

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

CIVIL REVISION NO. 01 OF 2015

(Arising from Misc. Application No. 015 of 2014)

(Arising from Civil Suit No. 44 of 2012)

EVELYNE NYANGOMA:.....APPLCANT

VERSUS

1. KUGONZA ALLEN BYEITIMA

2. LEGAL REPRESENTATIVE OF THE LATE

MARY JANE KABALIMU:.....RESPONDENTS

BEFORE: HON. JUSTICE WILSON MASALU MUSENE

RULING

The application, Evelyne Nyangoma, filed this application under Section 83 (a) (c) of the Civil Procedure Act and Order 52 rr 1,2 & 3 of the civil procedure rules against the Respondent, kugonza allen Byeitima. The application was seeking for orders that:

- i) The order by the Magistrate Grade one Hoima made in Miscellaneous application no. 15 of 2014 arising from civil suit No. 44 of 2012 appointing the Respondent legal representative of the late Mary Jane Kabalimu be revised and set aside on the ground that it was granted by court in exercise of its jurisdiction illegally and with material irregularities and injustice and /or in exercise of the jurisdiction not vested in it and in violation of rules of natural justice.
- ii) Costs of the application be provided for.

The application was supported by the affidavit of the applicant and the grounds are:-

- a) That the Magistrate's court exercised its jurisdiction illegally and with material irregularities and injustice and/or exercised jurisdiction not vested in it.
- b) That the applicant is the defendant in Civil Suit No. 44 of 2012 where the late Mary Jane Kabalimu who was the plaintiff in the said case.
- c) That after the death of the late Mary Jane Kabalimu the Respondent who is the grand child of the late Mary Jane Kabalimu applied to Hoima Court to be a legal representative of the late Mary Jane Kabalimu.
- d) That after making the application the process server of the Respondent's advocate attempted to serve the Applicant with the application but the Applicant advised the process server to serve her lawyer who was on record handling her case and the process server went with the application promising to serve the applicant's lawyer.
- e) That instead of serving the applicant's lawyer, an affidavit of service was sworn and filed in court purporting that the applicant was properly served whereas not and the application was heard exparte without giving applicant a chance of being heard.
- f) That the applicant and her counsel were surprised when on the 5th day of November, 2014 the Applicant's lawyer was served with an order of Court appointing the Respondent as a legal representative of the late Mary Jane Kabalimu when the applicant's lawyer was not aware of the existence of such application. A copy of the order is annexed hereto as "A".
- g) The hearing of the Respondent's application without giving the applicant a chance to be heard was illegal and unlawful and violated the rules of natural justice
- h) That the order made by the Magistrate in violation of the rules of natural justice is null and void.
- i) That the order of the Magistrate was a violation of the law of succession and as such should be revised and set aside.
- j) That it is fair just and equitable that this application is allowed.

The applicant was represented by M/s Baryabanza & Co. Advocates, while M/s Rwabogo & Co. Advocates represented the Respondent.

In an affidavit in reply Kugonza Allen Byeitima, opposed the application. The following paragraphs were pertinent.

5. That prior to the death of my grandmother, she had instituted a case against the applicant and her together with her witnesses had completed their testimonies and closed her case.
7. That I together with my other siblings stay on the suit land where our mother had allowed our late father to construct a house thereon and principally, this part of her estate upon the death of my grand mother devolved into me and my siblings.
8. That my grand mother left a big estate in Entebbe and the family has a number of issues to settle before they can appoint an administrator of her estate, where as a grand daughter I do not have that capacity to cause the said meeting.
9. That had the court not appointed me as a legal representatives, the suit will have abated, albeit with grave consequence to my siblings and my self who stay on the suit land.
12. That I have been further informed by my lawyer Mr. Rwabwogo Richard of M/S Rwabwogo & Co. Advocate the information I verily believe to be true and correct that the prayer to set aside the orders for non service is misconceived as no any application has ever been lodged in Hoima Magistrate Court to set aside its order and hence this Honourable Court has nothing to revise in that respect.

According to counsel for the applicant, this is an application for revision by the applicant brought under Section 83 (a) and (c) of the civil procedure Act and O. 52 rr1,2 and 3 Civil Procedure Rules. The application is seeking for an order of Court revising the order of the Magistrate Grade One Hoima in misc. application No 15 of 2014 arising from civil suit No. 44 of 2012 appointing the Respondent legal representative of late Mary Jane Kabalimu on the ground that it was granted by Court in exercise of its jurisdiction illegally and with material irregularities and injustice and/or in exercise of the jurisdiction not vested in it and in violation of the rules of natural justice. The application is also seeking for costs of the application.

