

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(EXECUTION AND BAILIFFS DIVISION)**

**MISCELLANEOUS APPLICATION NO. 1305 OF 2016
(ARISING FROM EXECUTION APPLICATION 197 OF 2015)
(ARISING FROM EMA NO. 196 OF 2015)
(ARISING FROM CIVIL SUIT NO. 367 OF 2007)**

MADAT GULAM HUSSEIN CHATUR

(SUING THROUGH HIS LAWFUL ATTORNEY KEMAL LALANI)

..... **APPLICANT**

VS.

SADRUDIN VIRANI RESPONDENT

LAWFUL ATTORNEY OF SHEILA GULAM HUSSEIN CHATUR & 3 OTHERS

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

By this application made under S.98 CPA and 0.1 r 13 C.PR, the Applicant sought orders of this court, substituting the current Respondent for the previous Respondents.

And order that execution should proceed against the substituted Respondent.

And costs of the Application.

The grounds for the application are that, the Applicant is the decree holder in Civil Suit 367/07.

Upon making application for execution, the Applicant came to learn that the previous Respondent had transferred all their known properties to their lawful Attorney / substituted Respondent.

That the Powers of Attorney provide that the Respondent suffers the judgment debts of the previous Respondents.

It is only just and fair that the application be granted.

The application is supported by the affidavit of Kemal Lalani which was heard and relied upon at the hearing.

There is an affidavit in reply of Sadrudin Virani, the Respondent where it is contended that he is a mere donee of Powers of Attorney of the Judgment Debtors and therefore their agent.

That therefore the execution proceedings cannot be maintained against him personally or his names but only against the disclosed principals.

5 Further that, the application for substitution of the Defendants in the main suit is incompetent as the proceedings in the suit have already been finalized and judgment entered against the Defendants.

10 That the Respondent is the absolute owner of all the assets transferred and registered into his names and that he holds no assets or properties on behalf of the previous Respondents who are the proper parties to this suit and any alleged execution proceedings.

It is therefore in the interests of justice that the application be dismissed with costs to the Respondents.

15 There is an affidavit in rejoinder of Kemal Lalani.

The application was called for hearing on 16.11.16.

20 Counsel for the Applicant informed court that all efforts to find an amicable settlement had proved futile.

He then went through the laws under which the application was made, the orders sought and the grounds thereof and the supporting affidavit.

25 He emphasized that the Respondent is the biological father of the would be Respondents and that the transfer was meant to defeat the execution proceedings that were imminent.

30 That the general Power of Attorney dated 20.02.08 clearly states that at P2 that the Respondent was **“to suffer judgment to be given against them”**.

That the affidavit in reply filed by the Respondents does not dispute the facts as stated in the application and therefore concede. Their only objection is that they are agents and the principals are known.

35 He pointed out that, it is clearly stated in the affidavit in rejoinder that the transfer of the properties from the children to the Respondent was made after the application for execution was filed.

40 Counsel argued that therefore the transfer was in bad faith and court has the absolute discretion in the interests of justice to substitute the Respondent, more so, Counsel added, as the action itself is fraudulent.

The case of **Samson Sempasa vs. P.K Sengendo Miscellenous Application 577/2013** was cited on the ground that it empowers court to exercise that discretion.

45 And the case of **Godfrey Yiga vs. Entebbe Municipal Council and 2 Others MA 207/15 _ Civil Suit 205/14** which discusses principles of substitution.

50 It was then prayed that the court grants the orders sought, together with costs, in the interests of justice.

Counsel for the Respondent opposed the application on the ground that the provisions of the law under which the application was made envisages substitution before trial. He pointed out that this

matter is at execution level and substituting the Respondent at this stage is not only unfair but also contrary to the law under which the application was brought.

5 Further that, the application is improperly before court as it is against the Respondent based on Powers of Attorney wherein the principals are disclosed, a fact conceded to, by the Applicant.

He argued that, the right party to be sued is not the Respondent but the Judgment Debtors as named in the decree.

10 Further that, substitution would amount to amendment of the decree arising from proceedings where the Respondent was not a party and was therefore not given a right to be heard.

It was argued that, as indicated in the affidavit in reply of the Respondent, whatever property belongs to the Responded was lawfully acquired.

