

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
MISCELLANEOUS CAUSE NO. 10 OF 2014

- 1. BETTY DAISY KAMPORORO KALIISA**
- 2. EVELYN KALIISA NYAKAANA**
- 3. TRUDY OFWONO KALIISA**
- 4. SUZAN KALIISA**
- 5. JULIUS KALIISA**
- 6. LT. CLEOPHAS KALIISA**
- 7. STELLA KALIISA BIRUNGI.....APPLICANTS**

VERSUS

THE ADMINISTRATOR GENERAL.....RESPONDENT

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE
RULING

This is an application by notice of motion brought under rules 3 & 6 of the Judicature (Judicial Review) Rules 2009 and section 98 of the Civil Procedure Act for an order for judicial reliefs of mandamus, certiorari and prohibition.

The grounds of the application are that:-

1. The applicants are beneficiaries of the estate of their late father Francis Muntukwonka Kaliisa who died in 1985. They unanimously nominated the 5th applicant Julius Kaliisa to seek letters of administration to their late father's estate but the respondent has without lawful and just cause, frustrated the applicant's desire by failure, refusal and/or neglect to issue a certificate of no objection which the latter applied for.
2. The respondent's act or omission to issue the sought certificate has rendered the estate of the deceased applicants' father to remain unadministered and consequently to go to waste.
3. The respondent has connived with and unlawfully adopted bias in favour of the respondents' biological brother, a one Fred Kabagambe Kaliisa who has shunned all family meetings convened on the subject of regulating and appointing a suitable administrator for the applicants' beneficial estate yet his minority views have been unjustifiably given priority in total disregard and contempt of those considered and reasonable ones by the overwhelming majority to their chagrin.

4. It is fair, reasonable and just that the orders sought to be granted to the applicants and accordingly the respondent be compelled by court to perform its statutory duty to facilitate the proper and orderly administration of the deceased's estate herein by complying with the law and issuing the certificate of no objection he was moved to issue to the applicants' nominee.

The application is supported by the affidavits of Cleophas Kaliisa (6th applicant) and Julius Kaliisa (5th applicant). The respondent filed an affidavit in reply affirmed by Nakibuule Madiina Assistant Administrator General, to which Julius Kaliisa filed an affidavit in rejoinder. The applicants were represented by Counsel Rwabwogo Richard and the respondent was represented by Bogere Robert.

When this matter was first called for hearing on 3rd December 2014, the respondent indicated to this court that the matter could be settled out of court. The matter was adjourned to 18th December 2014 to allow the matter to be amicably settled by the parties. The said date was for mention of the case when court would be updated about the outcome or progress of the mediation. On 18th December 2014 the respondent did not attend court and did not explain the non attendance. The applicants' counsel however informed court that the mediation meeting has never taken place. The matter was then fixed for hearing on 24th March 2015. On the said date the respondent's counsel requested for a further adjournment to allow counsel Robert Bogere in personal conduct of the case proceed with the case. The applicant's counsel however informed court that the respondent has never invited the applicants or their counsel for mediation or any settlement, yet four months had passed since the matter was last heard. This court then requested the parties or their counsel to file written submissions on the matter within given time schedules.

The applicants' case is that the 5th applicant applied to the respondent for a certificate of no objection to enable him apply for letters of administration to the estate of his father, the late Francis Muntukwonka Kaliisa who died on 24/10/1985. The applicant had been authorized to do so by all but one of his siblings, who are also applicants in this matter. The one sibling who did not authorize him was their late father's heir Fred Kabagambe Kaliisa. The respondent refused to issue a certificate of no objection to the 5th applicant based on Fred Kabagambe Kaliisa's refusal to assent to his siblings' choice.

The applicants contend that the acts of the respondent are *ultra vires* or illegal. They seek orders of mandamus, to compel the respondent to perform its duty by issuing a certificate of no objection to the 5th applicant to manage the estate of his father, an order of certiorari, and an order of prohibition to forbid the respondent from making any future decision that will be *ultra vires* in the management of the estate, and for costs.

