

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
MISCELLANEOUS APPLICATION NO 278 OF 2015
ARISING FROM OS NO 9 OF 2014
ALL ARISING FROM ADMINISTRATION OF THE ESTATE OF THE LATE H. H
DAUDI CHWA II
WAMELI & CO ADVOCATES.....APPLICANT

VERSUS

- 1. THE ADMINISTRATORS OF THE ESTATE OF
THE LATE H. H SIR DAUDI CHWA II**
- 2. THE ATTORNEY GENERAL OF UGANDA**
- 3. THE COMMISSIONER LAND REGISTRATION**
- 4. THE COMMISSIONER SURVEY & MAPPING.....RESPONDENTS**

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE

RULING ON PRELIMINARY OBJECTIONS

This is an application brought under Article 26(2) of the Constitution of the Republic of Uganda; section 33 of the Judicature Act cap 13; section 98 of the Civil Procedure Act cap 71; and Order 52 rules 1, 2 & 3 of the Civil Procedure Rules. The application is for consequential orders following this court's judgement in Originating Summons No 09/2014. The consequential orders prayed for are that:-

- i) The Registrar of Titles Mukono zonal office to issue a certificate of title for land described as Kyaggwe Block 113 Plot 9 at Nantabulirwa firstly in the names of Sir Daudi Chwa II (deceased) and then in the names of the administrators of his estate.

- ii) The Registrar of Titles Mukono zonal office to issue certificates of title for land described as Kyaggwe Block 113 Plots 457 & 458 at Nantabulirwa firstly in the names of Sir Daudi Chwa II (deceased) and then in the names of Muniafu Mukhembo Phillip.
- iii) The District Staff Surveyor of Mukono to reinstate the old boundaries of the aforementioned plots as per the certified cadastral sheets by the Commissioner Survey & Mapping now on court record.
- iv) The Commissioner Survey & Mapping Entebbe to amalgamate the residue by balance of 118.61 acres to land described as Kyaggwe Block 113 plot 458 at Nantabulirwa as reflected in the certified report on Kyaggwe Block 113 at Nantabulirwa to the Uganda Police – Kampala Metropolitan Police Headquarters dated 14th November 2013 under reference LAD 13/14/01.
- v) The Commissioner Survey & Mapping Entebbe to furnish to this honourable court with certified cadastral and/or micro film records accompanied with deed prints for the remaining properties falling under the aforesaid estate.
- vi) The Chief Government Valuer to furnish this honourable court with the official valuation of the estate of the late H. H Sir Daudi Chwa II.

When the application was called for hearing learned Counsel David Kaggwa for the 1st respondent and learned Counsel Bafirawala Elisha for the 2nd 3rd and 4th respondents raised preliminary objections upon which they prayed this court to dismiss the application with costs. The preliminary objections will be addressed in the manner in which they were raised.

The first PO raised by learned counsel David Kaggwa for the 1st respondent is that the nature of the application seeks for consequential orders to issue against the Registrar of Titles for issuance of a certificate of title in favour of Muniafu Mukembo for land comprised in Kyaggwe Block 113 Plots 457 & 458. Counsel submitted that the law governing such is section 177 of Registration Act. He submitted that the applicant in this matter has never recovered any land; and that the orders of this court under OS 09/2014 dated 26th August 2015 were declaratory in that court did not mention any piece of land that had been recovered. Counsel contended that the application is not only incompetent but also an abuse of court process; and that it does not meet the requirements of section 177 of the Registration of Titles Act since there was no recovery of land.

He cited **Darlington Kampama V Registrar of Titles Miscellaneous Application No 12/2013** to support his position.

The second PO, also raised by learned counsel David Kaggwa, is that the applicant's claim is for remuneration as an Advocate arising from a consent vide MC 13/2012 which was an application to tax an Advocate/Client Bill of Costs. He pointed out that the taxation was resolved by consent where the applicant was to be paid 10% of Prince Ssimbwa's share. He submitted that under section 57 of the Advocates Act, upon taxing an Advocate's Bill of Costs, an Advocate has to file an ordinary suit to recover costs. He contended that to date the applicant has never filed such suit; and that by bringing this suit, the applicant is circumventing section 67 of the Advocates Act which requires him to bring an ordinary suit. He cited **J. B Byamugisha V NSSF MC 25, 27 & 28 OF 2011** to support his position.