15 And that Powers of Attorney do not transfer property to the Respondent. And not all Powers of Attorney provide that the Responded suffers judgment. It is only the Power of Attorney by Shena Virani which made that provision. All the other three are silent.

20 That even then, the paragraph of the Power of Attorney that provides that the Respondent suffers judgment is qualified leaving it to the Respondent to choose whether or not to suffer judgment or decree. And that, the Respondent opposes the application and deems it fit not to be bound by this or any other judgment.

25 Commenting about the implication of fraud by the Applicant, Counsel asserted that where a party alleges fraud, the burden of proof is higher. The Applicant would be expected to adduce evidence on fraud and not to make mere allegations.

30 That there is no evidence of fraud in the transfer of any property. The Powers of Attorney are in respect of land which has not been transferred or there is no evidence that it has been fraudulently transferred.

35 It was pointed out that, the Applicant contends that the previous Respondents transferred all their known property to the Respondent in order to defeat execution. However that, the application for execution was filed on 02.09.14, and it was not fixed for hearing until 14.04.16.

40 The said shares, Counsel stated, were transferred on 20.01.16, long before the application was fixed for hearing. It was filed two years earlier. There is no evidence that the Respondent and the previous Respondents know about the application by the time the shares were transferred. The application had neither been fixed nor served by them. Therefore that, the transfer was lawful, devoid of bad faith and without knowledge of the application for execution.

45 Further that, it is not clear what properties the Applicant seeks to attach. It would be a waste of time, Counsel argued for court to be lead on a fishing expedition where the prayers are not clear as to commence against the Respondent to attach his property.

It was prayed that application be dismissed with costs to the First Respondent.

50 Second Counsel for the Respondent did not object to the provisions under which the application was made, but to the stage or time at which the application was made.

He stated that, it is evident from the proceedings that the application was brought after judgment and decree had been issued against the Defendants in the original suit No. 367/07.

The application seeks to substitute the Respondent for the Defendants at the stage of execution. The Respondent was not given a right to be heard in the matter as required by Article 28 of the Constitution.

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Therefore, it was argued substituting him or carrying out execution against him will amount to condemning him without a hearing.

It was the contention of Counsel that the application has two major limbs:-

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1. Power of Attorney granted to the Respondent under which the Applicant seeks him to be liable for the Judgment Debtor.

However that, there are four (4) different Powers of Attorney given by the Defendants to the Respondent.

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The application is premised on the Powers of Attorney granted to the Respondent by Shena Verani. The said provision in the Power of Attorney which seems to make the Respondent liable for the judgment debt of all the Defendants is misconceived.

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The case of **Frederick Zaabwe vs. Orient Bank Ltd SCCA 04/06** was cited for the principle on interpretation of Powers of Attorney. The court held in that case that ***“powers of attorney should be construed strictly and given the ordinary meaning intended by the parties.”***

25

Counsel then contended that, the Defendants in the present application did not intend to have the Respondent bound by any judgment/decree in execution. Therefore, Respondent cannot be substituted for the previous Respondents.

The case of **Sempasa vs. Sengendo (Supra)** cited by Counsel for the Applicant is not applicable to the circumstances of the present case, Counsel stated. In that case, the Applicant sought to be joined to the suit but did not seek to substitute any party. The application was made during trial and not at the execution stage.

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Therefore that, the current application is misconceived.

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As to the transfer of property, it was the submission of Counsel that the transfer was bonafide and that unless it is set aside, that is, declared null and void, the Respondent is entitled to own property. He cannot be deprived of the same without due process of the law.

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The prayers of first Counsel were reiterated.

In rejoinder, Counsel for the Applicant on defending the application for being brought at this stage relied on the case of **Sinbad K Ltd & 5 Others vs. UBC CA 03/14** where Lady Justice Arach Amoko interpreted S.34 (1) CPA and stated that ***“issues of execution are not to be determined by a separate suit but by court dealing with execution.”***

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It was further submitted that to interpret the Power of Attorney to say that only Shema Virani bound the Respondent, would lead to an absurdity. More so after leading people to believe otherwise. Parties have to be held responsible for their actions.

