint only disclosed that the deceased left behind over 400 heads of cattle and land approximating over 220 acres. This matter was brought before a Magistrate Grade One in 2009 and concluded in 2016. Witnesses were brought and the matter was heard till its conclusion. This was a matter regarding succession and misappropriation of estate. Surely any prudent judicial officer ought to have inquired about the exact value of the estate in question before handling the matter. More so by merely looking at the plaint and the stating of over 400 heads of cattle this would have rang a bell in the mind of the trial Magistrate about the value of the subject matter. Whether the subject matter was pleaded or not, the trial Magistrate ought to have inquired and established the amount of the estate

involved first before she determined the matter and granted the orders she did. Jurisdiction is a very crucial aspect in litigation. Without it a court has no power to make any step. A court of law downs its tolls in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. **See: Owners Of Motor Vessel Lillian Vs Caltex Oil Kenya Limited (1989)(1) KALR**

With that said, the trial Magistrate greatly erred in law and in fact when she decided a matter whose subject matter was way above her pecuniary jurisdiction and as such the judgment and orders therein are a nullity. This first ground therefore succeeds and has the effect of disposing off the entire application. Nevertheless I shall still proceed to resolve the rest of the grounds that were raised in submissions.

Counsel for the respondents in his submissions raised two issues which he prayed that this Court determines first. He started by submitting that the applicant herein was a stranger to the suit and had no locus standi to bring this application before this Court as he did not hold any letters of administration for the estate of the Enock Mugisha (deceased) to prove that he was indeed the son of the deceased. Counsel further submitted that the suit in the lower Court was between Enock Mugisha and Wilson Kazoora and the latter though alive is not bothered by the decision of the trial Court.

On the other hand, Counsel for the applicant in their rejoinder admitted that it was an oversight on his side when he failed to attach copies of the applicant's birth certificate and baptism card to prove that he was indeed the son of the deceased. He prayed that this Court exercises its discretion and admits the evidence.

The argument of Counsel for the respondents that Wilson Kazoora the 2nd defendant in the trial Court not bothered by the decision of the lower is in my view quite absurd. If he does not find it necessary to challenge the decision of the lower Court where he was a party, that does not in any way whatsoever stop the other party or his beneficiaries from contesting the same. A party is free to choose whether to bring a matter to Court or not.

On the issue of whether the applicant has locus standi to bring the matter to Court, it is true that the applicant has unfortunately not adduced any evidence to prove that he acquired any letters of administration from his late father Enock. What is on record, which

he prayed that Court admits, are just copies of his birth certificate and baptism card. This only proves that he is a direct beneficiary of the deceased. Section 191 of the Succession Act provides;

“Except as hereafter provided, but subject to section 4 of the Administrator General’s Act, no right to any part of the property of a person who has died intestate shall be established in any court of justice unless letters of administration have first been granted by a court of competent jurisdiction.”

The reading of the above section forestalls any right to claim for property of an intestate until letters of administration in respect of his or her estate have been duly granted. In other words section 191 negates *locus standi* to claim for property of an intestate until letters of administration shall have been granted in respect of such estate. The law thus seems to protect an intestate’s estate from claims from persons that have not been established as beneficiaries thereof.

However the case of **Israel Kabwa vs. Martin Banoba Musiga Civil Appeal NO.52 of 1995** (which Counsel for the applicant also cited) recognized legitimate beneficiaries’ right to protect their interest in an intestate’s estate. In that case the respondent was a customary heir and son to an intestate, and had developments on the land in question. Although he did not possess letters of administration at the time, he successfully instituted legal proceedings for the cancellation of the appellant’s title to the suit land on account of fraud. The appellant’s first ground of appeal was whether or not the respondent had *locus standi* to institute legal proceedings against him. It was held:

“The respondent’s locus standi is founded on his being the heir and son of his late father. In terms of section 28(1)(a) and 28(2) of the Succession Act as amended, the respondent could very well be entitled to 76% or more of the estate of his father. He is thus defending his interest. His position as heir has been enhanced by the belated grant of letters of administration in that way. Kotham’s case is irrelevant. Therefore I think that ground one should fail. It would still fail in my view even if no letters of administration had been obtained because the respondent’s right to the land and his developments thereon do not depend on letters of administration.”

