

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MUKONO
MISCELLANEOUS APPLICATION NO. 0092/2022
[ARISING FROM CIVIL SUIT NO. 0090 OF 2019]

NAMPALA BETTY AND 2 OTHERS) =====APPLICANTS

VERSUS

KIMULI STEPHEN AND 7 OTHERS =====RESPONDENTS

BEFOE HON. LADY JUSTICE CHRISTINE KAAHWA

RULING

The Application:

This Application is brought by way of Chamber Summons under Order 6 rules 19 & 31 and Order 1 rule 13 of the Civil Procedure Rules S.1 No.71-1 and Section 98 of the Civil Procedure Act CAP 71. The Application seeks orders that; leave be granted to the Applicants to amend the plaint; the Applicant be allowed to add the 7th and 8th Respondents to the plaint as Defendants in Civil Suit No.90 of 2019 and that costs of the Application be provided for.

This Application is based on the following grounds:

1. The amendment and addition of parties is necessary to resolve issues in controversy between the parties to the suit.
2. No injustice or prejudice shall be occasioned to the Respondents if leave to amend the plaint and addition of parties is granted.
3. The parties sought to be added as Defendants to the mother suit connived and committed fraud and unlawfully through fraudulent

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- means transferred the suit land from the names of the Applicant to the 1st, 2nd and 3rd Respondents.
4. The Applicants intend to amend the plaint and include fraud among the Respondents and an order of cancellation of land title and reinstate them as the registered proprietors.
 5. The Application to amend and for addition of parties is brought in good faith and is not impliedly or expressly prohibited by any law.
 6. The proposed amendment if granted will avoid multiplicity of cases in this honourable court.

The Application is supported by an affidavit deponed by the 2nd applicant **Sekabira Bernard Johnson**. The documentary evidence attached to the affidavit includes a copy of the land title for land at Nsabwe comprised in **Block 98 Plot 432 measuring 0.404 hectares**, a search certificate for the said land and a proposed amended plaint.

The Respondents' Case:

The 1st, 2nd, 3rd, 4th, 5th and 6th Respondents filed in Court their respective affidavit in reply and in opposition to this Application sworn by the 6th Respondent a one **Kaggwa Ssendendo Stephen** on behalf of all the other Respondents, deponed on the 5th day of September, 2022 and sought to raise preliminary objections on points of law to have the Application dismissed with costs.

The 1st to 6th Respondents objected to the grant of this Application on points of law which are; the Chamber Summons was served out of time after the summons had expired; the affidavit in support of the chamber summons is defective for having been sworn without authority from the applicants; the proposed amendment does not disclose reasonable cause of action; the failure to seal the annexures to the affidavit in support of the chamber summons by the Commissioner for oaths rendered them inadmissible; the Affidavit in Support of the Chamber Summons is

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defective for containing falsehoods and the Application is an abuse of Court process.

Additionally, the Respondents aver in paragraph 6 of the Affidavit in reply that;

- a. The Applicants filed HCCS No. 90 of 2019 on the 20th May 2019 which they abandoned and never prosecuted yet the 1-6th Respondents had filed a joint written statement of defence.
- b. The Applicants then filed HCCS No. 210 of 2020 on the 20th November 2020 between the same parties in respect of the same subject matter and a joint defence was filed by the 1st -6th Respondents.
- c. That the 1st-6th Respondents filed an application vide HCMA No. 340 of 2020 seeking to have the Applicant's HCCS No. 210 of 2020 dismissed or struck out on the ground that it was barred by law and the same is pending hearing in this honorable Court.
- d. The Applicants then instead of opposing Application in HCMA No. 340 of 2020 again filed an Application HCMA No. 173 of 2021 seeking to have their HCCS No. 210 of 2020 consolidated with HCCS No. 90 of 2019.
- e. That the 1st-6th Respondents filed an affidavit in reply to oppose the Applicants HCMA No.173 of 2021.
- f. That when the 1st- 6th Respondents' Application vide HCMA No. 340 of 2020 and the Applicants HCMA No. 173 of 2021 were pending hearing before the Court, the Applicants chose to withdraw both HCCS No. 210 of 2020 and HCMA No. 173 of 2021.
- g. That the Applicants have now embarked on amending the plaint in HCCS No. 90 of 2019 which they had abandoned three years ago which is an injustice to the Respondents.

