

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**FAMILY DIVISION**

**ORIGINATING SUMMONS NO. 04 OF 2012**

1. **ABUBAKER SEBALAMU (Administrator of the estate of the late Moses Sebitengero Ganya)**
2. **FAISAL IDI ZIMULA**
3. **NOAH MOHAMAD NKOOLA.....PLAINTIFFS**

**VERSUS**

1. **SARAH KIZITO**
2. **KATO DAMULIRA**
3. **KASSIM KIZZA**
4. **ABDU DAMULIRA.....DEFENDANTS**

**BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE**

**JUDGEMENT**

This suit was brought by way of Originating Summons (OS) under section 234 of the Succession Act cap 162, Order 37 rules 1(a), (b) & (h), 3, & 8 of the Civil Procedure Rules (CPR). The OS, which is supported by the affidavits of the three plaintiffs, namely **Abubaker Sebalamu, Faisal Idi Zimula** and **Noah Mohamad Nkoola**, is for determination of the following questions:-

1. Whether the defendants and those they claim to represent as beneficiaries of the estate of the late Abdul Aziz Nsubuga Bulwadda have an interest in the estate of late Moses Sebitengero Ganya to warrant lodgement of a caveat on the estate of the late Moses Sebitengero Ganya's land administered by the 1<sup>st</sup> plaintiff and 2<sup>nd</sup> and 3<sup>rd</sup> plaintiff's land therefrom for Kyadondo Block 189 Plots 767, 768, 770,771, 772, 773, 774 and 775 and others arising therefrom.
2. Whether the defendants who claim to be beneficiaries of the estate of the late Abdul Aziz Nsubuga Bulwadda should not be permanently restrained from intermeddling in the estate of late Moses Sebitengero Ganya administered by the 1<sup>st</sup> plaintiff's suit land as bona fide purchasers therefrom.
3. Whether the defendants should jointly and or severally pay costs of this suit.

The OS is opposed by the defendants through the affidavit in reply of the 1<sup>st</sup> defendant **Sarah Kizito** to which the 1<sup>st</sup> plaintiff **Abubaker Sebalamu** filed an affidavit in rejoinder.

The background to the OS is that the plaintiffs are challenging a caveat lodged by the defendants on the suit land where the 1<sup>st</sup> plaintiff claims interest as administrator of the estate of the late Moses Sebitengero Ganya, while the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs claim interest as purchasers of portions of the same land.

The preliminaries to the hearing of this OS were handled by a different Judge who has since been transferred to another division. I started at the submissions stage. All affidavit evidence was on record by the time I took over the matter.

The defendants and their counsel were absent when the matter came up for submissions. Counsel Eric Muhwezi for the plaintiffs prayed court to proceed *ex parte* on grounds that the hearing notice was served on the defendant's lawyers who had acknowledged service. The affidavit of service of Adam Bunya on the court record revealed that the defendants' lawyers were served on 25/02/2014. They acknowledged service by signing and stamping the hearing notice. There was no explanation on record from the defendants or their counsel as to why any or all of them were not in court. The hearing proceeded *ex parte* after court was satisfied that there was effective service of the defendants through their counsel. Learned Counsel Eric Muhwezi for the plaintiffs submitted that the defendants have no caveatable interest in the land, that they are not even beneficiaries of the late Ganya, and that the plaintiff dealt with the land in the way he deemed fit as the proprietor of the land.

It is trite law that even if a case is heard *ex parte*, the burden on the part of the plaintiff to prove his/her case to the required standard remains. Secondly, a judge has powers under order 37 rule 10 of the CPR to order the summons to be supported by such other evidence as is deemed necessary and give such directions as deemed just for the trial of any issues arising from the summons. A judge can also make any amendments to make the summons accord with existing facts or raise matters in issue between the parties.

Thus, after counsel's submissions, this court requested the plaintiff's counsel to avail court with either originals or certified copies of all the documents annexed to their affidavits within a deadline. This was because all the documents annexed to the affidavits on record were photocopies. Secondly, save for Block 189 Plot 50, the photocopies of the certificates of title to the suit lacked the encumbrance pages. There was need to peruse the certificates of title to the suit plots in their entirety to enable this court appreciate the case fully and make informed decisions judiciously.

I wrote the judgment without the respondents' submissions, but their affidavit in reply was on record. This was done under Order 17 rule 4 of the CPR which allows a court to proceed to decide a suit where any party has, among other things, failed to take action to further the progress of the proceedings.

The plaintiffs in their sworn affidavits state that the 1<sup>st</sup> plaintiff, together with Rehema Nansubuga and Sauda Nansubuga, were on 25/02/2005, registered on the certificate of title for

land measuring 28.80 acres, comprised in Kyadondo Block 189 Plot 50 land at Seta vide instrument number KLA 270601, as administrators of the estate of the late Moses Sebitengero Ganya. In July 2011, the 1<sup>st</sup> plaintiff sold 9 acres of the said land to the 2<sup>nd</sup> plaintiff and transferred it into his names. On 25/07/2011 it was sub divided into plots 767, 768, 770, 771, 772, 773, 774, and 775 vide instrument KLA 408889. The 2<sup>nd</sup> plaintiff later sold plot 771 of the same land measuring 0.810 hectares to the 3<sup>rd</sup> plaintiff and it was transferred into his names on 10/08/2011 vide instrument KLA 511336.

