THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(FAMILY DIVISION)

ORIGINATING SUMMONS NO. 04 OF 2021
(ARISING OUT OF ADMINISTRATION CAUSE NO. 191 OF 2011)

AND
IN THE MATTER OF THE ESTATE OF THE LATE SERUKWAYA ERENEST

AND
IN THE MATTER OF AN APPLICATION BY MATOVU AMINAH NAMUBIRU THE CO-ADMINISTARTOR OF THE SAID ESTATE, FOR THE REMOVAL OF THE LATE NAMUSAAZI PROSSY AS CO-ADMINISTARTOR ON GRANT

RULING

BEFORE: HON. LADY JUSTICE ALICE KOMUHANGI KHAUKHA

Introduction

This ruling is in respect of an *ex parte* application brought by way of Originating Summons under section 33 of the Judicature Act, Cap. 13, section 98 of the Civil Procedure Act, Cap. 71 and Order 37 Rules 1 (g), 2 (a) and (b) and 8 of the Civil Procedure Rules S. I 71-1 filed in this honourable court on the 12th day of March 2021 and supported by the affidavit of a one Matovu Aminah Namubiru (hereinafter referred to as the **applicant**). The application seeks for determination of the following questions;

1. whether the late Namusaazi Prossy being co-administrator of the late SERUKWAYA ERENEST can be removed leaving the applicant and SEMALULU FRANCO to administer the estate of the late Serukwaya Erenest;
2. whether the grant of letters of administration can be amended reflecting the removal of the late Namusaazi Prossy as co-administrator to the estate of the late Serukwaya Erenest;
3. whether costs will be provided for in the premises.

Representation

When the application came up for hearing on 11th November 2021, the applicant was represented by Counsel Allan Nshimye and Counsel Louis Lionel Muneza both of Nshimye & Co. Advocates. The applicant was not present in Court but the co- administrator, Semalulu Franco and Baganda Samson, who was on watching brief on behalf of the other beneficiaries of the estate of the late Serukwaya Erenest were present in court.

Counsel for the applicant made written submissions, citing and attaching some court decisions to guide court in making the decision in this matter and the same have been considered.

The facts giving rise to the application are as follows:

The applicant together with Semalulu Franco and Namusaazi Prossy (now deceased) were all co-administrators of the estate of the late Serukwaya Erenest vide, **Administration Cause No. 191 of 2011** for which Letters of Administration were issued to them on **12th August 2011** to that effect.

However, Namusaazi Prossy died on **17th June 2014** leaving the applicant and Semalulu Franco as the only administrators of the said estate and rendering the Letters of Administration issued on 12th August 2011 inoperative as the applicant

and her co-administrator, Semalulu Franco have been unable to administer the rest of the estate of the late Serukwaya Erenest because the signature of the late Namusaazi deceased is required on some documents before they can be executed.

It is upon that background that the applicant seeks that the grant of the Letters of Administration issued vide Administration Cause No. 191 of 2011 be amended to remove the late Namusaazi Prossy and only reflect the two surviving co-administrators to wit; the applicant and Semalulu Franco.

Issues

The issues for determination by this honourable court as per the applicant's submissions are:

1. ***Whether the late Namusaazi Prossy being co-administrator to the estate of the late Serukwaya Erenest can be removed leaving the applicants to administer the estate of the late Serukwaya Erenest;***
2. ***Whether the grant of Letters of Administration can be amended reflecting the removal of the late Namusaazi Prossy as co-administartor to the estate of the late Serukwaya Erenest;***
3. ***Whether costs will be provided for in the premises.***

Resolution of issues

I will resolve issue 1 and issue 2 together because the answer in issue 1 will resolve the question for determination in issue 2.

However, before resolving the above issues, I would like to clarify on the issue about the procedure such an application should take. Although not directly raised as an issue in the application, I perceived that there was uncertainty as to which procedure to follow when making applications of this kind to wit; whether the

application should have been brought by way of Originating Summons under Order 37 of the Civil Procedure Rules (CPR) or by Notice of Motion under Order 52 of the CPR.

Counsel in his submissions citing the cases of **Zalwango & Another Versus Walusimbi & Another [2014] UGHC, 9 and Sserunjogi & Another Versus Nkuubi [2019] UGHCFD, 43** stated that it is the principle of law that when dealing with simple matters that need settling in the administration of an estate, Originating Summons (O.S) may be taken out without the expense of bringing an action in the usual way since the procedure is primarily designed for the summary and 'ad hoc' determination of points of law or construction of certain questions of fact, or for the obtaining of specific directions, usually for the safeguarding or guidance of persons acting in fiduciary capacity or acting under the general directions of the court, such as administrators.