The third PO raised by learned counsel Bafirawala Elisha for the 2nd 3rd and 4th respondents is that the application was brought by Wameli & Co Advocates for consequential orders. The affidavit deponed by Philip Mukembo states clearly that he was given powers of attorney. According to the affidavit and the power of attorney, the powers of attorney were given to Philip Mukembo Muniafu and not to Wameli & Co Advocates; that the applicant acquired the powers of attorney as Philip Mukembo in his personal capacity; and that nowhere was Wameli & Co Advocates given powers of attorney. He contended that it is inconceivable that Wameli & Co Advocates a stranger to the proceedings is suing on behalf of Philip Mukembo; that Wameli & Co Advocates has no *locus standi*; that there is no judicial relief he can obtain from this court; and that it does not matter whether Mukembo works for the Firm, since the two are separate entities.

In response, learned counsel Senkeezi Ssali submitted that counsel's submissions were misleading; that the orders of court in OS 09/2014 were not only declaratory but were also directives, particularly Order number 2 which directed that the estate be distributed within one year. He submitted that the two issues about the applicant never recovering any properties of the estate or never being registered as proprietors are facts that need to be proved by leading evidence. They therefore do not pass the test of a PO. He also submitted that the application is not moving court to cancel any entry or certificate and reliance on section 177 of the Registration Act therefore does not arise.

On the second PO, the applicant's counsel submitted that the authority of **J. B Byamugisha V NSSF MC 25, 27 & 28 OF 2011** raised by the respondent's counsel is distinguishable from the facts of this case. He stated that the facts in the case cited related to taxation of a Bill of Costs but in the instant case there was no taxation; that the parties simply agreed on how to settle the applicant's claim hence putting aside the adversarial action to remuneration. He also submitted that the application was not seeking consequential orders from a taxation, but from a ruling of court which would be by ordinary suit.

On the third PO, counsel submitted that the 2nd respondent had not properly brought their case as there was no affidavit from them; that a Sarah Kulata Basangwa deponed an affidavit on behalf of the 2nd respondent yet section 10 of the Government Proceedings Act requires due authorization of the Attorney General. He submitted that there was no written authority from the 2nd respondent requesting the deponent of the affidavit to represent them. He also submitted that the 4th respondent had filed a consent to the application and so had no reason to raise a PO against it, that it amounts to abuse of court process. He contended that the POs are raised through twisting the law and applying it selectively in a bid to fail the applicant's genuine claim.

The respondent's counsel submitted in rejoinder that there is no need to adduce evidence; that the orders sought in the application especially 1(i) and (ii) involve an entry and a cancellation of a title; and that on top of that there will be a need to first cancel the 1st registered proprietor before Daudi Chwa's name is entered, without any proceeding. On the settlement of the Bill of Costs by consent, it was submitted that the file was opened for taxation for Advocate/Client Bill of Costs and the resultant order even if by consent should not be anything outside the Advocate/Client Bill of Costs as governed by the Advocates Act; that it is an irregularity for a client to operate outside the said Act. On the 2nd respondent's representation, it was submitted that the Attorney General is the legal adviser or representative of government; that it is not in dispute that the 3rd and 4th respondents are departments in the Ministry of Lands & Housing, and that being so, the Attorney General as the legal representative of government is obliged to represent the two commissioners.

It was contended for the respondents that there is no suit that can be sustained against the Attorney General without their being in a representative capacity; that the affidavit on record is drafted and filed by the Attorney General's chambers but deponed by Sarah Kulata Basangwa

Commissioner Land Registration; that the applicant's counsel had misunderstood the functions of the Attorney General in insisting that there is need for authorization for someone to swear an affidavit, that such only refers to situations when one is appearing in court and states he is representing the Attorney General. It was further submitted for the respondents that there is a pending application no 337/2015 which seeks to set aside the consent entered by the 2nd respondent on behalf of government, and that it is premature to indulge in its merits. The submissions also reiterated the respondents' position that the applicant has failed to point out from the powers of attorney where Wameli & Co Advocates was granted authority to act for and on behalf of the estate of the late Daudi Chwa II; that what appears in the power of attorney is Philip Mukembo and not Wameli & Co Advocates. The respondents prayed this court to dismiss the application with costs to the respondents.