The respondent opposed the application, maintaining that there is no justification for an order of judicial relief of mandamus or certiorari. It is the respondent's case that the estate's not being administered for over thirty years was a result of the omission of the beneficiaries who only filed

the application in 2013. The respondent also stated that their office does not simply rubber stamp nominations for the majority, otherwise polygamous family members would outvote beneficiaries borne alone in the same family; that they endeavour to settle matters amicably, that indeed they did so in this case; and that the matter should be referred for mediation to save court's time and money.

The question to address is whether the respondent's refusal to issue a certificate of no objection to the applicant is *ultra vires*, or shows impropriety.

Section 36 of the Judicature Act cap 13 provides that the High Court may make orders of mandamus, prohibition and certiorari. Judicial review can only be granted on three grounds namely illegality, irrationality and procedural impropriety – **Council of Civil Service Unions V Minister for the Civil Service [1985] AC 374**. The first two grounds are known as substantive grounds of judicial review because they relate to the substance of the disputed decision. Procedural impropriety is a procedural ground because it aims at the decision making procedure rather than the content of the decision itself - **Aggrey Bwire V The Attorney General & Anor Civil Application No. 160 of 2008 Mpagi Bahigaine JA**, as she then was.

In **John Jet Mwebaze V Makerere University Civil Application No. 353/2005**, Kasule J, as he then was, stated that prerogative orders look to the control of the exercise and abuse of power by those in public offices, rather than at providing final determination of private rights which is done in normal civil suits. Mandamus is used to compel performance of a statutory duty. It is used to compel public officers to perform duties imposed upon them by an Act of Parliament.

Besides the prerogative orders, section 33 of the Judicature Act empowers this court to grant absolutely or on such terms as and conditions as it thinks just, all such remedies as any of the parties to a cause 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 any multiplicities of legal proceedings concerning any of those matters avoided.

The applicants' evidence, as deduced from the affidavits of Cleophas Kaliisa (6th applicant) and Julius Kaliisa (5th applicant), is that the applicants are the biological children of the late Francis Kaliisa Muntukwonka who passed away on 24th October 1985. He was survived by the widow (now deceased), all the applicants, and Fred Kaliisa Kabagambe. The applicants and Fred Kabagambe Kaliisa are all Muntukwonka's biological children. The applicants convened family meetings and engaged the office of the respondent to regularize the administration of their late father's estate. Fred Kabagambe Kaliisa did not attend any of the said meetings. During the said meetings, Julius Kaliisa (5th applicant) was unequivocally nominated to administer the estate. He duly applied for a certificate of no objection from the respondent. The respondent responded by directing the holding of a family meeting before her agent the Chief Administrative Officer (CAO) of Hoima District. The meeting sat on 3rd January 2013 and reiterated the nomination of

Julius Kaliisa to administer the estate. The respondent convened a subsequent mediation meeting which all the applicants attended, except Kabagambe Kaliisa, where Julius Kaliisa was again nominated to administer the estate. The respondent still ignored the family resolution and promised to further study and consult Kabagambe Kaliisa on whether he would withdraw his objection.

The choice of Julius Kaliisa to administer the estate is evidenced by copies of the family consent and minutes of the family meeting of 3rd January 2013 attended by the CAO Hoima, annexure **B** to Cleophas Kaliisa's affidavit; and of affidavits of authorization sworn by six of the applicants save for Julius Kaliisa, annexures **A1, A2, A3, A4, A5** and **A6** to Cleophas Kaliisa's supporting affidavit. The applicants deponed in the said affidavits that they unanimously chose Julius Kaliisa to administer the estate of their late father since he resides and works in Uganda and is able and willing to closely monitor the estate. The choice of Julius Kaliisa is also reflected in the letter written by the 3rd applicant to the respondent, annexure **CC2** to Julius Kaliisa's affidavit.

