

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[FAMILY DIVISION]
MISCELLANEOUS APPLICATION NO. 286 OF 2023
ARISING FROM MISCELLANEOUS APPLICATION NO. 778 OF 2022
[ARISING FROM CIVIL SUIT NO. 178 OF 2017]

1. KYEYUNE ENOCK ROGERS
2. KISENYI RONALD
3. PHAIDERS NAYIGA KATO ::::::::::::::::::::::::::: APPLICANTS
4. KYEYUNE ADRINA ENOCK
[THROUGH A NEXT FRIEND SSEBOWA ALLEN]
5. SSEBULIME HAITHAM
[THROUGH A NEXT FRIEND NASSALI HAMIDAH]

VERSUS

1. ROSE NAKAYENGA
2. KAYONDO KATO
3. FLORENCE KNIGHT KYOLABA
4. SSENKONGA ENOCK ::::::::::::::::::::::::::: RESPONDENTS
5. PAULINE BISIRIKIRWA
6. ENRO HOTEL LIMITED
7. KATO INVESTMENTS LIMITED
8. COMMISSIONER FOR LAND REGISTRATION

RULING BEFORE: HON.LADY JUSTICE CELIA NAGAWA


1.0. This Ruling relates to Notice of Motion filed in this Court by the Applicants under Section 33 of the Judicature Act, Cap. 13, Section 98 of the Civil Procedure Act, Cap. 71, Order 9 rule 18 and 27 and Order 52 rule 1 & 3 of the Civil Procedure Rules, SI-71-1. The orders sought are that;



- 1. The Order dismissing Civil Suit No. 178 of 2017 be set aside.**
- 2. Civil Suit No. 178 of 2017 be reinstated as against the Respondents so that it is determined on its merits.**
- 3. The costs of this application be in the cause.**

2.0. The grounds of this application are set out in the Notice of Motion explicated in the affidavit in support sworn by Mr. Kyeyune Enock Rogers, (1st Applicant), but in brief are that; the applicant filed the main Civil Suit No. 178 of 2017 in this Court and has at all times prosecuted it. Due to the difficulties caused by COVID 19 and the lockdown, the trail of the matter was constrained, firstly the Applicants' co-counsel who was in charge of court fixtures was murdered by the mob, thus the matter was dismissed for non- appearance of parties. The applicant has never lost the desire to pursue justice by prosecuting an action seeking to annul a marriage and for revocation of letters of administration. In the interest of justice the order dismissing Civil Suit No. 467 of 2017 should be set aside and the said suit be reinstate for determination by court on merit. He prayed that it is fair and just that the application is allowed.

2.1. On the other hand, the respondents opposed this application and filed an affidavit in reply sworn by Rose Nakayenga Kayondo Kato (the 1st Respondent) with authorization from the 2nd through the 6th Respondents. The Respondents described the application as being bad in law and an outright abuse of court process and put the applicants on notice that their lawyers would, at the hearing raise Preliminary objections that:



a) The application is *res judicata*.

b) Kyeyune Enock Rogers has no written authority to swear the affidavit in support of the application on behalf of the rest of the Applicants. The affidavit is therefore, sworn contrary to Order 1 Rules 12 (1) and (2) of the Civil Procedure Rules.

c) The application is legally baseless and/or not founded on any law.

2.2 In further answer to the affidavit of the applicant, the respondents averred that if the applicants had indeed been interested in prosecuting their case, the same would not have been dismissed for want of prosecution.

2.3 The Respondents further stated that Miscellaneous Application No. 283 of 2017 for an interim order was withdrawn by the Applicants, whereas Miscellaneous Application No. 282 of 2017 for a temporary Injunction was dismissed by the court on 28th September, 2017 while Miscellaneous Application No. 438 of 2017 for a temporary injunction has never been heard by the court at all and Miscellaneous Application No. 411 of 2017 for amendment of the Plaint has never been heard nor did the respondents concede to the same.