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- h. The Applicants have been changing lawyers ever since the litigation started without any justifiable cause.

The 1st – 6th Respondents aver in paragraph 10 of the Affidavit in reply, that the proposed amendment will not avoid but rather create a multiplicity of suits for the following reasons;

- a. In their joint written statement of defence filed in HCCS No.90 of 2019, paragraph 5 (r), it was pleaded that the 1st, 2nd and 3rd Respondents had earlier filed HCCS No.94 of 2017 in this Court to recover the suit land on Plot 432 whose title had been held by Kaddu Christopher who was the 4th Defendant in that suit.
- b. That HCCS No. 94 of 2017 and the Applicant's HCCS No.90 of 2019 both are in respect of the same subject matter Plot 432 (the suit land) and the 7th and 8th Respondents whom the Applicants seek to add in HCCS No.90 of 2019 were the 4th and 7th Defendants respectively in HCCS No.94 of 2017.
- c. The 1st-3rd Respondents entered into a Consent Judgement in HCCS No.94 of 2017 with the 7th Respondent herein and he surrendered the title to the suit land for a consideration which was fully paid by the 1st, 2nd and 3rd Respondent.
- d. The 1st and 2nd Applicants then filed an Application vide HCMA No.384 of 2018 in this Court to be joined as Defendants in HCCS No.94 of 2017 which Application was signed by the Deputy Registrar on the 11th December 2018 but the Applicants did not prosecute it.

The Applicants in the instant Application filed an Affidavit in Rejoinder deponed on 22nd September 2022 wherein they denied dilatory conduct; attached written consent authorizing Sekabira to swear an Affidavit on behalf of the other Applicants; denied abandoning HCCS No.90 of 2019 from which the current Application arises; averred that HCCS No.210 of

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2020 was withdrawn in the presence of the Respondents and as such HCMA No.340 of 2020 and HCMA No.173 of 2021 collapsed.

Finally, that the Applicants filed an Application to set aside the Consent Judgement and consolidation of Civil Suit No.90 of 2019 and No.94 of 2017 vide Misc. Application No.369 of 2022 which is pending hearing and that the amendment is intended to amend and add the 7th and 8th Respondents as Defendants in Civil Suit No.90 of 2019.

Representation:

When this matter came up for hearing the Applicants were represented by Mr. Buyuni Joseck from M/S Sanywa, Wabwire & Co. Advocates and the 1st to 6th Respondents were represented by Mr. Mutumba Jolly from Messers Jolly Mutumba & Co. Advocates. It was agreed that the hearing would proceed by way of written submissions. The submissions were duly filed by both Counsel and the same have been adopted and considered by the Court.

Issues for determination:

1. Whether the Chamber Summons was served out of time after the summons had expired.
2. Whether the Affidavit in Support of the Chamber Summons is defective for having been sworn without authority from the other Applicants.
3. Whether the proposed amended plaint discloses no reasonable cause of action which makes the Application to be incompetent.
4. Whether the annexures to the supporting Affidavits ought to be rejected for not having been sealed by the Commissioner for Oaths.
5. Whether the Affidavit in Support of the Application is incurably defective for containing falsehoods.
6. Whether the Application is an abuse of court process?

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7. Whether leave to amend the Plaint and to add parties should be granted to the Applicants?
8. What are the remedies available to the parties?

This Court from the onset observed that the 7th and 8th Respondents who are sought to be added as parties did not file Affidavits in reply. It is not clear whether they were served as no Affidavit of Service is on Court record.

Resolution:

The 1st-6th Respondents in their Affidavit in reply and the written submissions raised preliminary points of law which I will deal with first before going into the gist of the Application. The points of law are enumerated as issues 1-6 above.

1. Whether the Chamber Summons was served out of time after the summons had expired?

Counsel for the Respondents grounded his submissions in paragraph 4 of their affidavit in reply. The Respondents contend that the chamber summons having been filed on the 4th March 2022 and served on the Respondents' Counsel on the 29th August 2022, was served five (5) months out of time.