The above decision indicates that a son and customary heir to the deceased is a legally recognized beneficiary to his estate by virtue of Section 27 of the Succession Act. The respondent in that case had an interest in protecting or preserving the deceased's estate and therefore did have *locus standi* to sue without first obtaining letters of administration. The principle therein is that a beneficiary of an estate as prescribed under section 27 of the Succession Act does have *locus standi* to institute legal proceedings for purposes of protecting or preserving an estate. Beneficiaries of an estate of a male intestate, as is the case presently, include lineal descendants of the intestate. **See: Section 27(1) of the Succession Act.**

In the instant case the applicant as a son to the late Enock Mugisha, who was the 1st defendant in the trial Court, is in the direct descending line of the deceased and therefore a lineal descendant. He has all the reasons to protect this estate. I find this ground sustainable.

Ground Two

Whether the trial Magistrate acted with material irregularity or injustice by failing to strike out the applicant's father from the record in Civil Suit No. 134 of 2009

Counsel for the applicant submitted that the respondents filed the civil suit in trial Court against his father and Wilson on the 22nd September 2009 yet his father the (1st defendant) had since died on the 12th January 2000, nine years before the institution of the suit. Counsel further stated that during trial PW2 Fenekansi Mugyema testified that he knew that the 1st defendant had died but did not remember when. That this, according to Counsel was a great injustice to his late father. In reply Counsel for the respondent stated that the suit in question was brought against two people and if one was dead the cause of action was continuing and there was no reason for the trial Magistrate to strike out the plaintiff.

On this ground again, I find that Counsel for the respondent in his submissions has not disputed that the applicant's father was dead when the matter was brought to Court. In fact the applicant even attached a copy of his father's death certificate which the respondents did not challenge. Counsel for the respondent's argument that there were two people who were sued in the lower

Court is in my view quite confusing. If the respondents knew that Enock Mugisha was long dead then why did they sue him? Counsel's argument that the 2nd defendant swore affidavits and brought applications in the lower Court on behalf of the deceased does not hold water. The 1st defendant was dead. It did not matter whether the 2nd defendant swore affidavits on his behalf. The respondents knew that he was dead but still proceeded to sue a nonexistent person. Order 24 rule 2 of the Civil Procedure Rules SI 71-1 states;

“where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs or against the surviving defendant or defendants.”

The above is very clear. The trial Magistrate ought to have entered the moment it came to her attention that the 1st defendant was dead on the record and substitute the same with the applicant that is, if indeed the cause of action was still continuing. Upon keenly analyzing the lower Court judgment which is on record, I found that indeed the 1st defendant's name Enock Mugisha was written with the word 'deceased' in brackets. Now this Court wonders why the trial Magistrate did that and still went ahead to determine the matter against the deceased without even addressing that issue in her decision. This to me was a great error and a suit against a dead person as has been held in numerous authorities is a nullity. See: **Zainab Binti Rekwe [1964] EA 24,MM Sheikh Dawood Vs G. Keshwala & Sons HCCA No. 39/ 2014, Pathack Vs Mpwekwe (1964) EA 24.** It is trite law that as a general rule, a plaintiff in civil proceedings is 'domonious letis' that is he is free to sue whoever he thinks he has a cause of action against See: **Batemuka Vs Anywa (1977) HCB 77** but it is also settled law that a suit cannot be sustained against a dead person.

In the result, I revise the lower court decision set aside the judgment and orders of the lower court. The respondent shall pay costs of this application for revision and the lower court.

I so order

Dr Flavian Zeija

Judge

27/10/2017