

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

FAMILY DIVISION

CIVIL SUIT NO.086 OF 2012

MARY NANKYA.....

COUNTERCLAIMANT

VERSUS

1. TEREZA NABWAMI

2. BETTY MPONYE

3. JOHN MASEMBE.....

COUNTERDEFENDANTS

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

JUDGMENT

This suit is based on the counter claimant against the counter defendants for a declaration that the letters of administration granted to the 1st counter defendant in Nakawa High Court vide Administration Cause No 1046/2011 was fraudulent and unlawful; a declaration that the letters of administration granted to the 1st counter claimant by this court to the estate of the late Leonia Margret Nankya is valid; a declaration that the counter claimant acted legally in dealing in the deceased's estate as legal administrator and transactions executed by her are unimpeachable; an order that all caveats on the suit land by the counter defendants and their agents or servants and nominees claiming to be beneficiaries be vacated; a permanent injunction restraining the counter defendants and or their agents from dealing and trespassing on the suit land; an order that the duplicate certificate of titles under the custody of the counter defendants are invalid and should be cancelled by the Commissioner Land Registration; that the counter defendants jointly and or severally pay general and exemplary damages for inconvenience, psychological torture and trauma; plus costs of the counterclaim.

The counter claimant's case is that the counter defendants colluded and fraudulently, irregularly and illegally obtained letters of administration vide *Nakawa High Court Administration Cause No 1046/2011* for the estate of the Leonia Margret Nankya when they were well aware of the existence of letters of administration vide *HCT 00 – CV – AC 999/2006*. It is her contention that the counter defendant's action to apply to Nakawa High Court where the 1st counter defendant was granted parallel letters of administration when the counter claimant still had an earlier grant from the High Court Family Division without disclosing it to court was an abuse of court process, fraudulent, irregular and illegal.

It is also the counter claimant's case that the 1st counter defendant has no legal interest in land comprised in Kibuga Block 1 Plots 270 and 1222 (suit land). That the said land was also a subject of a suit between the 1st plaintiff/counter defendant and the then registered proprietor, a one Olivia Sanyu in Civil Suit No 128/2011 at Mengo. On civil appeal for review in the High Court vide LDCR No 5/2011 the decree was upheld in favour of Olivia Sanyu, the transferee from the counterclaimant/defendant, rendering the suit land no longer available and the suit *res judicata*.

The counter claimant further claims that the 1st counter defendant is not the biological mother of the deceased Leonia Margret Nankya as per her testimony in a criminal case at Buganda Road Court Criminal Case No 536/2009; and that the 2nd and 3rd counter defendants also have no legal interest in the same suit land and are not biological children of the deceased.

When the suit from which this counterclaim arose was called for hearing, the defendant/counterclaimant prayed court to dismiss it for want of prosecution, and to set down the counterclaim for hearing *ex parte*. There was an affidavit of service on record by this court's process server indicating that all parties were served through their respective counsel who acknowledged service by signing and stamping on the court's copy of the hearing notice. The plaintiff's counsel indicated that the plaintiffs had lost touch with their counsel since 2013. This court dismissed the suit with costs under Order 17 rule 5 of the Civil Procedure Rules. It also allowed the defendant/counterclaimant to proceed *ex parte* with the counterclaim. The defendant/counterclaimant filed sworn witness statements and her counsel filed written submissions in accordance with time schedules set by this court.

The matter will be deliberated along the following issues:-

- i) Whether the letters of administration vide Administration Cause No 999/2006 for the estate of the late Mary Leonia Margret Nankya granted to the counterclaimant are valid.
- ii) Whether the 1st counter defendant fraudulently and unlawfully acquired letters of administration vide Administration Cause No 1046/2011 for the estate of the late Mary Leonia Margret Nankya.
- iii) Whether the 1st defendant fraudulently and unlawfully procured registration on the suit property comprised in Kibuga Block 1 Plots 270 and 629 as the administrator of the estate of the late Mary Leonia Margret Nankya.
- iv) What remedies are available to the parties.

Issue i: Whether the letters of administration vide Administration Cause No 999/2006 for the estate of the late Mary Leonia Margret Nankya granted to the counterclaimant are valid.

The counterclaimant states in her sworn witness statement that she holds letters of administration to the estate of the late Mary Leonia Margret Nankya. This is confirmed by annexure **D12** to her sworn witness statement. The said grant was challenged in ***U V Nankya Mary & 2 Others Criminal Case No 536/2009***. Court, as evidenced by annexure **D2** to her statement, found that there was no evidence to show that the counter claimant unlawfully obtained and/or forged the letters of administration. The appeal on the matter was also dismissed by the High Court vide ***U V Nankya Mary & 2 Others HCT – 00 – CR –CN – 0055 – 2011***, as evidenced by annexure **D9**.