On the other hand, Counsel for the Applicants disputed the matter. He contended that the Application was filed on 4th March 2022 and signed on the same day by the Deputy Registrar, it remained pending fixing a date by the trial Judge as a policy of this Court. That the Application was brought to the attention of Court when the main suit was fixed for mention on 25th of August 2022. The trial Judge fixed the chamber summons for hearing on 7th September, 2022 and thereafter Counsel for the Respondents was served on 29th August 2022, three days after the matter was fixed by the trial Judge.

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The Court perused the record in LD CS No. 0090/ 2019 and observed that the said suit was fixed for mention on 25th August, 2022. The proceedings show that there was an amended Plaintiff that had been filed without leave of Court and the Court proceeded to expunge it from its record. Counsel for the Plaintiffs then brought to the attention of Court MA No.92 of 2022, an Application seeking leave of court to amend the Plaintiff, and prayed that the Court fix the Application for hearing. The Court agreed to the request. It is the finding of this Court that the chamber summons was filed on 4th March 2022 and endorsed by the Deputy Registrar on the same day, the Application was given a hearing date on the 25th August 2022 by the Trial Judge and fixed for hearing on the 7th September 2022. The time therefore began to run from the 25th August 2022 when the Chamber Summons was fixed for hearing. The Chamber Summons did not expire as contended by the Respondents. This ground of objection is over ruled.

2. Whether the Affidavit in Support of the Chamber Summons is defective for having been sworn without authority from the other Applicants.

The Respondents' Counsel submitted that the Affidavit in Support of the Chamber Summons was incurably defective because it was sworn by the 2nd Applicant without authority from others. He further submitted that the Affidavit is not tenable in law since the deponent Sekabira Benard Johnson could not legally depone on behalf of the 1st and 3rd Applicant. Counsel argued that much as the deponent deposed in paragraph 1 of his Affidavit in Support of the Chamber Summons, that he had due authorization from other Applicants, he did not attach the letter of authority signed by the other Applicants.

In reply to this ground of objection, Counsel for the Applicants argued that there is a written authority on record, filed on the same date the Application was filed that is 4th March 2022, and served on Counsel for the Respondents on 29th August 2022.

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Resolution:

In paragraph 1 of the Affidavit in Support of the Chamber Summons, Sekabira stated that he had due authorization from the other Applicants to swear the affidavit in support of the Application; he however did not attach the authorization. Annexure A to that Affidavit is a copy of a land title. Sekabira Bernard Johnson, in the Affidavit in rejoinder filed on 23rd September 2022 avers that he had authorization to swear the Affidavit on behalf of the Applicants which is on court record and was filed on the same date with the Application. He attaches a copy of the authorization which is marked annexure A.

It is my opinion that the later annexure A, to the affidavit in rejoinder is an afterthought as the record of the Court did not bear the authorization at the time of filing the Chamber Summons. Nevertheless, this Court is of the considered opinion that the lack of such explicit authorization is not fatal to the Application as this case is not a representative action. Secondly, the Applicants in several other Applications and suits before this Court have authorized the said Sekabira to depone Affidavits on their behalf as the relevant facts seem to be within the common knowledge of the parties (Applicants). I will in the interest of justice allow the Affidavit in Support of the Application as presented and overrule the objection.

3. Whether the proposed amended plaint discloses no reasonable cause of action which makes the Application incompetent.

Counsel for the Respondent contested the Application on the ground that the intended Plaint discloses no cause of action under Order 7 rule 11 (a) of the Civil Procedure Rules(CPR) which provides that the plaint shall be rejected where it does not disclose a cause of action. He fortified his arguments by citing the case of **Auto Garage Versus Motokov (1971) EA page 519**, in which Court held that a cause of action is established where the plaint shows that the Plaintiff enjoyed a right, that right was violated

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and the Defendant is liable. He further argued that the Plaintiffs had handed over the title deed to the 1st Defendant and therefore the element of the Plaintiff's right being enjoyed is lacking.

In response to this objection, the Applicants Counsel submitted that the amended plaint clearly indicates that there is a right to own land, the same was infringed through fraud and the Respondents are liable for tempering with the land title and taking over the suit land through connivance with the 7th and 8th Defendants.

