THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 160 OF 2015

ARISING OUT OF CIVIL SUIT NO. 15 OF 2010

ANITE MARGRET..……..…….…….....APPLICANT

VERSUS

1. **AMULE SAMUEL YEKKA**
2. **TABAN CHARLES WAYI**
3. **MIKI ERIC YEKKA**
4. **MAMBO JIMMY**
5. **MARGRET BACIA**
6. **ANITA JANET**
7. **APAI SARAFINA**
8. **ANDRORU JACKLINE**
9. **ZENA FERU……..……RESPONDENTS**

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by notice of motion brought under Order 60 rule 30; Order 50 rule 8; and Order 52 rules 1, 2 & 3; all of the Civil Procedure Rules (CPR). It seeks various orders, namely that the *ex parte* interim order issued by the Acting Deputy Registrar in Miscellaneous Application 006/2014 (MA 006/2014) arising out of Civil Suit No 015/2010 be set aside or nullified; that the main suit Civil Suit No 015/2010 be struck out as being frivolous and vexatious; and that the costs of this application abide the result of this matter.

The application is supported by the affidavit of Anite Margret the applicant. The grounds of the application, also contained in the applicant's affidavit, are that:-

1. The respondents obtained an *ex parte* interim order against the applicant without serving her with the court documents.
2. The Registrar issued the said *ex parte* order against the applicant without affording her an opportunity to defend herself.
3. The said order ought to be set aside or nullified.
4. The respondents filed Civil Suit 015/2010 applying for revocation of letters of administration, an account and a share of the estate of the deceased.
5. The applicant as an administrator of the estate of the deceased has already filed in this honourable court an inventory and final distribution of the said estate.
6. In the premises the present suit is frivolous and vexatious and ought to be struck out with costs.

The application is opposed by the respondents through an affidavit in reply sworn by Taban Charles the 2nd respondent. Briefly, in as far as this application is concerned, he averred that the application is filed in the wrong court as the main suit CS 015/2010 is still pending in the High Court Arua; that most of the properties forming part of the estate are located in Arua; that all the beneficiaries, save for the applicant, reside in Arua within the jurisdiction of Arua High Court; that the applicant was served with the application through her counsel who acknowledged service by signing and stamping on the documents; and that the applicant's alleged inventory and final distribution of the estate filed in the Family Division four years after filing CS 015/2010 were not served on the beneficiaries of the estate.

I will first address the question of whether this matter is properly before this court since the 2nd respondent avers in his affidavit in reply and through their counsel's submissions that the matter should be heard by the High Court of Arua. The said affidavit raises the matter as a preliminary objection, hence why this court must dispose of it first.

I have addressed the affidavit evidence and the entire record on this matter, including the submissions of counsel.

The 2nd respondent averred in his affidavit in reply that:-

> *"2…at the commencement of the hearing, I…shall raise a preliminary objection that the application is filed in a wrong court as the main civil suit, Civil Suit No 15/2010 is still*

pending in High Court Arua and that most of the properties that form the estate of our late father and all the beneficiaries except the applicant are resident in Arua within jurisdiction of Arua High Court.

*3…on 30th September 2010 me together with the other 8 respondents filed at High Court Arua Civil Suit No 15/2010….This suit is still pending…and is fixed for hearing on 19th August 2015. A copy of the Hearing Notice and Summons to File Defence…are attached hereto marked **A** and **B** respectively."*

Annexture **A** is a certified true copy of the Summons to file Defence issued by the Assistant Registrar of the High Court Arua served on Anite Margret (applicant in the instant application and defendant in CS 015/2010). It is signed and stamped as having been received by M/S Jogo Tabu & Co Advocates on 08/10/2010. Annexture **B** is a copy of the Hearing Notice for MA 006/2014, signed and stamped as having been received by M/S Jogo Tabu & Co Advocates on 26/05/2015. On the same document, there are handwritten directions dated 27/05/2015 that the respondent should be served personally as they no longer act for her. Annexture **B** therefore is a hearing notice in respect of MA 006/2014 purportedly to be heard in Arua High Court on 19th August 2015. The copy of MA 006/2014 is not annexed to the 2nd respondent's affidavit in reply and so this court cannot tell the nature of the application.

This reveals some contradictions in this matter. The first is that, contrary to the respondents' contention, the matter scheduled to be heard by the High Court Arua on 19th August 2015 is not *Civil Suit No 015/2010*, but rather MA 006/2014 Arising From *Civil Suit No 015/2010*. The second is that though the order the applicant seeks to set aside or nullify was purportedly issued in MA 006/2014, the said application is apparently yet to be heard, at least going by the 2nd respondent's affidavit evidence. These are defects apparent on the face of the record which I will revert to at a later stage.

