

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
(FAMILY DIVISION)**

**MISCELLANEOUS APPLICATION NO. 863 OF 2022
(ARISING FROM CIVIL SUIT NO.357 OF 2019)**

- 1. CLEMENT RWAMBUBI MAWENU**
- 2. CHARLES MAWENU JUNIOR**
- 3. EDWARD BIRUNGI**
- 4. JOY MAWENU ::: APPLICANTS**

VERSUS

- 1. KENNETH NYEMERA MAWENU**
- 2. CHRISTOPHER MUZOORA MAWENU**
- 3. PETER BITA MAWENU**
- 4. PATRICIA KENYONZA WILLIEMS MAWENU**
- 5. MARYLIN BERTSHINGER**
- 6. HELLEN WILKINSON ::: RESPONDENTS.**

Before: Justice Ketrh Kitariisibwa Katunguka.

Ruling

- 1. Clement Rwambubi Mawenu, Charles Mawenu Junior, Edward Birungi And Joy Mawenu** (herein called **‘the applicants’**) sued Kenneth Nyemera Mawenu, Christopher Muzoora Mawenu, Peter Bita Mawenu, Patricia Kenyonza Williems Mawenu, Marylin Bertshinger and Hellen Wilkinson, (herein called **‘the respondents’**), under Order 17 rule 5, Order 52 rule 1 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act seeking orders that: - High Court Civil Suit No.357 of 2019 be dismissed for want of prosecution; costs of the application be provided for.
2. The grounds of the application as contained in the Notice of Motion and detailed in the affidavit in support deposed by Charles Mawenu Junior are that: - on the 18/12/2019 the respondents filed Civil Suit No.357 of 2019 against the applicants; the applicants filed their Written Statement of Defence on the 26/11/2020; a reply to the Written Statement of Defence was filed on the 23/2/2021; scheduling was concluded, and the applicants filed their trial bundle and witness statements on the 4/6/2021; to date, the respondents have failed to prosecute the suit and set the same down for hearing which is delaying the proper administration of the estate of the late Charles Bita Mawenu; it is equitable and in the interest of justice that this application is granted.

3. In opposition, the respondents filed an affidavit in reply deposed by the 1st respondent (Kenneth Nyemera Mawenu) raising three preliminary objections to the effect that: -
(a). The application is incompetently and illegally before this honourable court. (b) The application was served out of time without leave of court. (c) Clement Rwambubi Mawenu who the 2nd, 3rd, and 4th applicants purport to be alive passed away on 21st April, 2021 and could not have authorized the institution of this application, a matter which is within the knowledge of counsel for the applicants.
4. The 1st respondent avers that the applicants are no longer administrators to the estate of the late Charles Bitu Mawenu; no fresh letters of administration have been issued due to the several matter arising out of H.C.C.S No.357 of 2019 intermeddling; therefore, that the applicants have no capacity and locus standi to institute this application; there are applications: Misc. Application No.779 of 2022 (Kenneth Nyemera Mawenu Vs. Joy Adeline Mawenu & 2 Others), Misc. Application No. 141 of 2023 (Kenneth Nyemera Mawenu Vs. Adeline Mawenu & Others) and Misc. Application No. 528 of 2023 (Kenneth Nyemera Mawenu & 3 Others Vs. Banura Zebiah Margret); all arising from H.C.C.S No.357 of 2019 and Administration Cause No.1304 of 2017; on several occasions when their lawyer fixed the suit for hearing they were advised to first pursue and prosecute the several matters arising from the suit to prevent the emergence of conflicting or divergent court orders that may be hard to enforce or implement; he therefore prays that the application be dismissed and the applicants pay the costs.
5. The applicants filed an affidavit in rejoinder deposed by the 2nd applicant; contending that the application is competent before this court and was served on the respondents' lawyer on time but the lawyers claimed to no longer have instructions; the 2nd applicant admits that he is aware of the fact that Clement Rwambubi Mawenu passed away on 21st April, 2021 that is why he did not state in his affidavit in support of the application that Clement Rwambubi Mawenu was alive; after his death, the applicants filed M.A No.298 of 2022 for the amendment of the letters of administration to remove the said deceased person which application was granted; all the Miscellaneous Applications stated by the respondents are applications that were brought after the filing of this application for dismissal of Civil Suit No.357 of 2019; that the Misc. Applications have no effect on the instant application.