On that basis, I find that the letters of administration vide Administration Cause No 999/2006 for the estate of the late Mary Leonia Margret Nankya granted to the counterclaimant are valid.

Issue ii: Whether the 1st counter defendant fraudulently and unlawfully acquired letters of administration vide Administration Cause No. 1046/2011 for the estate of the late Mary Leonia Margret Nankya.

The counterclaimant states in her sworn witness statement that this matter is *res judicata* since it was resolved in ***Mary Nankya V Nabwami Tereza & another HCCS No 30/2014*** by Nakawa High Court. A copy of the judgement is annexed to the witness statement as **NM4**.

Section 7 of the Civil Procedure Act provides that for *res judicata* to apply, the matter directly and substantially in issue between the same parties or parties under whom they or any of them claim, litigating under the same title, must have been heard and finally decided by a competent court. In **Alfred Karokora V Attorney General Constitutional Petition No 45/2012**, *unreported*, it was held that once a suit has been heard and finally determined, all the issues that were canvassed should not be re packaged and brought to court. The relevance of *res judicata* is to avoid unnecessary multiplicity of suits and also to put an end to litigation.

In the instant case, annexure **NM4** reveals that the plaintiff (counter claimant in this case) sought revocation of letters of administration vide *Administration Cause No 1046/2011* for the estate of the late Mary Leonia Margret Nankya, in *Mary Nankya V Nabwami Tereza & another HCCS No 30/2014*, Nakawa High Court. The court, after hearing the case on the merits, resolved the matter by, among other things, revoking the said letters of administration issued to Tereza Nabwami (1st counter defendant in this case) vide *Administration Cause No 1046/2011*.

It is evident therefore, as correctly submitted by the counter claimant's counsel, that the matter is *res judicata* since it was resolved by Nakawa High Court in a former suit, *Mary Nankya V Nabwami Tereza & Another HCCS No 30/2014*. I will therefore not delve into this issue.

Issue iii: Whether the 1st defendant fraudulently and unlawfully procured registration on the suit property comprised in Kibuga Block 1 Plots 270 and 629 as the administrator of the estate of the late Mary Leonia Margret Nankya.

Annexure **NM4** already referred to above reveals that this issue was also resolved by a competent court, Nakawa High Court, in a former suit, *Mary Nankya V Nabwami Tereza & another HCCS No 30/2014*. The said court, after finding that the letters of administration referred to above had been fraudulently obtained, ordered, among others, that the 1st defendant Mary Nabwami (1st counter defendant in this suit) to surrender to the plaintiff Mary Nankya (counter claimant in this suit) the duplicate certificate of title to land comprised in Kibuga Block 1 Plots 270 and 629 land at Rubaga; and that the Commissioner Land Registration vacates or lifts or cancels the amendment of the register regarding land comprised in Kibuga Block 1 Plots 270, 629, 1222, & 1223 land at Rubaga.

In that connection I will not address the matter since it is *res judicata*, having been resolved by a competent court in a former suit.

Issue iv: What remedies are available to the parties.

The counter claimant has proved her case against the counter defendants that the letters of administration vide *Administration Cause No 999/2006* for the estate of the late Mary Leonia Margret Nankya granted to the counterclaimant are valid; that the 1st counter defendant fraudulently and unlawfully acquired letters of administration vide *Administration Cause No 1046/2011* for the estate of the late Mary Leonia Margret Nankya; and that the 1st defendant fraudulently and unlawfully procured registration on the suit property comprised in Kibuga Block 1 Plots 270 and 629 as the administrator of the estate of the late Mary Leonia Margret Nankya.

The counter claimant's sworn evidence has not been challenged or rebutted by the defendant. It was held in **Massa V Achen [1978] HCB 279** that an averment on oath which is neither denied nor rebutted is admitted as the true fact. This would entitle her to the reliefs sought in her counter claim.

Without prejudice, however I note that the counter claimant also prayed for an order that all caveats on the suit land by the counter defendants and their agents or servants and nominees claiming to be beneficiaries be vacated. This however was not brought out in the counter claimant's pleadings or evidence to enable court appreciate the merits, like who lodged the caveats, and for what reasons. Thus there was no basis or evidence for court to analyze with a view to making findings on which to base any judicial decision. I thus decline to make any orders on removal of caveats from the suit land.

The counter claimant prayed for an order that the duplicate certificate of titles under the custody of the counter defendants are invalid and should be cancelled by the Commissioner Land Registration, and for a permanent injunction restraining the counter defendants and or their agents from dealing and trespassing on the suit land.

Regarding the cancellation of the duplicate certificate of title to the suit land by the Commissioner Land Registration, I note that this matter is, as analyzed above, and as revealed in

annextures **NM1, NM2, NM4** and **NM5**, *res judicata*. The matter was disposed of first by the High Court Land Division in *Civil Appeal No. 6/2013 Olivia Sanyu & Mary Nankya V Commissioner Land Registration*, and later, by Nakawa High Court in *Civil Suit No 30/2014 Mary Nankya V Tereza Nabwami & Another*. In the Nakawa case, the very orders sought by the counterclaimant before this court were issued by the Nakawa court in her favour.