Counsel further referred to the evidence adduced by the applicant in her affidavit in support of the application under paragraphs 2, 3, 4 and 5 where the applicant states that one of the co-administrators, Namusaazi Prossy died and that her death had made it difficult for the surviving administrators to continue administering the said estate because her signature is required on certain instruments yet she is no longer available to sign where there is need to.

Order 37 Rule 1 (g) of the CPR provides that, "

the… administrator of a deceased person may take out as of course an originating summons, … the determination of any question arising out of the administration of the estate."

Rule 2 of the same goes ahead to provide that;

"*Any of the persons named in rule 1 of this Order may in like manner apply for and obtain an order for-*

(a) the administration of the personal estate of the deceased;

(b) the administration of the real estate of the deceased."

Rule 8 thereof also provides that;

(1) An originating summons shall be in Form 13 of Appendix B to these Rules, and shall specify the relief sought.

(2) The person entitled to apply shall present it ex parte to a judge sitting in chambers with an affidavit setting forth concisely the facts upon which the right sought by the summons is founded, and the judge, if satisfied that the facts as alleged are sufficient and the case is a proper one to be dealt with on an originating summons, shall sign the summons and give such directions for service upon persons or classes of persons and upon other matters as may then appear necessary.

Order 52 Rule 1 of the CPR provides that all applications to the court, expect where otherwise expressly provided for under these rules, shall be by motion and shall be heard in open court.

The application before this honourable court is one concerning the administration of an estate of a deceased person and the facts therein were not disputed by the co-administrator nor the representative of the beneficiaries who both were in court on the day this application came up for hearing and determination of the said questions in the application. This is line with the provisions of Order 37 Rule 1 which provides for the procedure to follow concerning matters relating to the administration of the estate of a deceased.

I therefore find that the application is brought under the right procedure that is to say, by way of Originating Summons since it is a simple straight forward matter that does not need to be brought the usual way as it doesn't involve the determination of a serious question. [See: In re Giles (2) (1890), 43 Ch. D 391]

Issue 1: <u>Whether the late Namusaazi Prossy being co-administrator of the estate of the late Serukwaya Erenest can be removed and the grant of the Letters of Administration be amended to reflect the applicant and Semalulu Franco as the only administrators of the estate of the late Serukwaya Erenest.</u>

It is the applicant's evidence in paragraphs 2 and 3 of her affidavit in support of the application that Namusaazi Prossy died on 17th June 2014 at Nsambya hospital and a death certificate was issued by National Identification and Registration Authority (NIRA) vide Registration Number 7815/14. The same was attached and marked as annexure B and I had the opportunity of looking at it.

The applicant also in paragraphs 4 and 5 of her affidavit in support stated that there is still part of the estate of the late Serukywaya Erenest that needs to be distributed and transferred to the beneficiaries but that the demise of Namusaazi Prossy has incapacitated the said distribution and transfer since each of the administrators named on the grant issued on 12th August 2011 needs to attach their National ID, sign and be physically present to transfer/distribute the remaining part of the said estate to the beneficiaries.

It therefore goes without saying that the grant for Letters of Administration have become useless or inoperative by reason of the death of Namusaazi Prossy. Section 234 (1) and (2) (d) of the Succession Act, Cap. 162 provide that, "***The grant of…Letters of Administration may be revoked or annulled for just cause…that the grant has become useless and in operative through circumstances…***"

In the matter of **the estate of the late Javuru Apollo Michael Miscellaneous Civil Application No. 0053 of 2016** cited by counsel for the applicant, it was held *inter alia* that the object of the power to revoke a grant is to ensure due and proper administration of an estate and protection of the interests of those

beneficially interested. (**See also: In the goods of William Loveday [1900] P 154**) Court also went ahead to state that:

"*There is only one way in which the name of an administrator of an estate may be removed from a grant and that is by revocation of the grant and the making of a fresh grant. A court cannot simply strike out the name of one administrator from a grant and continue on without revoking the grant. A fresh grant should be made because a grant is a public document and often must be produced to third parties as proof that the holder is the personal representative and thus enable him or her to administer the estate*."