Resolution

Under Section 59 of the Registration of Titles Act, possession of a Certificate of Title by a registered person is conclusive evidence of ownership of the land described therein. Further, under **Section 176 (c)**, a registered proprietor of land is protected against an action for ejectment except on ground of fraud. This was emphasized in the case of **Kampala Bottlers versus Damanico (U) Ltd, S. C. Civil Appeal No. 22 of 1992**. Therefore, the same Respondents can only be impeached on grounds of illegality or fraud, attributable to the transferee.

It follows that the intended amended plaint discloses a cause of action. The amendment if allowed, would require the Defendants/Respondents to amend their pleadings to show that there is no cause of action against them. This Court would then resolve all the issue in the substantive suit.

I overrule this ground of the preliminary objection.

4. Whether the annexures to the supporting Affidavits ought to be rejected for not having been sealed by the Commissioner for Oaths.

Learned Counsel for the respondents submitted that the annexures to the Affidavit in Support were not sealed by the Commissioner for Oaths contrary to section 7(1) (a), (b) and Rule 8 in schedule of the Commissioner for Oaths Act Cap 5 and Rule 8 provides,

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“All exhibits to the Affidavits shall be securely sealed to the Affidavits under the seal of the Commissioner and shall be marked with serial letters of identification”.

Counsel further submitted that the annexures to the supporting Affidavits being contrary to the provisions of the cited law, should be rejected and disregarded when determining the Application.

On the other hand, Counsel for the Applicants contended that the Affidavit in Support of the Application is duly commissioned together with the attachment and it was commissioned on the 22nd February, 2022 by a Commissioner called Dusabe Samuel. He submitted that the failure to seal the attachments is cured by Article 126 (2) (e) of the Constitution of the Republic of Uganda and does not in any way prejudice the Respondents.

Resolution:

Rule 8 of the Commissioner for Oaths Rules (Rules) provides that, all exhibits to Affidavits have to be securely sealed to the Affidavits under the seal of the Commissioner for Oaths, and marked with the serial number of the identification.

I have looked at the annexures being referred to and observed that annexures A, B and the proposed amended Plaintiff were not sealed.

In **Namboowa Rashida versus Bavekuno Mafuma Godfrey Kyeswa versus Electoral Commission EPA 69/2016** the Court of Appeal agreed with Justice Engau as he then was in **Uganda Corporation Creameries Ltd and Another versus Reamton Ltd CACA 1998** where the issue of failure to seal annexures by the Commissioner of Oaths was raised, when he stated *“I think it is very pertinent at this juncture to have the words “exhibit” and “annexure” defined. According to Black Law Dictionary “exhibit” is defined as a paper or document produced during a trial or*

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hearing in proof of facts. 'Annex' means to bind or to attach. The word expresses the idea of joining a smaller or subordinate thing with another larger or of higher importance in that context. It is my well-considered view that the word 'exhibit' cannot be used interchangeably with the word 'annexure'. An exhibit is a document or thing that tendered in court during a trial or hearing to prove a fact but an annexure is a smaller subordinate thing attached to larger thing that does not affect its importance....Rule 8 though mandatory is procedural and does not go to the root as the competence of affidavits. In the premises substantive justice should be administered without undue regard to technicalities....."

This Court adopts the distinction made by the learned Justices in the above case that failing to securely seal an annexure with the seal of the advocate who commissioned the Affidavit did not offend the rule 8 as they were not exhibits produced and exhibited in Court during a trial or hearing in proof of facts. This is in light of the fact that this is an Application for amendment of a Plaint and not for determining the rights between the parties. This point of law is therefore overruled.

5. Whether the Affidavit in Support of the Application is incurably defective for containing falsehoods.

Counsel for the Respondents submitted that paragraph 10 of the Affidavit in Support of the chamber summons contained falsehoods in as far as the attached Certificate of Title does not indicate that the 3rd Applicant as a joint proprietor with the 1st and 2nd Applicants. Counsel further argued that as per the Certificate of Title marked A to the Affidavit in Support of the chamber summons as well as the plaint in HCCS No.210 of 2020 attached to the affidavit in reply and marked "C" does not include the 3rd Applicant as an Administrator of the estate of the Late Hannington Eric Kangave. He again contended that such falsehoods in the Affidavit renders the entire Affidavit suspect. He relied on the case of **Bigways**

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Construction Ltd Vs Trentyre (U) Ltd HCMA No 0832 of 2005 where Hon. Mr. Justice Bamwine Yokokamu relied on the case of **Joseph Mulenga Vs Photo Focus (U) Ltd HCMA No.308/96** reproduced in [1996] VI KALR 19 and held that an Application based on such Affidavit must fail.