The plaintiffs also state that the defendants, claiming to be beneficiaries of the estate of the late Abdul Aziz Nsubuga Bulwadda, lodged a caveat on the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs' land, and enclosed part of the residue land for the estate of the late Moses Sebitengero Ganya as well as parts of the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs' land.

The 1<sup>st</sup> defendant stated in her sworn affidavit that she is a descendant of Abdallah Aziz Bulwada a father to her late father, Bulwada Kizito; that the defendants and the 1<sup>st</sup> plaintiff are her cousins, all grandchildren of the late Abdallah Aziz Bulwada; that her grandfather Abdallah Aziz Bulwada was the registered proprietor of Block 189 at Seeta, Kasangati measuring 138 acres out of which he allocated 53 acres as bijja (burial grounds) for his descendants; that Abdallah Aziz Bulwada was succeeded by Alamanzani Ganya who got registered on the land but who on his demise did not bequeath the 53 acres of the burial grounds; that Alamanzani Ganya was succeeded by Moses Sebitengero who as such got registered on land formerly known as plot 50 consisting of the burial grounds; that Sebitengero was succeeded by Karim Ganya who disappeared and was replaced by Ismail Ddamulira; and that the plaintiff who was a brother to Moses Sebitengero obtained letters of administration to Sebitengero's estate together with Sauda Nansubuga and Rehema Nansubuga both of who eventually passed away; that the burial grounds have since been a subject of litigation vide SC Cr. Appeal No 32/1995 and Court of Appeal Civil Appeal No 110/2011 arising from HCCS No 550/2004; and that the 1<sup>st</sup> plaintiff's application for letters of administration was caveated by a one Yasmin Nalwoga resulting in HCCS 89/2010.

The duplicate certificates of title eventually availed by the plaintiffs on request by this court related to Block 189 plots 37, 38, 63, 64, 274, 275, 276 and 767. The said certificates, except that relating Block 189 plot 767, had nothing to do with the suit plots, at least judging by its plot numbers. They were not mentioned anywhere in the OS or the affidavit evidence on record. The plaintiff's counsel, when queried on the issue, responded by correspondence that he only furnished certificates of title on which caveats are still lodged, and that the application in respect of those titles not availed had abated since caveats had already been removed. There was nothing in the evidence adduced, or in counsel's submissions, showing which suit plots were no longer under the defendants' caveat as to make the suit concerning them abate.

The duplicate certificate of title to Block 189 plot 767, which was the only relevant certificate availed, on the face of its encumbrance page, shows that there has never been an encumbrance on the said title. This varied from the affidavit evidence on record. The plaintiff's not availing the

relevant duplicate certificates of title to the other suit plots, or at least certified copies of the same, also raised questions about the adequacy and authenticity of their evidence. This was despite the said plaintiffs being accorded the opportunity to adduce the required evidence by this court.

The adduced evidence on court record has not assisted court to determine the questions put before it. It is not authentic enough, and is lacking in some material particulars. All the documents annexed to the plaintiff's and the defendants' affidavits were photocopies which lacked the encumbrances page to guide court on which suit plots were still under encumbrance. Such evidence would strengthen the plaintiffs' affidavit evidence to answer the questions put before this court for determination.

It is relevant for court to know on which suit plots the caveats were still subsisting before ordering for their removal or permanently restraining the defendants from intermeddling with the suit land forming part of the estate of the late Sebitengero. This court can only make decisions based on authentic evidence availed to it to avoid possible prejudices and injustices to whoever may be affected by its orders. It cannot make speculations about which suit plots were still under caveat such that the eventual orders if given have practical effect and are capable of enforcement.

Secondly, the issues arising from the 1<sup>st</sup> defendant's affidavit, like the defendants' claims to the estate of the late Moses Sebitengero Ganya, and the pending court cases on the same estate, require more probing if not authenticity, by calling evidence and or analyzing the relevant certified true copies or originals of the documents or court records. The essence of an OS is simplicity and speed to determine questions and dispose of them in a summary manner. Under Order 37 rule 11 of the CPR, if it appears that the matters in respect of which relief is sought cannot be properly disposed of in a summary manner, a judge may refuse to pass any order on the summons, and may dismiss it, referring the parties to a suit in the ordinary course, and making such orders as to costs he/she considers just.

In light of the foregoing, it is my opinion that the plaintiffs have not adduced adequate evidence to the required standards to enable me determine the questions contained in the OS. Secondly, the matters relating to the estate of the late Sebitengero Ganya, including the caveats lodged on the land forming part of his estate by the defendants, require that they be heard in an ordinary civil suit where evidence on questions of fact and law can be adduced and deliberated on.

The Originating Summons is dismissed.

Each party will bear their own costs.

**Dated at Kampala this 14<sup>th</sup> day of May 2014.**

Percy Night Tuhaise

**Judge.**