In addition, there are various letters on record written by the respondent, the applicants' counsel, a representative of the CAO Hoima, and the 3rd applicant, all indicating that a family meeting was held where the 5th applicant was unanimously nominated to administer the estate. There is also a letter on court record written by Fred Kabagambe Kaliisa to the respondent strongly objecting to the choice of Julius Kaliisa's administering the estate. Annexure **A** to Julius Kaliisa's affidavit in rejoinder reveals that the respondent wrote to Fred Kabagambe Kaliisa through the Local Council Chairperson of the area inviting him for a meeting on 24/01/2014, stating that they would not hesitate to issue a certificate of no objection to Julius Kaliisa if he did not show up. It is apparent from the correspondence and the entire record that Kabagambe Kaliisa did not attend the said meeting or other family meetings, but there is nothing on record to show that the respondent issued the certificate of no objection to Julius Kaliisa.

The applicants maintain that the respondent is legally obliged to furnish the certificate of no objection where the majority of the beneficiaries of a deceased person's estate voluntarily choose that person; that the respondent has failed, refused and/or neglected to furnish the certificate of no objection to the applicant who qualifies to be issued with the same; and that the estate has remained without a legal administrator and consequently going to waste.

In the affidavit affirmed by Nakibuule Madina Assistant Administrator General, the respondent denies having connived with, or being biased in favour of Fred Kabagambe Kaliisa, or having any ulterior motive; or that the applicants' father's estate has gone to waste. The respondent contends that the estate was not administered for over thirty years as a result of the omission of the beneficiaries themselves, since the applicants' father passed away in 1985 but the file with the respondent on the matter was only opened in 2013.

The respondent further states that the office does not simply rubber stamp nominations for the majority, otherwise polygamous family members would outvote beneficiaries borne alone in the

same family; that they did not refuse to issue the certificate of no objection but were in the process of mediating the dispute between the family members, but that before concluding mediation, they received documents indicating the applicants had filed civil suit 331/2014 against their brother Fred Kabagambe Kaliisa; and that the matter should be referred for mediation to save court's time and money.

The applicants' counsel submitted that the issuance of a certificate of no objection is a duty imposed on the respondent by an Act of Parliament, and she should be compelled to perform it so that the estate is administered; and that the refusal to issue the same is *ultra vires*, shows impropriety, and there is an apparent error on the face of the record.

The respondent submitted in reply that there is a civil suit no. 331/2014 between the applicants, their brother and a company regarding property which forms part of the estate. It was also the respondent's submission that the Administrator General cannot be compelled to issue a certificate of no objection because doing so would be to fetter his discretion. It was further submitted for the respondent that the decision not to issue a certificate of no objection to the 5th respondent was reasonable in the circumstances.

Section 5 of the Administrator General's Act requires intending applicants for a grant of probate or letters of administration, except for widows/widowers of the deceased or executors in a will, to produce to court proof that the Administrator General or his/her agent has declined to administer the estate, or proof of having given the Administrator General fourteen days' written notice of the intention to apply for the grant. Section 201 of the Succession Act requires that in intestacy those connected with the deceased by marriage or consanguinity are entitled to obtain letters of administration of the estate.

It is clear from the foregoing legal provisions that the Administrator General has a statutory duty to issue certificates of no objection to intending applicants for grants if he/she is not interested in administering the estate himself/herself or through an agent. The Succession Act also requires estates to be administered within given time schedules. The import of section 278 of the Succession Act, for instance, is that an estate, unless court extends the time, should be administered within a year after obtaining the grant.

In the instant case, there is undisputed evidence that the 5th applicant was nominated to administer the estate by the majority of family members. All the children of the deceased, except one, endorsed him as the person to apply for letters of administration. He duly applied for a certificate of no objection from the respondent in 2013. A family meeting was subsequently held before the respondent's agent, the Chief Administrative Officer (CAO) of Hoima District, on 3rd January 2013. The meeting reiterated the nomination of Julius Kaliisa to administer the estate.

