

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

FAMILY DIVISION

CONSOLIDATED MISCELLANEOUS APPLICATIONS 125 & 132/2014

ARISING FROM CIVIL SUIT NO. 15/2013

1. MARGARET TUMWINE TUMUSHABE

2. AYEBARE FAMINAH

3. BIRUNGI ARTHUR

4. ASHEMEZA RAYMOND

5. BAMUSIIME SHERINA.....

APPLICANTS

VERSUS

BRIAN ASIIMWE.....

RESPONDENT

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE

RULING

These were two consolidated applications, namely Miscellaneous Application 125/2014 and Miscellaneous Application 132/2014, both arising from Civil Suit 015/2013. The consolidated application, brought under Order 46 rules 1 & 8 of the Civil Procedure Rules (CPR), is for orders that the consent decree entered in Civil Suit No. 15/2013 be reviewed; and that costs of the application be provided for.

The application is supported by the affidavits of Margret Tumwine Tumushabe and Birungi Arthur, the 1st and 3rd applicants respectively. The grounds of the application are briefly that:-

- a) The consent decree was entered in error and by mistake regarding some of the terms in the decree which if not reviewed or adjusted shall prejudice other beneficiaries of the estate.
- b) The 1st applicant did not understand why the kibanja located in Mutungo zone 3 Nakawa Division, which forms part of the estate, was excluded from the deceased's estate and relinquished to the respondent. The applicant mistakenly or erroneously consented to this clause which if not reviewed the interests of the other beneficiaries shall be jeopardized.
- c) The valuation of the estate ought to have been carried out jointly by the valuers of both parties but since the 1st applicant was not adequately advised by her lawyer, the valuation was carried out at the instance of only the respondent and as a result the estate was overvalued.
- d) The consent decree stipulated the time frame within which the money representing the respondent's share would be paid, yet the entire value of the estate is constituted of physical assets, not liquid cash, which would require some long time to sell in order to realize the respondent's decretal sum.
- e) The respondent is not a biological son of the late Joseph Tumushabe and is therefore not a beneficiary of the deceased's estate.

The application was opposed by the respondent through his affidavit in reply.

The background to the two applications is that the 1st applicant petitioned court for a grant of letters of administration to the estate of her husband the late Joseph Tumushabe. The respondent lodged a caveat on the petition but a grant had already been signed in favour of the 1st applicant. The respondent then filed Civil Suit No 015/2013 against the 1st applicant but the parties later resolved the suit by consent based on a valuation report. The respondent commenced execution proceedings against the 1st applicant who however applied for stay of execution and filed Miscellaneous Application 125/2014 for review of the consent decree. The 2nd 3rd 4th and 5th applicants had also separately filed Miscellaneous Application 132/2014 against the respondent and the 1st defendant for review of the same decree.

When Miscellaneous Application 125/2014 came up for hearing, this court ordered the two applications to be consolidated since they arose from the same civil suit and administration cause, and involved the same parties. At the request of the applicants' counsel, this Court also

ordered that a DNA test be carried out on the respondent to ascertain his paternity. Court also granted the respondent's counsel's prayer to have the DNA test carried out by the Government Analytical Laboratory.

Counsel filed written submissions within time schedules set by this court. When the DNA results were eventually procured, the applicants' counsel filed additional submissions, but this was protested by the respondent's counsel in a letter dated 08/10/15 addressed to this court. I did not address the supplementary submissions because they were not submitted with leave of court, having been filed after submissions were closed, and the other party had not got opportunity to respond to them.

The respondent's Counsel, Arthur Murangira, in his submissions in reply, challenged the 3rd applicant's supporting affidavit as being defective. This was opposed by Counsel Tumwesigye for the 1st applicant and Counsel John Mary Muwaya for the 2nd to 5th applicants. I will first address this aspect before delving into the substantive matters of the application.

The respondent's counsel submitted that there are incurable defects in the 3rd applicant's affidavit supporting the consolidated application. Counsel argued that the 3rd applicant deponed the affidavit on behalf of the 2nd 4th and 5th applicants without proof of any authority to do so; that this is derived from the use of the words "we" and "our" in reference to the 2nd 4th and 5th applicants as contained in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the said affidavit. He submitted that this offends Order 19 rule 3 of the CPR which provides that an affidavit must be confined to such facts as the deponent is able in his/her knowledge to prove. He also cited Order 1 rule 12(1) & (2) of the CPR which mandatorily requires written authority of a person who authorizes another to appear, plead or act for that other person in any proceedings. Counsel contended that the 3rd applicant's affidavit is incompetent and defective and ought to be struck out, with the effect that the 2nd 4th and 5th applicants' application remains unsupported by affidavit and liable to be struck out. He cited **Joy Kaingana V Dabo Boubon [1986] HCB 59** and **Lena Nakalema Binaisa V Mucunguzi Myers Miscellaneous Application No 0460 Arising From Civil Suit No 0211/2009** to support his submissions.

