THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

MISCELLANEOUS APPLICATION NO. 0025 OF 2020)

(ARISING OUT OF MISC. APPLICATION NO. 0042 OF 2018)

(ARISING OUT OF MISC. APPLICATION NO. 0036 OF 2002)

(ARISING OUT OF MISC. APPLICATION NO. 0162 OF 1994)

(ALL ARISING OUT OF CHIEF MAGISTRATES COURT CIVIL SUIT NO. 0025 OF 1989)

1. BYAKAGABA MOSES ATEENYI

2. KATUSABE ANDREW ..... APPLICANTS

VERSUS

1.BASEMERA ESAU

2.NYAMBUBI ALICE ..... RESPONDENTS

BEFORE: Hon. Justice Isah Serunkuma

RULING

This application was brought by Notice of Motion under Order 46 rules 1 and 8 of the Civil Procedure Rules and Sections 35, 37, 82 and 98 of the Civil Procedure Act CAP 71. The Applicants filed this application against the Defendants seeking the following orders;

a. An order to review and set aside the order appointing the 2nd Respondent Nyamumbi Alice as the Legal Representative of the Late Enock Mukidi for purposes of executing the orders in Misc. Cause No. 0036 of 2002, Misc. Application No. 0162 of 1994, Misc. Application No. 0042 of 2018 and the Decree in the Chief Magistrate's Civil Appeal No. MH 25 of 1989.

b. An order to review and set aside all proceedings against the Estate of the Late Enock Mukidi that were conducted after 28th September, 2016 without involving the Applicants.

c. An order to stay the execution against the Estate of the Late Enock Mukidi by the 1st Respondent Basemereza Esau as Legal Representative of the late Eseza Ganukura.

d. Costs of the suit

The grounds for the Application were laid out in the Notice of Motion and affidavit in support sworn by the 1st Applicant but briefly the grounds are;

1. That the Applicants are the legal representatives of the Estate of the Late Enock Mukidi having been granted the Letters of Administration on 28th September, 2016.

2. That the 1st Respondent illegally and irregularly proceeded and commenced the execution proceedings against the estate of the Late Enock Mukidi without involving the Applicants who are the legitimate Administrators/ the legal representatives/Administrators of the estate of the Late Enock Mukidi.

3. That the 1st Respondent is threatening to execute a decree and orders that are time barred.

4. That the appointment of the 2nd Respondent as the administrator of the Estate of the Late Enock Mukiidi vide Misc. Application No. 0042 of 2018 for purposes limited to execution of the 1st Respondent's decree was done in error and ought to be set aside.

Background

The Applicants are children and the Legal Representatives/ Administrators of the Estate of the Late Enock Mukidi, having been granted Letters of Administration on the 28th day of September, 2016. The 1st Respondent is the Executor of the Estate of the Late Eseza Ganukura, having been granted Probate on 14th of April, 2015.

The Late Enock Mukiidi and Eseza Ganukura were children of the Late Earnest Komusingwa who died on the 23rd day of September, 1970. Their late father owned a piece of land measuring approximately 172 acres on which his children co- existed during his life time and it has been alleged that there were well known demarcations for each child on the land. Following his death, the Late Eseza Ganukura sued her brother, Enock Mukidi for trespass on the 100 acres of land which belonged to her on the basis that he attempted to lease out all the 172 acres, including hers. The Magistrate Grade 11 decided in favour of the Defendant. She appealed to the Chief Magistrate's Court at Masindi and the judgement in Civil Appeal No. M/H No. 25 of 1989 was in her favour.

The Late Enock Mukidi challenged the decree through two applications at the High Court of Uganda at Kampala and Masindi both of which were dismissed in 2005 and 2013 respectively. By 2018 when the 1st Respondent set out to commence the execution of the Chief Magistrate's decree, the Late Enock Mukidi had already passed on. The 1st Respondent therefore applied to the honourable court under Section 222 of the Succession Act, Cap 162 vide Misc. Application No. 0042 of 2018 to nominate the 2nd Respondent as the representative of the Estate of the Late Enock Mukiidi for the purposes limited to the execution of the decree that was granted to the estate of the Late Eseza Gakunura.

The Applicants filed this Application on the basis that the said order appointing the 2nd Respondent was issued in error as they already had Letters of Administration to the Estate of the Late Enock Mukidi and that the execution was time barred as the same was beginning 12 years after the grant of the decree.