Where a grant to two or more administrators is revoked however, and a new grant is issued to the one of the original administrators, a court does not require the continuing administrator to prove once more all the matters which were proved in order to obtain the original grant. (See: Gould Versus Gould [2005] NSWSC 914 at 9 per Campbell J)"

I have also taken note of the case **In Re the estate of the late L. Kamugungunu O.S 05 of 2016** cited by counsel for the applicant which he bases on to invite this honourable court to use its inherent powers to vary the Letters of Administration issued in the estate of the late Serukwaya Erenest and remove the deceased co-administrator Namusaazi Prossy leaving the applicant and Semalulu Franco in order to maintain all matters relating to the administration of the estate of Serukwaya Erenest in one file that is, ADMINISTRATION CAUSE NO. 191 of 2011 for future reference by any party.

In the face of two judgments dealing with a similar issue but with different outcomes as to the approach that should be followed when faced with such a scenario, and even when I know that the applicant and Semalulu Franco will not have to prove once more all the matters which were proved in order to make the original grant such as; advertising and the entire process of applying for the grant

of Letters of Administration, I am persuaded by the argument of counsel for the applicant that for purposes of maintenance of order, there is need to keep all the matters relating to the administration of the estate of the late Serukwaya Erenest in one file which is, **Administrative Cause No. 191 of 2011** for future reference by anyone interested in following up on the affairs of the said estate. I am mindful of the fact that there is a tendency of files getting lost from court registries and the risk of such happening is higher if there are multiple files concerning the same matter.

In the premises, I will deviate from the decision of the learned Honourable Justice Stephen Mubiru in the matter of the estate of the late Javuru Apollo Michael, *supra* and instead adopt the approach used by Honourable Lady Justice Percy Night Tuhaise in the matter of the estate of the late L. Kamugungunu, *supra* in which she simply varied the letters of administration to include and/ or join other co-administrators that had been appointed after the death of four of the original administrators, in a bid to keep the affairs of the administration of the estate of the late Serukwaya Erenest as one record for ease of reference in the future by anyone interested in making a follow up on the affairs of the said estate.

As such, issue 1 and 2 are resolved in the affirmative. The late Namusaazi Prossy being co-administrator of the estate of the late Serukwaya Erenest can be removed from the grant of Letters of Administration issued on 12th August 2011 and the same amended to reflect the applicant and Semalulu Franco as the only administrators of the estate of the late Serukwaya Erenest.

Issue 3: <u>Whether costs will be provided for in the premises.</u>

Section 27 (1) of the Civil Procedure Act (CPA) provides for costs and states as follows:

"*Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits the discretion of the court shall be in or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purpose aforesaid*." [Emphasis mine]

Counsel for the applicant in his submissions relied on the case of **Besigye Kizza Versus Museveni Yoweri Kaguta and the Electoral Commission, Presidential Election Petition No. 1 of 2001** where it was stated that it is trite that costs follow the events upon the determination of law suits unless court for good reason orders otherwise. [Emphasis mine] Counsel for the applicant also prayed that the costs be levied against the estate of the late Serukwaya Erenest since the applicant is acting in her capacity as an administrator as stated in paragraph 1 of her affidavit in support.

I am inclined not to grant costs in this application because firstly, it was an ex parte application which was straight forward with very simple questions to be determined by court. Secondly, I perceive that the said estate has not been administered since around 2014 when Namusaazi Prossy died and court does not know the state in which this estate is as to whether it is capable of providing for the costs of this application as prayed for by counsel for the applicant in the submissions. I really do not have good enough reason to grant costs in this application save for the fact that costs follow the event, which is also not a hard and fast rule to be followed by court or a judge as per section 27 (1) of the CPA cited above. I therefore use my discretion not to grant costs in this suit for reasons cited above.

Issue 4 is hereby resolved in the negative and costs will not be provided for in the premises.

Conclusion

In light of the above and in order to ensure the due and proper administration of the estate and protection of the interests of the beneficiaries, I allow this application in part and make the following orders:

a) that the name of the late Namusaazi Prossy be removed from the grant of Letters of Administration issued on 12th August 2011;
b) that the said Letters of Administration be amended to only include or indicate the name of the applicant, Matovu Aminah Namubiru and Semalulu Franco as the administrators of the estate of the late Serukwaya Erenest;
c) that I make no order as to the costs of this application.

I so order.

Dated at Kampala this 30th day of November 2021.

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Alice Komuhangi Khaukha
Judge.
30/11/2021