2.4 In regard to the instructions to handle this matter for the applicants, the respondents averred that M/S KSMO Advocates were jointly instructed in this matter on 21st September, 2017 from then on the pleadings were jointly drawn and filed by both that law firm and M/S Orima & Co. Advocates. There is nowhere on the court record that at the time of the COVID-19 pandemic any of the above Law firms had applied for any hearing date. Therefore, there was never any indication



both to the court and to the respondents' counsel that M/S Orima & Co. Advocates or the late Mr. Kibirango Peter were only responsible for Court fixtures.

2.5 The respondents further stated that the late Mr. Kibirango Peter was killed in October, 2019 and it was nearly after three (3) years when the applicants filed Miscellaneous Application No. 778 of 2022 for reinstatement of the said suit and this application was dismissed by court.

2.6 The Respondents contended that the applicants were not diligent in pursuit of their case and they are guilty of dilatory conduct. There is no merit in the main suit, the same does not have any chance of success and the application should be dismissed with costs.

3.0. Representation and Hearing

3.1. When the matter came up for hearing on 5th October, 2023, the applicants were represented by Mr. Joseph Kuteesa holding brief for Mr. David Ssempala and the 1st through 7th Respondents were represented by Mr. Kalule Ahmed Mukasa. The 8th Respondent was neither in court nor represented. The parties agreed to proceed by way of written submissions, the applicants having filed this application along with their submissions and in response the respondents filed their submissions. I have taken into consideration the said pleadings and the submissions in determination of this application.

5.0 Preliminary Objection: 1

4.1 Counsel for the Respondents raised Preliminary points of law. The



application being *res judicata* and could not be relitigated. To the respondents, the application is identical to Miscellaneous Application No. 778 of 2022 which had been heard and determined by the court interparty.

4.2 The respondents counsel cited Section 7 of the Civil Procedure Act, Cap. 71 which bars court from trying any suit in which the matter has directly and substantially been in issue on a former suit between the parties adjudicated upon by a competent court. He relied on the case of **Mansukhlala Ramji Karia & Crane Finance Co. Ltd Versus Attorney General, Makerere Properties Ltd & Amin Mohamed Pirani SCCA No. 20 of 2002**. Wherein *Hon. Justice Tsekoko* (JSC) interpreted Section 7 of the Civil Procedure Act and stated; “... *that the broad minimum conditions that have to be satisfied under Section 7 of the Civil Procedure Act are;*

- a) There have to be a former suit or issue decided by a competent court;*
- b) The matter in dispute in the former suit between parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar;*
- c) The parties in the former suit should be the same parties or parties under whom they or any of them claim litigating under the same title.*

4.3 According the respondents there is no difference in the substance of this application or the orders sought with the previous application heard and determined interparty. The two applications are nearly identical. The parties are same and the subject matter is the same. The application cannot be brought again seeking a different result on the same subject matter. Section 7 Explanation 4 of the Civil Procedure Act provides; “*Explanation 4- Any matter which might and ought to have*



been made a ground of defense or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit.”

4.4 In case of **John Kafeero Sentongo Versus Shell (U) Ltd & Uganda Petroleum Co. Ltd CAC Appl. No. 50 of 2003**. The Court of Appeal held that; “In determining whether or not a suit is barred by *res judicata*, the test is whether the plaintiff in the second suit is trying to bring before the court in another way in the form of a new cause of action, a transaction which has already been presented before a court of a competent jurisdiction in earlier proceedings which have been adjudicated upon.

4.5 The orders that were being sought in Miscellaneous Application No. 778 of 2022 were;

- i. **The Order dismissing Civil Suit No. 178 of 2017 be set aside.**
- ii. **Civil Suit No. 178 of 2017 be reinstated as against the Respondents so that it is determined on its merits.**
- iii. **The costs of this application be in the cause.**