This was opposed by the applicants' counsel who submitted that the 3rd applicant's counsel's affidavit has no defects but is based on facts that are within the said applicant's knowledge, and

that the deponent is not swearing the affidavit on anybody's behalf. Counsel contended that the cases cited by the respondent's counsel are distinguishable from the instant case.

I have carefully read the supporting affidavit of Birungi Arthur the 3rd applicant. It is not stated anywhere in the affidavit that the said applicant was swearing the affidavit on behalf of the other applicants. He concluded his affidavit by averring that what he stated is true and correct to the best of his knowledge.

In **Joy Kaingana V Dabo Boubon [1986] HCB 59** the affidavit challenging the application was sworn by the husband on behalf of the wife when the husband was not even a party. In such circumstances the husband required the authority of the wife. In **Lena Nakalema Binaisa V Mucunguzi Myers Miscellaneous Application No 0460 Arising From Civil Suit No 0211/2009** the deponent stated in her affidavit that she had been authorized by the 2nd and 3rd applicants and swears the affidavit on their behalf. In that case she required the said applicants' authority.

In the instant case there is nothing to show that the 3rd applicant was swearing the affidavit on behalf of the 2nd 4th and 5th applicants. He deposed the affidavit as a witness who had knowledge of the facts upon which the applicant's joint action was based. He did not state in his affidavit that he was swearing the affidavit on behalf of the other applicants. I agree with the applicants' counsel that the cases of **Joy Kaingana V Dabo Boubon** and **Lena Nakalema Binaisa V Mucunguzi Myers Miscellaneous Application** are distinguishable from the circumstances of this application, and are, therefore, not applicable. In that regard, it is my finding that the 3rd applicant's affidavit is not defective.

This takes me to the substantive issue in the application, that is, whether the consent judgement entered into by the parties resolving Civil Suit No. 015/2013 should be reviewed.

Section 82 of the Civil Procedure Act cap 71 provides that any person considering himself or herself aggrieved by an order from which no appeal is allowed may apply for review to the court which passed the order. Order 46 rules 1 and 8 of the Civil Procedure Rules (CPR) provides that any person aggrieved by an order from which an appeal is allowed but which no appeal has been preferred and who on account of some mistake or error on the face of record or for any sufficient reason may apply for review of the judgement to the court which passed the decree or order.

In **Attorney General & Uganda Land Commission V John Mark Kamoga SCCA No.8 of 2004** the Supreme Court held that a consent judgement has to be upheld unless it is vitiated by a reason that would enable court to set aside an agreement, such as fraud, mistake, misapprehension or contravention of court policy. See also **Peter Mulira V Mitchell Cotts CACA15/2012**.

The 1st applicant states in her affidavit that the consent decree was entered in error and by mistake regarding some of the terms; that the kibanja located in Mutungo zone 3 Nakawa Division, which forms part of the estate, was excluded from the deceased's estate and relinquished to the respondent without proper evaluation; that the value of the kibanja located in Mutungo zone 3 Nakawa Division and of the retail store at St. Balikuddembe Market were exaggerated; and that she mistakenly and erroneously consented through her lawyer who did not adequately advise her. The respondent states in paragraph 10 of his affidavit in reply that there was no error or mistake regarding the terms of the consent decree and that the same was consented to after a lengthy settlement conference. He also averred in paragraph 18 of the same affidavit that there was no over evaluation of the estate and the amount was agreed after comparing each of the parties valuation reports.

The record indicates that on 29/08/2013 counsel for both the 1st applicant and the respondent informed court of the terms the parties had agreed with their advocates. The Judge consequently entered the same on the court record as a consent judgement. Annexure F to the respondent's affidavit shows that M/S Salem Appraisal, whose customer was Brian Asiimwe (respondent) valued the estate property at Uganda Shillings 2,400,000,000/= (two billion four hundred million). Annexure F was not disputed by the applicants or their counsel in their affidavits and submissions. The consent decree, annexed as A to the 1st and 3rd applicants' affidavits shows that the entire value of the estate, excluding the kibanja at Mutungo zone 3 Nakawa was Uganda Shillings 1,400,000,000/= (one billion four hundred million).