Representation:

6. The applicants are represented by counsel Kyobe William of M/s Kentaro Mugerwa & Co. Advocates, while the respondents are represented by counsel Mugerwa Herbert of M/s DAB Advocates. Both counsel filed written submissions.

Background:

7. The applicants and respondents are all beneficiaries to the estate of the late Charles Bitu Mawenu (herein after called '**the deceased**'); the applicants were granted letters



of administration to the estate of the deceased vide High Court Administration Cause No.1304 of 2017; the respondents/plaintiffs filed High Court Civil Suit No.357 of 2019 against the applicants/defendants for the revocation of the said letters; the applicants have filed this application seeking for the dismissal of Civil Suit No.357 of 2019 for want of prosecution.

8. Determination of points of law:

- i) *The application is incompetently and illegally before this honourable court.***
- ii) **That the applicants have no capacity and lack locus standi to bring this application.****

A) The application is incompetently and illegally before this honourable court.

Counsel for the applicants submitted on the first two preliminary objections concurrently; I shall follow the same pattern.

- 9.** Counsel for the respondents submitted citing Order 5 rule 1 (2) of the Civil Procedure Rules which requires that summons be served within 21 days from the date of issue; that the Notice of Motion was issued by court on 14/9/2022 and served upon F.AOGON & CO. ADVOCATES on 21/3/2023, which is 6 months and 7 days from the date of issue; that the same notice of motion was served on upon M/S DAB ADVOCATES on 22/6/2023 at 9:05am and therefore a period of 9 months and 8 days had passed far beyond the 21 days within which service of summons is required to be effected under the law. Counsel argued that although the applicants' advocates took out a hearing notice and served the same upon the respondents, the illegality of non-service of the Notice of Motion within the time required by the law was not cured; yet they did not apply to court for extension of time.
- 10.** The record shows that the Notice of Motion was endorsed by this court on 5/10/2022; according to the affidavit of service dated 16/6/2023 deposed by a one Mabodhe Ramathan a process server C/o of M/s Kentaro Mugerwa & Co. Advocates, on 13/6/2023 he proceeded to F.Aogon & Co. Advocates to effect service on counsel for the respondents; on reaching the law chambers, he was informed that the law firm no longer had instructions. The same process server deposes an affidavit of service dated 22/6/2023 affirming that on 22/6/2023 the Notice of Motion, Applicants' submissions and hearing notices were served on DAB Advocates who are counsel for the respondents; the Notice of Motion is endorsed by a 'received stamp' by DAP Advocates as confirmation that summons was indeed served on counsel for the respondents on 22/6/2023.
- 11.** When the matter came up for hearing on 23/6/2023, counsel for the respondent admitted having been served and failed to file a reply since he had just been served the previous day; and that some of the respondents are out of jurisdiction; court on its own motion, ordered that the respondents be given time to file their reply to the

application. By implication, court had extended the time for service of summons and the timelines within which the respondents could file their reply; In that regard I find the instant applicant competent before this court

This preliminary point of law has no merit.

Clement Rwambubi Mawenu who the 2nd, 3rd, and 4th applicants purport to be alive passed away on 21st April, 2021 and could not have authorized the institution of this application, a matter which is within the knowledge of counsel for the applicants.

12. That the 1st applicant Clement Rwambubi Mawenu is now deceased is not contested by the respondents; a death certificate on record attached to the respondents' affidavit in reply, shows that he died on 21/4/2021 and the instant Miscellanies Application was filed on 16/9/2022. The 2nd, 3rd and 4th applicants filed Miscellaneous Application No. 298 of 2022 seeking that the grant of letters of administration in HCAC No.1304 of 2017 be revoked and amended to remove Clement Rwambubi Mawenu as a Co. Administrator to the estate of the late Charles Bitu Mawenu on the ground that he was deceased; the application was granted and court ordered that the applicants being the surviving administrators were entitled to a fresh grant of letters of administration.

13. In the applicants' affidavit in rejoinder, it is admitted that the 1st applicant is dead; the inclusion of the 1st applicant in the instant application well knowing that he is dead is erroneous; I note the written authority attached to the application where it is only the 3rd and 4th applicants who authorized the 2nd applicant to give evidence on their behalf. In the circumstances, I find that the late Clement Rwambubi Mawenu was improperly joined as an applicant; however, **Order 24 rule 1 of the Civil Procedure Rules** provides that; *"The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues."*; in any case since court had already ordered removal of the deceased administrator It is my considered opinion that leaving him there was simply an error that should not affect the pleadings; the preliminary objection though upheld shall only cause the correction of the pleadings by striking the name of the deceased person off.