The respondent's affirmed evidence is that the office endeavoured to settle matters amicably. The respondent contends that the matter should be referred for mediation to save court's time and money. With respect, this court finds the respondent's contention difficult to comprehend. It

is on record that this court gave ample time to the respondent, at their request, to settle the matter amicably. However, there is nothing on the record or in the respondent's defence to show that the respondent exploited the said opportunity to commence or effect or continue with the mediation. The correspondence on record reflects that even the respondent's earlier calls for a meeting to ascertain the consent of the sole dissenting family member regarding the nomination of Julius Kaliisa was not heeded. The respondent also did not appear in court on the mention date fixed in their presence to update court about the outcome or progress, if any, of the mediation.

The respondent's affidavit evidence that the estate was not administered for over thirty years (between 1985 and 2013) due to the beneficiaries omissions was rebutted by the 5th applicant's affidavit in rejoinder that the estate was stable under the management of their mother (widow) who passed away in 2010.

This court initially appreciated the respondent's attempt at having the matter mediated before determining it on the merits, hence why time was allowed to the respondent to pursue mediation. However, much as mediation initiated by the respondent as a first resort is appreciated, administration of an estate should not be unreasonably delayed where one of the family members is not agreeing with the other family members on who is to administer the estate. The respondent states in paragraph 9 of her affidavit in reply that the office does not simply rubber stamp nominations for the majority, otherwise polygamous family members would outvote beneficiaries borne alone in the same family. This albeit noble position, in my opinion should be applied selectively, depending on the facts of each case, rather than being applied to all cases regardless of the dynamics and realities of the concerned family.

The respondent has stated in paragraph 17 of their affidavit in reply that in their experience it is almost inevitable that if they were to issue a certificate of no objection, "*Kabagambe Kaliisa will definitely lodge a caveat against the application for letters of administration giving rise to a third unnecessary suit.*" The perturbing question is, for how long should the respondent refrain from issuing a certificate of no objection on basis of anticipating the lodgement of a caveat or subsequent suits for that matter?

In circumstances of this case, where even the much hyped mediation was not taking off and the deadlock between one family member and other family members continued unresolved, prudence would demand the respondent, instead of further delaying to perform their statutory duty of issuing the certificate of no objection for the sake of putting in motion the process of administering the estate, well appreciating that any dissenting family member or person may exercise their right to caveat the application to the High Court for letters of administration. In fact it is the respondent's delay to issue a certificate of no objection that has given rise to this application which in a way is also contributing to multiplicity of suits.

Section 265 of the Succession Act provides for situations where caveats against issuing of letters of administration have been lodged, in that the petitioner for letters of administration becomes

the plaintiff and the person opposing the grant becomes the defendant. The rationale is that the matter, once it becomes contentious, is eventually heard and adjudicated on merits after hearing both sides. It is, in my opinion, at this stage that the dissenting member's contentions or allegations of the applicant (in this case Julius Kaliisa) being likely to mismanage the estate would be judiciously deliberated on after both sides have been heard. In this case, the respondent chose to base on the dissenting member's allegations that Julius Kaliisa had mortgaged the property to deny him the certificate of no objection before the allegation was even substantiated.

Section 265 of the Succession Act, read with sections 201 and 278 of the same Act, together with section 5 of the Administrator General's Act, in my opinion, was meant to ensure that matters of administration of estates do not lie in limbo for ever. In any case, even the question of delaying to issue a certificate of no objection to avoid multiplicity of suits should a caveat be filed may be rather too far fetched. In my opinion, if multiplicity of suits is detected by court or brought to the court's attention, it can be curbed or minimized through consolidations or other case management strategies.

In the instant case moreover, this court did avail time at the respondent's request to have the matter mediated. By the time the matter was eventually called for hearing, which was about four months from the date of the case first being called, the mediation had not taken place. In the circumstances of this case, where ample time for mediation had been allowed by court on request and had not been exploited by the respondent who requested for it, the respondent's excuse of mediation to delay the issuing a certificate of no objection would not be fair, or rational, or reasonable. Yet, delay in issuing a certificate of no objection could lead the estate to waste or to be intermeddled.