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Counsel argued that, the case of **Sidpra (Supra)** does not apply. Words should be given their ordinary meaning. And the ordinary meaning is that the Respondent should suffer judgment debt.

Therefore that, the Respondent has no discretion in this respect. He is estopped at this stage to claim that he will not suffer judgment.

5 The Respondent's claim that he did not know of the application cannot stand. Court was referred to paragraph 6 of the affidavit in reply where there is a general averment that all properties belong to the Respondent. There is also a specific allegation by the Applicant that transfers were done to defeat justice to which there was no response.

10 Court was also asked to note that none of the principals swore any affidavit to deny the allegations of the Applicant, and yet their Counsel was served.

15 On the issue of alleged denial of right of hearing to the Respondent, it was contended that the Respondent prosecuted the case from the beginning to this date. And he is therefore more well versed with the matter than the other Respondents.

He is being brought in at this stage because of the transfer of the other Respondents to him, which he does not deny or explain. He is the biological father of Yasmin, Shena and Shafiq. While Sheila is his sister.

20 It was emphasized that the Respondent is not a stranger to the suit. He is the one who prosecuted the case and when the application for execution was filed, the properties were transferred into his names.

25 Counsel prayed that the Respondent be substituted as a party in respect of the properties that were transferred to him after the application for execution was made.

30 With leave of court, Counsel for the Respondent pointed out that S.34 (1) CPA refers to "***all parties to the suit to which the decree was passed***" concluding that the Respondent was not a party to the suit in which the decree was passed.

That leading prosecution of the suit did not make him a party to the suit as envisaged under the law. He was an agent of the Defendants.

35 Transfer of the properties was not questioned but substitution of the Respondent to be held liable.

The issues are:-

- 40 1) **Whether the Respondent can be substituted at this stage for the previous Respondents.**
- 2) **Whether execution should issue against the substituted Respondents.**

45 **Substitution of the Respondents:**

The application was made under 0.1 r 13 C.P.R and 0.22 r 9 C.P.R.

50 0.1 r 13 C.P.R provides for applications to add, strike out or substitute a plaintiff or defendant. "***Any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by motion or summons or at the trial of the suit in a summary manner***".

This application has been made at execution stage. I therefore find that 0.1 r 13 C.P.R is not applicable. However, I bear in mind the established principle that ***“citing of the wrong law does not vitiate the proceedings as the right law can still be inserted”***. – See case of **Saggu vs. Road Master Cycles (U) Ltd [2002] IEA 258**.

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After careful consideration of the circumstances of the present case, I find that 0.1 r 10 (2) C.P.R is more applicable.

10 The rule provides that ***“the court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions in the suit, be added”***.

15 The Respondent in the present case holds powers of the Attorney from the previous Respondents. He is the father and brother respectively of the Respondents. The Donees transferred all their known property to him at the stage of execution of the judgment against them. One of the donees provided that, the Respondent would be liable for the judgment/decree.

20 The Respondent is the one who conducted proceedings on behalf of the Respondents.

While the Respondent has a right to own property in his own right, it is apparent from the circumstances of this case that the transfers were meant to defeat the course of justice and thereby deny the Applicants the fruits of their judgment/decree.

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The presence of the Respondent as a party to the suit and not attorney is necessary to enable court to effectively and completely adjudicate upon and settle all questions involved in the execution of the judgment/decree.

30 It is therefore only proper and just that he be substituted for the Respondents as a party under 0.1 r 10 (2) C.P.R. This will enable the Applicant to attach the properties transferred to him at execution stage, in order to satisfy the decree.

35 According to the case of **Sinbad K Ltd & 5 Others vs. UBC CA 03/14** ***“all matters at execution stage can be dealt with by the court executing the decree. There is no need for a separate suit.”***

40 This court also takes into account the provisions of S.33 of the Judicature Act which empower the High Court ***“to grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a case or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any or those matters avoided”***.

45 The provision is mandatory.

The application is allowed for all those reasons.

The current Respondent is substituted for the previous Respondents.

50 Execution proceedings to issue against the substituted Respondent in respect of those properties that were transferred to him by the previous Respondents.

Costs of the application are also awarded to the Applicant.

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FLAVIA SENOGA ANGLIN

JUDGE

05.06.17