This, on the face of it, shows that the valuation report initiated by the respondent did not have the final say on the valuation of the estate, since its initial amount was Uganda Shillings 2,400,000,000/= (two billion four hundred million). This is Uganda Shillings 1,000,000,000/= (one billion) lower than the amount eventually reflected in the consent decree, annexure A, which shows the entire value of the estate, excluding the kibanja at Mutungo zone 3 Nakawa, to

be Uganda Shillings 1,400,000,000/= (one billion four hundred million). This disproves the 1st applicant's averments that the valuation of the estate property was carried out at the instance of only the respondent. Besides, the 1st applicant has not supported her averments of the estate being over valued with any other cogent evidence to show court that there was indeed over valuation of the estate. Her counsel submitted that the valuers never visited the assets but simply guessed at the instigation of the respondent. This did not feature anywhere in the two supporting affidavits. It can only be treated by this court as adducing evidence from the Bar, and this court cannot rely on it to make a decision.

It was held in **Hirani V Kassam (1952) 19 EACA 131** that:-

“prima facie, any order made in the presence and the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them, and it cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of court...or if the consent was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside an agreement.”

In view of the foregoing, I find nothing in the adduced evidence to show that the respondent over valued the estate, or that it was only him who instigated the valuation of the estate. I cannot therefore rely on grounds (a), (b), and (c) of the application to order the review of the consent judgement. I take it that the 1st applicant is on that aspect, having failed to adduce evidence of fraud or mistake or other vitiating factors stated above, bound by what her counsel signed in the consent judgement.

The 1st and 3rd applicants however also state in their supporting affidavits that the kibanja in Mutungo zone 3 Nakawa Division, which the 1st applicant consented to relinquish and exclude from the deceased's estate, forms part of their late father's estate. The respondent stated in reply that the said kibanja did not form part of the estate as the same had been gifted to him by the deceased during his lifetime with the full knowledge of the 1st applicant. He attached a copy of the sale agreement, annexure E to his affidavit to support his averment.

The respondent has not adduced cogent evidence to support his averments that the kibanja in Mutungo zone 3 Nakawa Division was not part of the estate of the late Joseph Tumushabe. The

sale agreement he annexed to his affidavit as **F** only reveals that the late Joseph Tumushabe bought the land in question from a one Kaggwa Gerald. The agreement does not show that Joseph Tumushabe gave the land as a gift to the respondent. Mere possession of the agreement does not indicate that the land was gifted to him. He did not avail court any deed of gift or other evidence to show that the kibanja was given to him as a gift.

Paragraph 1 of the consent order states that:-

“the entire value of the estate of the late Joseph Tumushabe excluding the kibanja in Mutungo zone 3 Mutungo parish Nakawa Division is set at Ugx 1,400,000,000/= (Uganda Shillings one billion four hundred million).”

Paragraph 6 of the same order states that :-

“the defendant shall as administrator of the estate of the late Joseph Tumushabe, cede and relinquish to the plaintiff all of the deceased’s interest in the kibanja and house thereon located in Mutungo zone 3 Mutungo parish Nakawa Division Kampala and offer assistance where necessary to the plaintiff in his pursuit to acquire registration in respect thereof.”

The foregoing, in my humble interpretation of the clause, infers that the said property was perceived as part of the estate, and the 1st applicant, in the consent judgement, merely took the compromise position of relinquishing the deceased’s interest as administrator of the estate. If the said land was the deceased’s gift to the respondent as claimed by the respondent, there is no way it would have featured in the consent decree as part of the deceased’s estate. The wording of the decree suggests that the land in question was taken to be part of the estate by the parties at the time they signed the consent judgement.

The 3rd applicant states that the consent decree was entered into disregarding the interests of the 2nd 3rd 4th and 5th applicants as beneficiaries of the estate. The 1st applicant also stated in paragraph 4 of her supporting affidavit that she entered the consent judgement purely as administrator of the estate of the late Joseph Tumushabe. The respondent’s affidavit in reply states that he sued the 1st applicant in HCCS 015/2013 in her personal capacity since she had not

yet been issued letters of administration to the estate, and that these were only issued pursuant to the consent judgement.

The plaint in *HCCS 015/2013 Brian Asiimwe V Margret Tumwine Tumushabe*, however shows that the plaintiff's (respondent in this case) claim against the defendant (1st applicant in this case) was for, among other things, an order for the revocation/cancellation of a grant of letters of administration of the estate of the late Joseph Tumushabe, and for an account of all the proceeds of the said estate. Paragraph 4 of the same plaint states that the letters of administration were issued but the plaintiff lodged a caveat. The record shows that after their issuance, the Registrar of this court indicated to the defendant's counsel that the letters were issued in error.

