

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

FAMILY DIVISION

MISCELLANEOUS CAUSE NO 005 OF 2015

IN THE MATTER OF THE ESTATE OF THE LATE HAJJ ISMAIL MAGALA

AND

**IN THE MATTER OF AN APPLICATION FOR ADMINISTRATION LIMITED TO
SUIT**

AND

**IN THE MATTER OF AN APPLICATION FOR APPOINTMENT OF SULA MAGALA,
EDIRISA MUTUMBA, HAMZA KAUMA, NSAGA HATIB, BUSULWA SIRAJ &
AHMED MALE AS ADMINISTRATORS.**

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This is an application by Notice of Motion, *ex parte*, brought under section 33 of the Judicature Act Cap 14; sections 222 & 224 of the Succession Act Cap 162; section 98 of the Civil Procedure Act Cap 71; and Order 52 rules 1 & 3 of the Civil Procedure Rules (CPR) SI 71 – 1. It seeks orders that:-

1. Letters of administration to the estate of the late Hajj Ismail Magala be granted to the applicants limited for the purpose of representing the estate in *Sula Magala, & 5 Others V Ismail Magala & Another High Court Civil Suit No 437/2014* in the Land Division.
2. The applicants be appointed administrators of the deceased's estate by this honourable court with limited letters of administration until such time as when the same court will grant the said letters without any limitation whatsoever.
3. Provisions be made as to costs.

The application is supported by the affidavits of all the applicants, but it is the affidavit of Edirisa Mutumba the 2nd applicant which spells out the grounds of the application, which are briefly that:-

- a) The deceased Hajj Ismail Magala died intestate in 1986 at Jeza Muduuma Mpigi District.
- b) Ever since his death the estate of the deceased has not been administered and as such portions of the same have been disposed of by some individuals to the detriment of all other beneficiaries.
- c) The estate has been intermeddled with and is at the brink of being depleted, wasted to completion.
- d) The applicants are children of the deceased Hajj Ismail Magala.
- e) It is in the interests of justice that this application be heard and granted.

The background to the application is that the applicants are among the many children who survived their father the late Hajj Ismail Magala who died intestate in 1986. They filed *Civil Suit No 437/2014 Sula Magala & 5 Others V Ismail Magala & Another* in the Land Division of the High Court to recover part of their late father's estate from their brother the 1st defendant in the civil suit, who allegedly obtained the same fraudulently and sold a portion of it to the 2nd defendant. They then filed this application for letters of administration limited for the purpose of representing the estate in the suit pending in the Land Division. The estate is yet to be administered.

The 2nd applicant's supporting affidavit, which all the other applicants associated with through their shorter supporting affidavits, is that their father Hajj Ismail Magala died intestate in 1986. He was survived by many children, who include all the applicants and a one Ismail Magala. The deceased left various properties including 32 acres of land at Jeza, Muduuma, Mpigi, a plot of land at Busongola Kaseese, and herds of cattle. Since their father's death, the estate has never been administered. The applicants discovered that their brother Ismail Magala who shares the same name with their deceased father took over the deceased's estate and dealt with it as his own. He got the land title registered in his names and sold a portion of the same to James Luyonga Nkata. The applicants then filed *Civil Suit No 437/2014 Sula Magala & 5 Others V Ismail Magala & Another* to recover the said land from Ismail Magala and James Luyonga Nkata. The suit is pending in the Land Division of the High Court.

The applicants also aver that prior to filing the suit they sought audience from the Administrator General to process a certificate of no objection in vain, owing to Ismail Magala's refusal to comply with the requirements of securing the same. That all family meetings held since 2012 to obtain the certificate of no objection have been frustrated by the refusal of the Administrator General to grant the same without including the heir Ismail Magala. They further aver that they ought to be appointed administrators for the purpose of pursuing the suit, and to administer the estate of their late father to protect it from those intermeddling with it until substantive administrators are granted letters of administration.

I have carefully perused the applicants' affidavits and counsel's submissions, including the law applicable to this situation.