There is correspondence on record which reveals that on 05th April 2011 M/S Jogo Tabu & Co Advocates, then acting for Anite Margret, applied to the Registrar of the High Court Family Division in Kampala to transfer *HCCS 015/2010 Amuel Samuel Yekka & 8 Others V Anite Margret* to Kampala. On 7th April 2011 the then Deputy Registrar of the Family Division wrote to the Chief Magistrate/Ag Registrar Arua High Court requesting him to forward *MA 0048/2010,*

MA 47/2010, and *CS 015/2010 Amuel Samuel Yekka & 8 Others V Anite Margret* to Kampala for perusal and advice. The record reveals that a one Justus Musinguzi, the bearer of the letter, received the files in question and signed for them on 08/04/2011. The records are therefore currently under this Court.

The record however does not indicate whether the Registrar of the Family Division, as she then was, eventually gave any advice on the files as promised in her letter. However, subsequent correspondence on record reveals that she continued to handle the file administratively, including requesting the parties to a meeting on 26/05/2011. It is not indicated on the record though, whether the parties eventually met the Registrar, since there is no record of proceedings to that effect on record. It is not clear therefore as to whether the issue of transferring the court record from Arua to Kampala, as opposed to forwarding the same for perusal and advice, was resolved. What is clear, though, is that the entire court record has been accessed from this Division of the High Court, and that the instant application was eventually allocated by a Registrar in this court.

This situation, as borne out by the record, disproves the respondents' affidavit evidence and their counsel's submissions that *High Court Arua Civil Suit No 015/2010* is still pending and is fixed for hearing on 19th August 2015. This finding is strengthened by the 2nd respondent's Annexture **B** to his affidavit in reply, the copy of the Hearing Notice for MA 006/2014, which refers to MA 006/2014 to be the matter pending hearing before Arua High Court on 19th August 2015, and not the main suit *Civil Suit No 015/2010*.

In the premises, I find that *CS 15/2010 Amule Samuel Yekka & 8 Others V Anite Margret; MA 0048/2010;* and *MA 47/2010* were forwarded to this court for perusal and advice on the request of the Registrar of this Court. To that extent, the instant application which arises from the main suit *CS 015/2010 Amule Samuel Yekka & 8 Others V Anite Margret* is properly before this court.

The foregoing notwithstanding however, the purported pending of MA 006/2014 (arising out of CS 015/2010) before the High Court in Arua when the main civil suit and the entire court record is in the Family Division of the High Court in Kampala points to uncoordinated management, or mismanagement, of this case. It infers that there are pending matters in different courts over the same dispute by the same parties. This situation ought to be checked to avoid multiplicity of

proceedings and abuse of court process, including creating unnecessary caseload or workload on Judicial Officers.

The second question to be addressed is whether the interim order issued in MA 006/2014 arising out of CS 015/2010 should be set aside. The applicant avers in the application and in paragraph 2 of her supporting affidavit that the respondents obtained an *ex parte* interim order in MA 006/2014 arising out of CS 015/2010 against her without serving her with the court documents. She also avers that a copy of the said court order is attached as annexture **A** to her supporting affidavit. The 2nd respondent however rebuts this in his affidavit in reply where he avers that the applicant was served through her counsel who acknowledged service by signing and stamping on the documents. The respondent attached two court orders to his affidavit in reply issued by the High Court of Arua as annextures **C** and **D**. The said annextures are final Court Orders issued in connection with MA 0048/2010 Arising from MA 47/2010; and MA 0015/2014 Arising from MA 006/2014 (though its reading suggests it arose from MA 48/2010).

I have perused the application, the affidavits on record and the annexed documents. I have failed to locate a copy of the *ex parte* interim order in MA 006/2014 arising out of CS 015/2010, which is the subject of this application. Annexture **A** to the applicant's supporting affidavit is a copy of an order issued in MA 15/2014. As already stated the heading indicates that it arises from MA 006/2014 and CS 15/2010. Paragraph 1 of the said MA 15/2014 however refers to an interim order issued in MA 0048/2010 and does not mention MA 006/2014. The only document named as MA 006/2014 is annexture **B** to the 2nd respondent's affidavit in reply, which is a hearing notice of the said application scheduled for 19th August 2015 at Arua High Court. This confuses the court's mind more since, as already stated, it suggests that the application is yet to be heard by the High Court in Arua.

The entire record does not contain a copy of the so called interim order issued in MA 006/2014 arising out of CS 015/2010, let alone the application itself or its supporting affidavits, yet it is the subject of the application. The affidavits and submissions from both sides allude to MA 006/2014 as the subject of the application, in that the interim order purportedly issued from it is sought to be revoked by the applicant, which is opposed by the respondents. These, in my opinion, are defects apparent on the face of the record which are now beyond amendment since they were not raised by any one side during the hearing of the application. This court cannot risk

speculating on which order the parties could probably have been alluding to because there are a number of them on the court record or as annextures to the affidavits.