Issues;

1. Whether the application discloses any grounds for setting aside the appointment of the 2nd Respondent as the representative of the estate of the Late Enock Mukiidi for purposes of execution of the orders granted in Misc. Application No. 0036 of 2002, Misc. Application No. 0162 of 1994 and the decree in Civil Appeal No. MH 25 of 1989?

2. Whether the execution of the decree in Chief Magistrate's Civil Appeal No. MH 25 of 1989 is time barred?

3. Whether the application discloses any grounds for stay of the execution of the decree in Chief Magistrate's Civil Appeal No. MH 25 of 1989?

Representations.

M/S Tugume – Byensi & Co. Advocates represented the applicants while M/S Kasangaki & Co. Advocates represented the 1st respondent. Parties were granted leave to file written submission which they duly complied with.

Resolution of issues

Issue 1: Whether the application discloses any grounds for review and setting aside the appointment of the 2nd Respondent as the representative of the estate of the Late Enock Mukiidi for purposes of execution of the orders granted in Misc. Application No. 0036 of 2002, Misc. Application No. 0162 of 1994 and the decree in Civil Appeal No. MH 25 of 1989?

The 2nd Respondent was appointed by court vide Misc. Application No. 0042 of 2018 to act as the legal representative of the Estate of the Late Enock Mukidi for purposes of execution of the decree that was issued in favour of the Late Eseza Gakunura. This was pursuant to Section 222 of the Succession Act. The Applicants are seeking to set aside the said decree on the basis that they were granted Letters of Administration to the said estate and are thus entitled to be part of all the cases in respect to the said estate.

The law on review and setting aside judgments

The remedy of review is provided for in Section of 82 of the Civil Procedure Act Cap 71 and Order 46 rule 1 of the Civil Procedure Rules which states that a person who considers himself or herself aggrieved by;

a) A decree or order from which an appeal is allowed but from which no appeal has been preferred; or
b) A decree or order from which no appeal is allowed by Act,

may apply for review of judgment to the court which passed the decree or made the order and the court may make such order on the decree or order as it thinks fit.

Review was defined in **F.X Mubuuke versus Uganda Electricity Board; HCMA No. 0098 of 2005** as a reconsideration of the subject of the suit by the same court under specific conditions set out by law. The conditions for review as set out in **Order 46 rule 1 of the Civil Procedure Rules S1 71-1** and they are;

a) Upon discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made; or
b) On account of some mistake or error apparent on the face of the record; or
c) Any other sufficient reason.

Counsel for the Applicant submitted that the orders they seek to review are as a result of some mistake or error apparent or manifest on the face of record given that they were granted without regard to **Section 37(1) of the Civil Procedure Act**. The said **Section 37(1)** provides that where a judgment debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed the decree against the legal representative of the deceased, or against any person who has intermeddled with the estate of the deceased.

Counsel for the Applicants has submitted that the grant of the letters to the 2nd Respondent for limited executorship was done in error as the Applicants had already been granted the letters of administration. They submitted that the 1st Respondent should have moved court to have the Applicants substitute the Late Enock Mukidi instead of moving court under **Section 222 of the Succession Act** to appoint the 2nd Respondent.

In response, the 1st Respondent's Counsel submitted that at the time they made the application under Section 222 of the Succession Act to have the 2nd Respondent nominated for limited executorship, it had not been brought to the 1st Respondent's attention or that of court that the Applicants had been granted letters of administration to the estate of the Late Enock Mukidi. In the absence of the knowledge of

administration of the estate, they made the Application in order to see to it that the execution would proceed.

The general rule in respect to substitution of parties upon death is set out in **Order 24 of the Civil Procedure Rules SI 71-1. Order 24 Rule 1** provides that the death of a Plaintiff or Defendant shall not cause the suit to abate if the cause of action survives. **Order 24 rule 4(1)** provides that in the event of death of a sole defendant and the cause of action survives or continues, the court, on an application made for that purpose, shall cause the legal representative of that deceased defendant to be made party and shall proceed. By the said order, it is the duty of the legal representatives to apply to be substituted on the suits wherein the deceased was engaged. In this case, the Applicants did not make the said Application, neither did they inform court or the 1st Respondent of the grant of letters of administration. Further, the 2nd Respondent, who is a sibling of the Applicants, did not inform court that her siblings had been granted the Letters of Administration to their Late Father's estate when she was nominated as a legal representative for purposes of execution.