The counterclaimant's counsel submitted that the counterclaimant is entitled to the cancellation of the title because the Commissioner Land Registration has never complied with the court orders issued in *Civil Appeal No. 6/2013 Olivia Sanyu & Mary Nankya V Commissioner Land Registration*. With respect, I do not agree with the position taken by the counterclaimant or her counsel to resolve the impasse. In my opinion, besides the matter being *res judicata*, it is an abuse of court process for the counterclaimant to seek the same orders already issued by another competent court.

For the foregoing reasons, I decline to issue any orders on cancellation of the certificate of title to the suit property by the Commissioner Land Registration. The counterclaimant should enforce the orders issued in her favour in earlier suits instead of forum shopping through filing numerous suits on issues already resolved by court.

The prayer for a permanent injunction restraining the counter defendants and or their agents from dealing and trespassing on the suit land would, however, be appropriate in the given circumstances where the 1st counter defendant was found by a competent court to have fraudulently and unlawfully procured registration on the suit property comprised in Kibuga Block 1 Plots 270 and 629 as the administrator of the estate of the late Mary Leonia Margret Nankya; and where the transferee from the counterclaimant/defendant was re instated on the register book by court.

The counterclaimant also prayed this court to order the counter defendants jointly and severally to pay general damages and exemplary for inconvenience, psychological torture and trauma.

It is trite law that damages are the direct probable consequence of the act complained of. Such consequences may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering. General damages must be pleaded and proved. See **Moses Kizige V Muzakawo Batolewo [1981] HCB 66**).

The counter claimant stated in paragraph 20 of her witness statement that the 1st counter defendant's flashing of a duplicate certificate of title has greatly inconvenienced her and also caused her emotional stress. I note that she made the same prayers against the 1st defendant and they were considered by Nakawa High Court in *Mary Nankya V Nabwami Tereza & another HCCS No 30/2014*. In that case the plaintiff (now counter claimant) had prayed court for general damages due to the wrongful and fraudulent act of the 1st defendant (now counter defendant). The court awarded her general damages of Uganda Shillings 18,000,000/= (eighteen million) at the rate of 6% per year from the date of decree to the date of payment.

To that extent therefore, it would not be appropriate for this court to award general damages against the 1st counter defendant over the same wrong when such damages were assessed and awarded against him by a competent court in an earlier suit. The loss the counter claimant was found to have suffered, which she is again claiming in this suit, arose from the 1st defendant's (now counter defendant) wrongful and fraudulent conduct in procuring letters of administration alongside the counter claimant's grant, and using the same to transfer the suit land into the counter defendant's names. The matter would in my opinion, as was resolved in issues ii and iii above, also be covered by the principle of *res judicata*.

On the counter claimant's prayer for exemplary damages, there are case decisions to the effect that exemplary damages can only be awarded where the act complained of is oppressive, arbitrary or unconstitutional if done by servants of government. These damages can also be awarded in cases where the defendants conduct has been calculated by him to make profits for himself which may well exceed the compensation payable to the plaintiff. In addition, three conditions must be borne in mind when awarding exemplary damages. The first is that the plaintiff cannot recover exemplary damages unless he/she is the victim of punishable behavior. The second is that since the power to award exemplary damages is a weapon which can be used both for and against liberty, restraint ought to be exercised, and to that end, the court has discretion. The third is that the means of parties which are relevant in compensation are material in assessment of exemplary damages. See **James Nsaba Butuuro V Munnansi Newspaper [1982] HCB 134; Kyambadde V Mpigi District Administration [1983] HCB 44.**

In the instant case, I find nothing in the counterclaimant's evidence that satisfies the said requirements. I do not find it appropriate to award exemplary damages against the counter defendants.

All in all, I find that the counter claimant is entitled to the orders sought against the counter defendants, except for those I declined to award with reasons.

I therefore enter judgment for the counter claimant against the counter defendants jointly and severally for:-

- a) A declaration that the letters of administration granted to the 1st counter defendant in Nakawa High Court vide Administration Cause No 1046/2011 was fraudulent and unlawful.
- b) A declaration that the letters of administration granted to the 1st counterclaimant by this honourable court to the estate of the late Leonia Margret Nankya is valid.
- c) A declaration that the counter claimant acted legally in dealing in the deceased's estate as legal administrator and transactions executed by her are unimpeachable.
- d) A permanent injunction restraining the counter defendants and or their agents from dealing and trespassing on the suit land.
- e) Costs of the suit.

I so order.

Dated at Kampala this 20th day of August 2015.

Percy Night Tuhaise

Judge.