I have also perused the annexed pleadings in *Civil Suit 331/2014: Betty Daisy Kampororo & 6 Others V M/S Miika Estates & 2 Others*, pending in the Land Division of the High Court, filed by the applicants against the defendants who include their brother Fred Kabagambe Kaliisa. The suit seeks for, among others, an order to the Registrar of Titles for cancellation of Kabagambe Kaliisa's title to land known as Bugahya Block 15 Plots 372, 373, & 374 and entry of the plaintiffs or the administrators of the estate as the rightful proprietor(s). I have failed to see where this particular prayer, which was highlighted by the respondent, would prejudice, contradict or hamper the issuance of a certificate of no objection or the eventual administration of the estate. If anything, without prejudice, the prayer itself, by requesting the suit land to be registered in favour of the administrator of the estate, as an alternative to the plaintiffs as beneficiaries, envisaged the eventual appointment of an administrator to the estate.

With respect, I do not agree with the respondent's submission that that the Administrator General cannot be compelled to issue a certificate of no objection because doing so would be to fetter the Administrator General's discretion. It is very clear, as was stated by Kasule J, as he then was, in **John Jet Mwebaze V Makerere University**, already cited, that mandamus is used to compel performance of a statutory duty. It is used to compel public officers to perform duties imposed

upon them by an Act of Parliament. It is evident from the provisions of the Administrator General's Act cited above that the Administrator General is a public officer and the duty of issuing a certificate of no objection is a statutory duty imposed on him by the Administrator General's Act. In that regard therefore the Administrator General can be compelled as a public officer to perform his/her statutory duties by way of judicial review.

It is my considered opinion that delaying or refusing to issue a certificate of no objection where amicable settlement of the matter has failed or is not taking off, or where there is a deadlock on who is to administer the estate, is irrational, unfair, and unreasonable, if not a procedural impropriety.

The applicants also prayed for an order of certiorari. It was stated in **John Jet Mwebaze** that

"...certiorari issues to quash a decision which is ultra vires as vitiated by an error on the face of the record...certiorari looks to the past..."

In **Kasibo Joshua V The Commissioner of Customs, Uganda Revenue Authority HCT 00 44/2007**, Kiryabwire J, as he then was, citing Hilary Delany in his book Judicial Review of Administrative Action 2001 Sweet and Maxwell pages 5 and 6, on certiorari, stated that;-

"...Judicial review is concerned not with the decision, but the decision making process. Essentially judicial review involves an assessment of the manner in which a decision is made, it is not an appeal and the jurisdiction is exercised in a supervisory manner...not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality."

The facts of this case and the adduced evidence, however, do not reveal anywhere that the respondent has made a decision that would require to be quashed. Section 36(2) of the Judicature Act provides that no order of mandamus, prohibition or certiorari shall be made in any case where, among other things, the order applied for would be rendered unnecessary. I decline therefore to issue the order of certiorari since it would, in my opinion, be issued in a vacuum and would be unnecessary.

The applicants further sought an order of prohibition to forbid the respondent from making any future decision that will be *ultra vires* in the management of the estate. In **John Jet Mwebaze**, already cited, an order of prohibition was held to forbid some act or decision which would be *ultra vires*. In **Kasibo Joshua V The Commissioner of Customs, Uganda Revenue Authority**, already cited, it was stated that the court may award a prohibition *quousque* – an order that is operative until the decision maker or inferior tribunal has corrected its conduct by containing itself within the bounds of its jurisdiction. I find that prohibition would be appropriate in the circumstances of this case. I accordingly grant the order of prohibition until the respondent has complied with the order of mandamus issued by this court.

In the premises, for reasons given, and on the authorities cited, I would grant against the respondent the following orders:-

1. An order of mandamus directing the Administrator General to issue the 5th applicant Julius Kaliisa a certificate of no objection to apply for letters of administration in respect of the estate of his late father Francis Muntukwonka Kaliisa.
2. An order of prohibition to forbid the respondent from making any future decision that will be *ultra vires* in the management of the estate.
3. Each party in this application will bear their own costs.

Dated at Kampala this 25th day of June 2015.

Percy Night Tuhaise

Judge.