In the circumstances, it is court's opinion that this does not qualify as an error or mistake on the face of record so as to justify setting aside the court order. In the case of **Al-Shafi Investment Group LLC versus Ahmed Darwish & Anor (Misc. Applic No. 0901 of 2017), Justice Bashaija while citing Attorney General and Ors versus Boniface Byanyima; HCMA No. 01789 of 2000** and **Levi Uganda Transportation Company [1995] HCB 340** stated that, *"mistake or error apparent on the face of the record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record.....".*

From the consideration of the facts as have been presented herein, the court correctly arrived at the decision to appoint the 2nd Respondent as a Limited Representative of the Late Enock Mukiidi's estate and there is no error apparent on record in respect to the same.

However, it should be noted that the court may also review and set aside an order for sufficient reason. In this case, the Applicants have proved that they were granted the letters of administration to the estate of the Late Enock Mukiidi. The 1st Respondent has not contested the validity of the said letters and has further agreed to the substitution of the Limited Representative with the Applicants, who were granted

the Letters of Administration to the estate of the Late Enock Mukiidi. There is no reason for this honourable court to deny this prayer.

I am satisfied that these circumstances warrant the Applicants to a right to review the order of the judgment vide Miscellaneous Application No. 0042 of 2018 appointing the 2nd Respondent, Nyambubi Alice as the Administrator of the estate of the Late Enock Mukiidi for purposes of execution. The 2nd Respondent is discharged and shall be substituted with the Applicants.

Issue 2: Whether the execution of the decree in Chief Magistrate's Civil Appeal No. MH 25 of 1989 is time barred?

The 1st Respondent is seeking to execute a decree arising from an appeal that was decided on 2nd of day of July, 1993. Counsel for the Applicant submitted that the execution is time barred as the Appeal was determined over 20 years ago and therefore it is beyond the 12 years period within which the law requires a decree to be executed.

In response, Counsel for the 1st Respondent argued that the process of execution of the decree begun on 10th August, 1994 with the demolition of some huts and a permanent house that were located on the suit land that had been awarded to the Late Eseza Ganukura in the appeal. Thereafter, the execution was encumbered by various applications filed by the Applicants and the Late Enock Mukiidi, including the instant Application.

The Law on execution is provided for in Section 35(1) of the Civil Procedure Act and it is provided therein that, *"Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the decree shall be made upon any fresh application presented after the expiration of twelve years from-*

(a) The date of the decree sought to be executed; or

(b) Where the decree or any subsequent order directs any payment of money, or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the Applicant seeks to execute the decree.

However, Section 35(2) of the Civil Procedure Act provides for the exception that court may order execution beyond the 12-year limit where the judgment debtor has by force or fraud, prevented the execution within the period provided by law.

In the instant case, the first attempt at execution begun in 1994 when the 10 huts and permanent house were first demolished. It was halted thereafter when the Late Enock Mukidi filed Miscellaneous Applications No. 0162 of 1994 at the High Court of Uganda at Kampala for stay of execution and extension of time within which to appeal. The Applications were dismissed in 2005. The second attempt at execution was by warrant of arrest but they did not succeed because the Late Enock Mukiidi escaped. Another application was filed by Late Enock Mukidi to stay the execution vide M.A No. 0063 of 2008 at the High Court at Masindi and it was dismissed on 6th November, 2013 for want of prosecution.

Although the same was not concluded, the execution in this matter begun within the period of one year of determination of the appeal and that was in 1994. However, the conclusion of the matter was fettered by the Applications that kept coming up. Accordingly, whereas the same was not yet concluded and has unreasonably delayed, it can be seen that it begun within the designated 12 years' period. The decision made in the application being contested herein was not an application for execution proceedings per se to commence as the same had already started but for the 2nd Respondent to be appointed as a limited representative of the Estate of the Late Enock Mukidi for purposes of concluding the execution that begun in 1994. In the circumstances, the execution is not time barred as the same was commenced within the statutory period for the commencement of execution proceedings.

Issue 3: Whether the application discloses any grounds for stay of the execution?