Order 7 rule 14(1) of the Civil procedure Rules provides that where a plaintiff sues upon a document in his or her possession or power, he or she shall produce it in court when the plaint is presented, and shall at the same time deliver the document or a copy of it to be filed with the plaint. This legal provision is mandatory. See **Nileways (U) Ltd V KCCA MA 1077/2013**, Kainamura J.

Sections 98 of the Civil Procedure Act empowers this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The exercise of inherent powers lies in the discretion of court. It was held in **Kayondo V Attorney General [1988 – 1990] HCB 127** that court will use its inherent powers to strike out a plaint or written statement of defence where the defect is apparent on the face of the record and where no amount of amendment will cure the defect. The procedure is intended to stop proceedings which should not have been brought to court in the first place and to protect the parties from the continuance of futile and useless proceedings.

In this case, though the matter was not raised by the respondents who rather also alluded to the same, apparently nonexistent, document, court can only on its own motion exercise its inherent powers to rectify the anomaly. Where the basis of the application has not been brought to the attention of court, I find this part of the application referring to the interim order of MA 006/2014 incompetent for purposes of being adjudicated on the merits. I cannot set aside an order that is not shown to exist by both sides as well as by the record court. I can only strike out as incompetent the application which refers to a nonexistent order.

The third issue is whether the main suit CS 015/2010 should be struck out as being frivolous and vexatious. The applicant contends that she has already filed in this court an inventory and final distribution of the said estate as an administrator of the estate of the deceased. She annexed a copy of the said inventory and final distribution of the estate as annextures **C** and **D** to her affidavit. She also averred in paragraph 9 of her affidavit that the estate had been finally distributed to all the beneficiaries, and that the main suit is therefore frivolous and vexatious. The 2nd respondent, on the other hand, avers that applicant's alleged inventory and final distribution

of the estate filed in the Family Division four years after filing civil suit 015/2010 were not served on the beneficiaries of the estate.

The record indicates that an inventory was filed in this court by the applicant on 18/03/2015. The applicant contends that her filing of the inventory and final account of the estate renders the suit frivolous and vexatious. If this contention was accepted, it would mean that her filing of the inventory and accounts more than four years after the filing of the suit would render the previously filed suit frivolous and vexatious. I do not accept this contention.

In my opinion, without even having to address the question of whether the plaintiffs were served with the same or not, filing of an inventory and final account of an estate subsequent to the filing of a suit may not necessarily render the said suit frivolous and vexatious. This is especially where the said suit, as is the situation in the instant case, with reference to paragraph 4(g) of the plaint, alleges the defendant's (applicant in this case) failure to file an inventory or to distribute the estate. A suit would only be frivolous and vexatious if the so called inventory and accounts were filed before the filing of a suit which alleges non filing of the same, or if the suit is not challenging the validity of an already filed inventory or accounts. I will not delve into the question of whether the inventory and accounts are valid, or whether the applicant/defendant has made a final distribution of the estate, for it would tantamount to delving into the merits of the main suit. I find no ground therefore to strike out CS 015/2010 Arua High Court on grounds that it is frivolous and vexatious.

I cannot take leave of this matter without addressing the manner in which this case or applications under it are being managed by two High Courts at the same time. The circumstances of this case reveal that MA 006/2014 (arising out of CS 015/2010) is pending before the High Court in Arua, but the main civil suit and the entire court record is in the Family Division of the High Court in Kampala. It is apparent the plaintiffs/respondents are filing applications in Arua High Court while the defendant/applicant is filing hers in the Family Division of the High Court Kampala, yet they all arise from the same main suit. It infers that there are pending matters in different courts over the same dispute by the same parties. This creates duplicity and multiplicity of suits over the same dispute. It may prejudice the parties' interests, or cause delays or contradictions, and lead to unnecessary caseload or workload over the already overburdened judicial officers.

It is clear from the record that the letters of administration in AC 517/2001 were issued by the High Court at Kampala. The High Court has since been decentralized throughout Uganda, including Arua where the main suit in the instant case was initially filed. Without prejudice to my finding that the record in this matter was forwarded to this Division for perusal and advice by the Arua High Court on request by this Division's Registrar, it is my opinion that, in the interests of justice, predictability and consistency, all the files should be handled by the same court, preferably the court within whose geographical jurisdiction the estate is situated, and where the main suit was initially filed.

Section 33 of the Judicature Act provides that this court in the exercise of its jurisdiction shall grant absolutely or on such terms and conditions as it thinks fit 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 all multiplicities of legal proceedings concerning any of those matters avoided. Sections 98 of the Civil Procedure Act empowers this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Thus, I would, in addition, direct that this file be transferred back to Arua High Court where the bulk of the disputed estate is situate, and where the main suit was initially filed.

In the premises, for reasons I have already given, this application is, in as far as it relates to MA 006/2014 struck out. Secondly, I decline to strike out CS 015/2010 for reasons already given. Each party will bear their own costs.

Dated at Kampala this 21st day of July 2015.

Percy Night Tuhaise

Judge.