Section 5 of the Administrator General's Act provides that no grant shall be made to any person, except an executor appointed by will of the deceased or the widower or widow of the deceased or his or her attorney duly authorized in writing, until the applicant has produced to court proof that the Administrator General or his or her agent has declined to administer the estate or proof of having given the Administrator General fourteen clear days' notice in writing of his or her intention to apply for the grant. The Judicature (Administration of Estates) Rules Statutory Instrument 13 – 7 require the applicant to serve a notice of intention to apply, proof of publication of such notice and a bond.

Section 246 of the Succession Act provides that the application for letters of administration shall be made by petition. It spells out the contents to be included in the petition which has to be verified under section 247 of the same Act. A grant can be issued through an ordinary petition as spelt out under section 246 of the Succession Act, or during the pendency of a suit under section 218, or after the conclusion of a suit under section 265, or for special purposes under sections 219 to 224, or with exceptions under sections 225 to 227, or under other peculiar situations covered by sections 228 to 231 of the same Act.

It is clear from the foregoing provisions of the law that it is only a widow or widower or executors in a will or their duly authorized attorneys who can apply for and obtain probate or letters of administration without reference to, or obtaining a certificate of no objection from the Administrator General. All other persons must serve the Administrator General with notice of

their intention to apply for letters of administration within the prescribed time. Also see **Administrator General V Akello Joyce Otti & Donato Otti Supreme Court Civil Appeal No 15/1993**, Manyindo DCJ, as he then was.

The instant application was filed under sections 222 and 224 of the Succession Act. Section 222 provides that where the representative of a deceased person is made party to a pending suit but is unwilling or unable to act, letters of administration may be granted to the nominee of a party in a suit, limited for the purpose of representing the deceased in that suit or in any other such cause until a final decree is made. Section 224 provides that where the deceased's representative is resident out of Uganda, or unwilling or unable to act, the court, where it is necessary or convenient, may, in its discretion, appoint a person other than the one normally entitled to administration, and in such case the letters of administration may be limited.

The instant application does not fall within the situations envisaged by sections 222 and 224 of the Succession Act. The facts as deduced from the applicants' affidavit evidence do not reveal anywhere that there is an administrator of the estate who is unwilling or unable to act as a party to the suit, or who is residing out of Uganda, as to prompt this court to grant limited grants to other persons. On the contrary, the facts are that the Administrator General has refused to issue a certificate of no objection to enable a grant to be issued in respect of the estate. This is different from having an administrator for the estate who is unable or unwilling to act, or residing out of Uganda. There are legal measures the applicants can invoke to compel the Administrator General to perform his/her duties, but applying for limited grants is not an appropriate option.

Secondly, as already observed, not being widows of the deceased or duly appointed attorneys for such widows, they cannot procure a grant of letters of administration without reference to, or first obtaining a certificate of no objection from the Administrator General. Besides, the applicants as beneficiaries of the estate of the intestate have *locus* to sue in their own name to protect the estate of the intestate without having first to obtain letters of administration, as was held in **Israel Kabwa V Martin Banoba Supreme Court Civil Appeal No 52/1995**, Tsekooko, JSC.

The applicants also based their application on section 33 of the Judicature Act and section 98 of the Civil Procedure Act. Section 33 of the Judicature Act provides that this court in 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. Section 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. In the exercise of this discretion, court must act judiciously and according to settled principles, bearing in mind that the decision must be based on common sense and justice. See **Standard Chartered Bank (U) Ltd V Ben Kavuya & Barclays Bank (U) Ltd [2006] HCB Vol 1 p.134.**

In the premises and on basis of the foregoing authorities, it is my opinion that court's discretion should be sought after due diligence and observance of the correct procedure especially where such procedure is clearly provided under the law. In my opinion, the applicants have not complied with the same.

The application is in that regard dismissed. There is no order as to costs since the application was *ex parte*.

Dated at Kampala this 21st day of July 2015.

Percy Night Tuhaise

Judge.