The Applicants Counsel contended that the Affidavit is in line with order 19 Rule 3 of the CPR, and that as far as paragraph 10 of the Affidavit in Support of the Application is concerned, the deponent states that the 1st, 2nd and 3rd Respondents frequently registered their names into the land title and indeed upon perusal of annexure B, its registered in their names without basis and in the alternative prayed that if there is anything false, it can be severed.

I agree with the submission of Counsel for the Respondents that the attached Certificate of title does not include the 3rd Applicant as joint proprietor of the contested land. I perused the record in Civil Suit No.90 of 2019 and saw a Sales Agreement dated 14th May 2008, as per the Sales Agreement, the contested land has a house shared between the 2nd and 3rd Applicants hence much as the 3rd Applicant's name is not on the land Title as a proprietor, he is an interested party and it is right for him to pursue his rights.

In that regard I find that the averment is not intended to mislead the Court. This objection is overruled.

6. Whether the Application is an abuse of court process?

On this ground, learned Counsel for the Respondents argued that the Application is an abuse of Court process and relied on the holding in **Attorney General Vs James Kamoga & Another SCCA NO.8 of 2004 Malanga JSC (R.I.P)** in the lead judgment where the Court concurred with the definition of abuse of Court as proffered by authors of Black's Law dictionary (6th Ed) and held that abuse of court process involves the

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use of the process for an improper purpose for which the process was not established. This was mainly in light of the matters and Applications that had been filed and then later withdrawn.

Conversely, Counsel for the Applicants submitted that the Application is proper before Court as it meets the grounds for amendment of a plaint under Order 6 Rule 19 of the CPR and also addition of parties under Order 1 Rule 13 of the CPR and that, it is brought in good faith to guard against multiplicity of suits and resolving real issues in controversy and all Respondents will benefit.

Resolution

In the case of **Muchanga Investments Limited v. Safaris Unlimited (Africa) Ltd & 2 Others**, Civil Appeal No. 25 of 2002, [2009] KLR 229, the Court of Appeal held that;

"The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it. The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions."

This Court observes from the record that there have been several Suits and Applications from the land in contest to wit Block 98 Plot 15, which has been subdivided severally to create other plots. These suits are among others Civil Suit No. 20 of 2020 which was withdrawn, and correctly in my view to avoid multiplicity of suits. The Applicants sought to be joined as parties in Civil Suit No. 94 of 2017 but later withdrew their Application, which I believe would have enabled the court to determine all the issues

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in the presence of the interested parties. Suffice to note that one of the Administrators of the estate of Late Eric Kangave is a party (1st Defendant, Kinzanyiro Samuel) in Civil Suit No. 94 of 2017.

Suffice to note that the issues raised in Civil Suit No. 90 of 2019 as it stands, the proposed amendment and Civil Suit No. No. 94 of 2017 stem from the contention that Late Hannington Erick Kangave bought the suit lands formerly comprised in Kyaggwe Block 98 Plot 15 from Susane Iga Mulumba Salongo on one hand, and Block Kyaggwe Block 98 Plot 15 being given to the Late Sembwa Kiyini Yayiro by Susane Iga Mulumba Salongo on the hand. That issue seemed to have been settled by the revocation of the letters of Administration held by Kinzanyiro and Lubwama in High Court in FD CS No. 0015 of 2007, arising from Administration Cause No. 1192 of 2006 in Jinja High Court in 2007. What then remains to be answered is what part of the estate of the Late Ssembwa was given to the descendants of the Late Eric Kangave?

Without perusing the FD CS No. 0015 of 2017 and the Administration Cause this Court cannot reach a decision that the Application for amendment is an abuse of court process.

Suffice to note that the other arguments as lis pendis rule and the principle of res judicata shall be covered in the main suit.