It appears from the record that the procedure following the caveating of an application for letters of administration as set out under section 265 of the Succession Act was not followed, otherwise the 1st applicant would have been the party to file a civil suit against the respondent (caveator), requiring him to show cause why his caveat should not be removed. In this case the respondent filed a civil suit against the 1st applicant as if the latter had actually been granted the letters of administration, and the prayers were for revocation of letters of administration. The 1st applicant's (defendant in CS 15/2013) written statement of defence is also apparently based on the same assumption that she was the administrator of the estate of the late Joseph Tumushabe. On that premise, it can be assumed that the 1st applicant signed the consent as administrator of the estate of the late Joseph Tumushabe.

The record shows that at the time the consent judgement was signed, all the children of the deceased, who are parties to this application, were adults except the 5th applicant Bamusiime Sherina who was then aged 16 years. There is nothing on record to show that the beneficiaries were part of the settlements that formed the basis of the consent judgement. The 1st applicant, who was a *de facto* trustee holding the estate on behalf of the beneficiaries, did not have their mandate to relinquish part of the estate in a consent judgement.

I would in that respect agree with the applicants' counsel that it is contrary to court policy for a legal representative of an estate to enter a consent that has the effect of prejudicing the interests of other beneficiaries of the estate who are not party to the consent, or who have not mandated the legal representative to consent on their behalf. On that aspect of the legal representative's

lack of the beneficiaries' participation in the consent which jeopardized their interests, I would allow a review of the consent judgement.

The 1st applicant also avers in paragraph 11 of her supporting affidavit that the respondent is not a biological son of the late Joseph Tumushabe, and is therefore not a beneficiary of the deceased's estate. The respondent replied in paragraph 4 of his affidavit in reply that he has always been the son of late Joseph Tumushabe. He attached a copy of his birth certificate as annexure **A** to support his averment. In that connection this court had granted the applicants' prayer to have the respondent undergo a paternity test after hearing counsel to both parties on the matter. This was done at the stage of hearing the application. The court also granted the respondent's counsel's prayer, after the applicants' counsel had not opposed it, to have the DNA conducted by a Government Analyst.

The DNA results were eventually availed to this court through its Registrar, under cover of a letter signed by Onen Geoffrey, Principal Government Analyst. This was after the written submissions of both counsel had been filed. I addressed the DNA results on basis of the fact that they were pleaded as ground (e) of the amended application, supported by paragraph 11 of the 1st applicant's affidavit. The respondent responded to the said paragraph 11 in paragraphs 4, 5, and 6 of his affidavit in reply. The matter was therefore not strange to the application and the affidavit evidence on record, and this court could appropriately address and analyze it, with or without counsel's submissions on the matter.

Annexure **A** the birth certificate reveals that Brian Asiimwe (the respondent) is a son of the late Joseph Tumushabe. The DNA results that were eventually submitted to court, however, reveal that the respondent is not a son of the late Joseph Tumushabe. This was based on the finding of the Principal Government Analyst agreed on by both parties to conduct the DNA. According to the report Brian Asiimwe (the respondent) is not paternally related to Stephen Ndyabangi, a paternal uncle. The same DNA report reveals the 3rd and 4th applicants, siblings of the respondent, to be paternally related to the same Stephen Ndyabangi.

The DNA results are scientific proof of paternity (or lack of it), as opposed to a birth certificate which is based on information availed to the birth certificate issuing authority. I am more

inclined to believe the DNA report about the respondent's paternity because it is scientific and not based on mere information.

The availability of this evidence is a ground for reviewing the consent decree by setting it aside. At the time the 1st applicant signed the consent decree in Civil Suit No. 015/2013, the scientific evidence pointing to the lack of paternal relationship between the deceased (Joseph Tumushabe) and the respondent (Brian Asiimwe) was not within the applicants' knowledge. In that respect, I find that the consent judgement, in as far, as the paternity of the respondent is concerned, was given without sufficient material facts or in misapprehension or in ignorance of material facts. In the given circumstances, it cannot bind the parties to the proceedings or action, and on those claiming under them. To that extent, the consent can be reviewed on ground (e) of the application, that is, that the respondent is not the biological son of the late Joseph Tumushabe. The applicants have proved to this court that the consent was given without sufficient material facts or in misapprehension or in ignorance of material facts.

All in all, the consent in HCCS 015/2013 can be reviewed because it was based on an agreement contrary to the policy of court, that is, that the beneficiaries to the estate were not party to the consent by the 1st applicant who relinquished part of their late father's estate; and/or because it was given without sufficient material facts or in misapprehension or in ignorance of material facts, that is regarding the paternity of the respondent.

It is my considered opinion therefore that the decision in **Attorney General & Uganda Land Commission V John Mark Kamoga SCCA No.8 of 2004** permits a consent judgement to be reviewed and or set aside for reasons set out above.

The consolidated applications are allowed with costs to the applicants.

Dated at Kampala this 15th day of October 2015.

Percy Night Tuhaise

Judge.