4.6 *The grounds of this application as sworn by Mr. Jacob Kalaabi (An Advocate of the High Court of Uganda) of KSMO Advocates, were; the Applicants being represented by M/S Orima & Co. Advocates filed Civil Suit No. 178 of 2017 and at all times prosecuted it. On 21st September, 2017 his firm was given instructions to jointly represent the Applicants. The Applicants filed Miscellaneous Application Nos. 283, 438 and 411 of 2017 for an interim injunction, temporary injunctive orders and unconditional leave to amend the Plaint, respectively. Court granted the temporary injunctive orders and also the parties consented to the amendment of Plaint. Due to Covid -19 pandemic and lockdown, the trail*



of the matter was constrained, the applicants' Co-counsel in charge of Court fixtures was murdered by a mob and counsel for the respondents fell sick of Covid-19 and died. Hence the matter was dismissed for non-appearance of parties. The dismissal of the suit was due to the negligence/and or mistake of the Applicants advocates which should not be visited on the Applicants. Civil Suit No. 178 of 2017 is meritorious and has high likelihood of success. It is in the interest of justice and enquiry that the order dismissing Civil Suit No. 178 of 2017 be set aside and the said suit be reinstated for determination by Court. He prayed that the application should be allowed.

4.7 These are the same orders that are being sought in this application. The principle in *res judicata* is that the subject matter of the former suit is directly and substantially in issue in the current suit.

4.8 Upon thorough perusal of the Application and the reliefs sought, I find that the same have been conclusively determined in Miscellaneous Applications No. 778 of 2022. It is the same parties, same orders sought and the grounds are closely related. The ruling was delivered on 23rd February, 2023. I find that this application is therefore *Res Judicata* and should therefore be dismissed.

5.0 **Preliminary Objection 2:**

5.1 The deponent Mr. Kyeyune Enock Rogers has no written authority to swear the affidavit in support of the application on behalf of the Applicants. According to the Respondents, the affidavit was therefore, sworn contrary to Order 1 Rules 12 (1) and (2) of the Civil Procedure Rules.

5.2 The Respondents counsel opposed the application stating that without any authorization from the applicants to act as he did (Mr.



Kyeyune), it was fatal that he failed to comply with the law. Counsel cited the provisions of Order 1 Rule 12 (2) of the CPR, the authority must be in writing signed by the party giving it and shall be filed with the case, this provision has been interpreted by the High Court as mandatory in the case of **Lena Nakalema Binaisa & 3 Ors Vs Mucunguzi Myers HCMA No. 469 of 2013.**

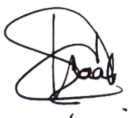
5.3 The effect of not complying with the law renders an affidavit to be fundamentally defective having been sworn by a party without authority. It would then follow that the application is not supported by an affidavit in support/evidence and therefore must collapse as decided in the case of **Jim Muhwezi & others Versus Attorney General Constitutional Petition No. 4 of 1998.**

5.4 Where a party swears an affidavit on his or her own behalf and on behalf of others without authority, when it is not a representative suit, the affidavit becomes defective for want of authority.

5.5 The application was filed without any written authority annexed to it. I find it irregular and improper. In paragraph 2 of the affidavit in support the deponent avers that, *"I have also been authorized by the second to the fifth Applicants to swear this affidavit on their behalf"*. This is a mandatory requirement which ought to have been adhered to by the applicants' deponent in case he/they found representation was necessary. The affidavit is therefore, defective.

6.0 **Preliminary Objection 3.**

6.1 The application is misconceived and is alien to the law. Civil Suit No. 178 of 2017 was dismissed by the court not for non- appearance but for want of prosecution. According to the Respondents' Counsel it appeared that the Applicants were laboring under the mistake that



the suit was dismissed for non- appearance of the parties under Order 9 Rule where under 9 Rule 27 an application for reinstatement of the suit can be brought.

6.2 The respondents submitted that where a suit is dismissed for want of prosecution, the remedy is not to apply for reinstatement as no Law provides for it but to appeal against the order of dismissal or file a fresh suit subject to the Law on limitation. He relied on the case of **Gold Beverages Uganda Limited Versus Muhangura Kenneth and another HCMA No. 674 of 2019.**

6.3 I do not find the submission of the applicants sufficient and if they were interested and vigilant in prosecuting the suit, had it been the case then there is no way the suit could have been dismissed either for non- appearance of counsel and parties even then failure to have their case prosecuted. Not forgetting the time it took them to apply for reinstatement since the said dismissal.

7.0 **Conclusion:**

The Preliminary objections succeed. This application is dismissed. I award costs to the 1st through 7th Respondents.

I so order.

Dated, signed and delivered by email this 7th day of November, 2023.



**CELIA NAGAWA
JUDGE**