7. Whether the amendment should be allowed?

Order 6 Rule 19 of the CPR empowers the Court to grant leave to a party to amend their pleadings at any stage of the proceedings. It provides as follows:

"The Court may, at any stage of the proceedings, allow either party to alter or amend his or her pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

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The principles that have been recognized by the Courts as governing the exercise of discretion to allow or disallow amendment of pleadings have been summarized in a number of decided cases **See: Gaso Transport Services (Bus) Ltd vs Obene (1990-1994) EA 88; Mulwooza & Brothers Ltd vs Shah & Co. Ltd, SCCA No. 26 of 2010; and Nicholas Serunkuma Ssewagudde & 2 Others vs Namasole Namusoke Namatovu Veronica HCMA No. 1307 of 2016.**

It is my considered opinion that Civil Suit No. 94 of 2017 has been to a large extent; if not wholly completed by three (3) Consent Judgments as follows;

- a. The first Consent Judgment was entered on the 19th October 2017 between the Plaintiffs, Kimuli Stephen, Yayiro Kiwanuka and Sempa Vicent on one hand and 2nd and 6th Defendant, Tumushabe Juliet and Joseph Allan Kiwuuwa respectively wherein the 2nd and 6th defendants agreed to surrender 0.7 acres (70 decimals) in full and final settlement of the claim and the said defendants were required to vacate their agricultural produce from the land comprised in Block 98 Plots 435 and 436.
- b. The second Consent Judgment dated 16th November 2017 was entered between the plaintiffs, Kimuli Stephen, Yayiro Kiwanuka and Sempa Vincent on one hand and the 5th Defendant, Luggya Beatrice where in it was agreed that the 5th Defendant surrenders 2 acres and 25 decimal to the Plaintiffs in full and final settlement of the claim against her; out of the 2 acres and 25 decimals, 1 acre and 25 decimals would be divided off Block 98 Plot 438 (which is currently subdivided into several plots and the remaining 1 acre, its title already in place would be given to the Plaintiffs).

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- c. The third Consent Judgment was entered on 26th April 2019 between the Plaintiffs and the 4th Defendant, Kaddu Christopher wherein it was agreed that the Plaintiffs pay to the 6th Defendant (possibly an error since the consent is signed by the 4th Defendant) and in return for a land title Block 98 Plot 432 which he got from the first Applicant, Nampala Betty and Sekabira Edward Johnson after paying them a consideration of 10m shillings in 2009. The "6th Defendant" was to thereafter be withdrawn from the suit.

The first and second Consents are not contested by the Plaintiffs in Civil Suit No. 90 of 2019, (save for the amendments that are sought to be introduced under paragraph 8 of the proposed amended Plaintiff). The 3rd Consent Judgement is contested in Application No.369/2022 arising from Civil Suit No. 90 of 2019 which has not yet been heard. That Application seeks to set aside the said Consent Judgement, consolidate Civil Suit No.94 of 2017 with Civil Suit No.90 of 2019. The said Application was filed on the 7th September 2022 but has never been given a date for hearing. In a letter dated 18th January 2023 Counsel for the Applicants requested for a hearing date of the said Application. When MA No. 0092 of 2022 came for hearing the Applicants did not remind the Court that MA No. 369/2022 had not yet been set down for hearing. It would have been desirable to have both Applications fixed for hearing to conclusively determine all the matters arising in a more organized manner.

The parties sought to be added in the current Application are Kaddu Christopher and the Commissioner Land Registration who are the 4th and 7th Defendants respectively in Civil Suit No.94 of 2017. The matters between the 4th Defendant as earlier opined stand concluded by the 3rd Consent Judgement.

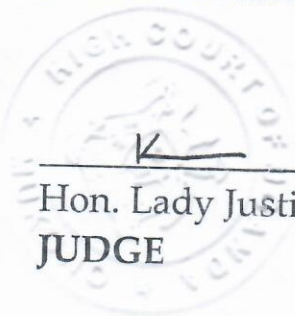
It would therefore be futile to cause an amendment in Civil Suit No. 90 of 2019 to include matters that have been resolved by the Court vide the

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Consent Judgments. I am therefore in agreement with the submission of Counsel for the Respondent that Consent Judgment is a Judgment by the Court and until it is reviewed or set aside it has the force of law.

In the result, I dismiss the Application for amendment and order that each party bears their own costs.

Dated at Mukono this 13th day of April 2023.



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Hon. Lady Justice Christine Kaahwa
JUDGE