The first preliminary objection raises the issue as to whether consequential orders can be issued against the Registrar of Titles for issuance of certificates of title without recovery of land. The application arose from orders of this court issued in Originating Summons No. 09/2014. The first order concerning the interest of Prince Alexander David Ssimbwa in the estate of the late Daudi Chwa II, was declaratory but the second and third orders regarding the estate of the late Daudi Chwa II and on costs respectively, were directive. The second order was issued under sections 33 of the Judicature Act and section 98 of the Civil Procedure Act on court's observation that the administration of the estate in question was long overdue. Both the declaratory and directive orders however did not mention any interest in land by anybody since such was never an issue for deliberation in the OS, let alone the fact that the extent of the entire estate had not been determined.

The applicant's counsel contends in his submissions that he is not moving court to cancel any entry or certificate and that reliance on section 177 of the Registration of Titles Act therefore does not arise. I differ from this position. It is clear from the prayers highlighted above, particularly prayer number 1 (i) & (ii), that the orders sought would involve an entry and a cancellation of titles. Prayer 1 (i) seeks this court to "*direct the Registrar of Titles – Mukono Zonal Office to issue a certificate of title for land described as Kyaggwe Block 113 Plot 9 Nantabulirwa and issue it in the names of H. H Sir Daudi Chwa II (deceased) and then in the names of the administrators of his estate.*" Prayer number 1(ii) seeks this court to "*direct the*

Registrar of Titles - Mukono Zonal Office to issue certificates of title for land described as Kyaggwe Block 113 Plots 457 & 458 at Nantabulirwa firstly in the names of Sir Daudi Chwa II (deceased) and then in the names of Muniafu Mukhembo Phillip.”

It is clear from the wording of the said prayers, as correctly submitted by the respondents' counsel, that this would require the said Registrar to first cancel the 1st registered proprietor or proprietors before the subsequent entries in favour of the late Daudi Chwa II, or of the administrators of his estate, or of Philip Mukembo Muniafu, are effected.

The applicant's counsel contends that the applicant did not rely on section 177 of the Registration of Titles Act. The circumstances of this case, however, are that the applicant is seeking this court to order the Registrar of Titles to enter the names of the late Sir Daudi Chwa II, and then in the names of the administrators of his estate on the certificate of title to land comprised in Kyaggwe Block 113 Plot 9 at Nantabulirwa. The applicant is also seeking this court to order the same officer to enter the names of the applicant on a certificate of title to land comprised in Kyaggwe Block 113 Plots 457 & 458 at Nantabulirwa. This would in a way, though not mentioned by the applicant, bring into play the provisions of the Registration of Titles Act which regulate issuance of certificates of titles and handling of the Register Book.

The section that covers such situations is section 177 of the Registration of Titles Act which states that:-

“upon recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may in any case in which the proceeding is not herein expressly barred, direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land, estate or interest, and to substitute such certificate of title or entry.....and the registrar shall give effect to that order.”

This court as already stated did not make any orders regarding recovery of land, nor was such recovery of land an issue for determination in OS 09/2014. This court did not also deliberate on the extent of the estate, since it was not an issue for deliberation, neither was evidence to that effect adduced before court. The circumstances of the OS were that the extent of the entire estate was yet to be determined. Thus any attempts to make this court issue consequential orders on

matters it did not deliberate on, is misdirected and misconceived, if not an abuse of court process. This, in my opinion, covers not only areas on issuance of certificates of title, which, as already stated, are governed by section 177 of the Registration of Titles Act, but also the areas of causing surveys or mapping of land and of valuation of an estate whose extent is yet to be determined. There are court orders already in place which the applicant can invoke to have the administrators of the estate of the late Daudi Chwa II identify the properties of the estate or to establish the extent of the estate for purposes of its distribution as ordered by this court.

In that respect the first PO is sustained. It disposes of the entire application, which is accordingly dismissed with costs. This renders it unnecessary to proceed with the second and third preliminary objections which are consequently relegated to the position of legal mootness, relevant only for academic purposes. Courts adjudicate on issues which actually exist between litigants and not academic ones.

Dated at Kampala this 14th day of December 2015.

Percy Night Tuhaise

Judge.