He added that Misc. application No. 15 of 2012 was heard by the trial Magistrate *ex parte* and the trial Magistrate in his order appointed the Respondent herein as a legal representative of the late Mary Jane Kabalimu for purposes of civil suit No. 044 of 2012 only.

He challenged the ruling of the trial Magistrate on page 2 which was:-

“I have heard the submissions of the learned Counsel for the Applicant on appointment of the legal representative of Mary Jane Kabalimu deceased, by the applicant kugonza allen Byeitima. Civil Suit No. 044 of 2012 is still pending before court partly heard because of one of the Plaintiff’s death.

I accordingly appoint Allen Byeitima the legal representative of the late Mary Jane Kabalimu for purposes of pursuing Civil Suit No. 044 of 2012 only. I so order.”

He concluded that according to O.24 r 3 (1) Civil Procedure Rules , it is provided that **“the court, on application made for the purpose, shall cause the legal representative of the deceased Plaintiff to be made a party and shall proceed with the suit.”**

He added that the implication of the above is that before court can cause a person to be made a party to the suit, that person must be a legal representative within the law which in the instant case must be a person with letters of administration duly granted by a court with competent jurisdiction.

In reply, Counsel for the Respondent submitted that a beneficiary or an intending applicant for letters of administration has a right to institute a case for trespass against the deceased’s estates as was held by the supreme court case of, **Isreal Kabwa vs martin Banoba Mugiga SCSA No. 52 of 1995** . The Court further relied on **Williams and Mortimer on Executors /administrators and Probate**. 15th Edition of Williams on Executors and 3rd edition of Mortimer on probate. This supreme court decision should be construed Ejusdem Generis in respect to the instant case, the over raiding factor being to protect the deceased estate.

He also maintained that the Applicant’s counsel incorrectly submitted on order xxiv r 3 of Civil Procedure Rules wherein he stated that **“the Magistrate’s Court has only jurisdiction to only grant leave to the legal Representative who makes an application to court under the said order to substitute the deceased and proceed with the case and not to appoint a legal representative.”** This exponent is erroneous as nowhere is the word **“leave”** used in this particular legislation.

He concluded that the order of the court has not prejudiced the applicant in any way.

I have carefully considered the submissions on both sides in his Application for revision. O. 24 r. 3 (1) of the Civil Procedure Rules provides:-

“Where one of two or more Plaintiffs dies and the cause of action does not survive or continue to the surviving Plaintiff or Plaintiffs alone, or a sole plaintiff or surviving Plaintiff dies and the cause of action survives or continues, the court, an application made for that purpose, shall cause the legal representative of the deceased Plaintiff to be made a party and shall proceed with the suit.”

In my view, the Magistrates court has jurisdiction to grant leave to the legal representative who makes an application to court under O. 24 r 3 (1) of the Civil Procedure Rules to substitute the deceased, **but not to appoint a legal representative.** The Magistrate therefore exercised jurisdiction not vested in him when he appointed the Respondent as a legal representative of Mary Jane Kabalimu under O. 24 r. 3 5 & 12 of the Civil Procedure Rules.

It was irregular on the part of the trial Magistrate to act the way he did.

And whereas counsel for the Respondent relied on O. 24 r. 5 of the Civil procedure rules’ that the issue of whether a person is a legal representative or not is determined by court, such a person must conform with the Succession Act. Such person has to be in possession of letters of Administration which was not the case here.

And the Supreme Court case of **Israel Kabula vs Martin Banoba, SCCA No. 52 of 1995**, is distinguishable in that in the present case, the deceased person died when the case was already instituted and part heard.

In the premises, and in the view of what I have outlined, I do hereby exercise this Court’s power of Revision to set aside the order of the trial Magistrate of appointing **Kugonza Allen Byeitima**, as a legal representative of the late Mary Jane Kabalimu. He had no powers to do so. Let a person apply and be granted Letters of Administration or probate before he/she can step in the shoes of the late Mary Jane Kabalimu.

The application accordingly succeeds. Since the case is part heard and pending, I order that costs be in the cause.

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Wilson Masalu Musene

Judge

02/08/2017