Order 22 rule 23 of the Civil Procedure Rules SI 71-1 provides that a court to which a decree has been sent for execution shall upon sufficient cause being shown, stay the execution of the decree for a reasonable period to enable judgment debtor apply to the relevant court for the relevant order in the circumstances. In this case, the Applicants intend to appeal as they submitted on their intention to file an application to file an appeal out of time.

Order 43 rule 4(1) of the Civil Procedure Rules provides that an appeal to the High Court shall not operate as an automatic stay of proceedings under a decree or order appealed from but upon application, the High Court may for sufficient reasons, stay the execution of a decree.

The merits for stay of execution are set out in Order 43 rule 4(3) of the Civil Procedure Rules and espoused in the authority of Lawrence Musiitwa Kyazze versus Eunice Businge; Supreme Court Civil Application No. 0013 of 1990 and Honourable Theodore Ssekikubo & Ors; Constitutional Application No. 003 of 2014 as follows;

a. The Applicant shows that he lodged a Notice of Appeal.
b. That substantial loss may result to the Applicant unless the stay of execution is granted.
c. That the Application has been made without unreasonable delay.
d. That security has been given for due performance of the decree by the Applicant as ultimately may be binding upon him.

In the instant case, there is no evidence of an appeal having been filed on record. An appeal is commenced by lodging a notice of appeal within two weeks after the date of the decision against which one desires to appeal. In the event that the said two weeks are already exceeded, the intending Appellant must file an application for leave to file out of time, in which case, the said application would be evidence of the intention to file an appeal out of time.

There is no evidence in this case of the intention to appeal nor have the Applicants submitted on the same beyond the same being mentioned in the Application. Accordingly, court finds that there is no appeal or intention to appeal by the Applicants.

With regard to the substantial loss that may result to the Applicant unless the stay of execution is granted, substantial loss is a question of fact ought to be loss beyond the ordinary consequences of litigation. In Tanzania Cotton Marketing Board versus Cogecot Cotton SA (1995- 1999)1 E.A 312 as cited with approval in Hoima Municipal Council versus Karamagi (Miscellaneous Application No. 0032 of 2021) [2022], Lubuva J.A while defining substantial loss stated that, *"The word substantial cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence".*

I agree with the Defendants that the costs that resulted from the different applications were not substantial losses as to necessitate a stay of execution. According to **Hon. Lady Justice Hellen Obura in the case of Andrew Kisauzi versus Dan Oundo Malingu HCT-00-CC-MA-467-2013,** it was held that substantial loss cannot mean ordinary loss of the decretal sum or costs which must be settled by the losing party but something more than that. Further, the learned judge also stated in the case of ***Banshidhar vs Pribku Dayal Air 41 1954*** that;

> *"The words 'substantial" cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case…substantial loss must mean something in addition to all different from that."*

Accordingly, the execution orders that are sought to implement recovery of the costs arising from the different applications cannot be said to result into substantial loss.

With regard to the fact that an application has been made without unreasonable delay, the Applicants have pleaded that that they filed their application on 11th March, 2020, which was a period of less than 30 days from when they learnt of the 1st Respondent's intended execution. In response, Counsel for the 1st Respondent has argued that he applied for letters of administration in 2015 and it is only 5 years later on 11th March, 2020 that this Application was filed.

It is my view that given that neither party had applied to be substituted in the proceedings under Order 24, it is considered that neither of them also knew of any of the proceedings thereafter. In the circumstances, the Applicants shall not be faulted for the 5 years' period when they did not know about the said changes. Further, the execution order was issued on 19th December, 2019 and thus the result of knowing about it in 2020 when the execution commenced. It is therefore clear that the Applicants acted within reasonable time.

As for the issue of whether security for due performance of the decree has been given by the Applicant as ultimately may be binding upon him, **Order 43 rule 4 of the Civil Procedure Rules** provides that no

order of stay of execution can be made under subrule (1) or (2) of this rule unless the court making it is satisfied that; the security has been given by the Applicant for the due performance of the decree or order as may be ultimately binding upon him or her. In the absence of an appeal, there is no basis upon which the security for costs be deposited nor can this court determine that security be paid on an intention to appeal where the steps necessarily have not been taken. Accordingly, this condition too was not fulfilled.

The Applicant has fulfilled only one out of the four conditions for stay of execution and for that reason, this ground too shall fail. The application for stay of execution is therefore dismissed.

It is so ordered.

Dated and delivered this 31st day of August, 2023.

Isah Serunkuma

JUDGE