B) That the applicants have no capacity and lack locus standi to bring this application.

14. It is submitted for the respondents that the applicants have no capacity, and they lack locus standi to bring this application since they have not been issued new letters of administration to the estate of the late Charles Bitu Mawenu. According to the facts of the case, the 2nd and 3rd applicants are sons to the deceased while the 3rd applicant is a widow which makes them beneficiaries; a beneficiary to an estate does not need letters of administration to bring an action in his or her own names in regards to the estate. (see: *Isreal Kabwa V. Martin Banoba Musiga [1996] UGSC 1*). Besides the

applicants being the defendants in High Court Civil Suit No. 357 of 2019 have the locus standi to bring this application for its dismissal for want of prosecution.

The preliminary objection is not sustained. I shall go ahead and consider the merits of the application.

Merits of the application:

15. Both counsel filed written submissions but did not raise any issue for court's resolution; I shall pursuant to Order 15 rule 5(1) of the Civil Procedure Rules frame the issue for court's determination as: -

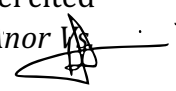
Whether High Court Civil Suit No. 357 of 2019 should be dismissed for want of prosecution?

Submission for the Applicants;

16. The application is brought under Order 17 rules 5 of the Civil Procedure Rules; counsel for the applicants submits that respondents have at all material times avoided taking any step towards having the matter disposed of by prolonging or delaying court process and frustrating the applicants; counsel cited Article 28(1) of the Constitution of the Republic of Uganda, 1995, which provides for a right to fair and speedy hearing; he cited *Kampala International University Ltd Vs Tororo Cement Ltd, & Others HCCS 433 of 2006*;

17. Counsel argued that Civil Suit No.357 of 2019 was filed on 18/12/2019; the applicants/defendants filed their trial bundle and witness statement on 4/6/2021, and to date, the plaintiff has failed to prosecute the suit and set the same down for hearing; which is a wastage of court's time yet there exist no special factors or reasonable excuse for the delay by the respondents; which is to the prejudice of the applicants who intend to administer the estate of the late Charles Bitwa Mawenu. ; counsel cited ***Solland International Ltd v. Clifford Harris & Co [2015] EWHC 2018***; where court found that; "*Litigants who, having started litigation, elect to allow that litigation to sink into indefinite abeyance, who have had no serious and settled intent to pursue that litigation and who have, in consequence, acted, in respect of that litigation, in knowing disregard of their obligation to the court and to the opposing party, should not be allowed to carry out with litigation conducted in that manner*"; and prayed that the cs ought to be dismissed.

Submissions for the respondents:

18. For the respondents it was submitted that there are several matters arising out of High Court Civil Suit No.357 of 2019 and Administration Cause No.1304 of 2017 in respect of the estate of the late Charles Bitwa Mawenu which are pending before court; the civil suit was fixed but could not be heard because hearing and disposing of the suit and those matters concurrently may result in conflicting decisions that may not be implemented; that considering the substance of the provisions of Order 17 rule 5 of the Civil Procedure Rules, dismissal of a suit is discouraged according to Article 126(2) of the Constitution of the Republic of Uganda, 1995 as amended; counsel cited *Re Executrix of the Estate of the Late Christine Mary Namatovu Tebajjukira & Anor* 

Noel Grace Shalita Stanazi [1987] H.C.B. 85, S.C.C Application No.8/1988, where court held that; the administration of justice should normally require that the substance of disputes should be investigated and decided on merits;

19. Counsel contends that the cases referred to by counsel for the applicants are merely persuasive and not binding on this court; the applicants' submission that the suit should be dismissed for want of prosecution is untenable since there are other matters pending derived from the same estate; Counsel prays for the dismissal of this application since the dismissal of the main suit shall not serve the ends of justice but shall enable the applicants to continue with their injustices against the respondents which the main suit seeks to end.

Determination:

20. I have considered the pleadings, the written submissions, the cited authorities and the relevant provisions of the law ; **Order 17 Rule 5(1) of the Civil Procedure Amendment Rules of 2019** provides that; *'In any case, not otherwise provided for, in which no application is made or step taken for a period of six months by either party with a view to proceeding with the suit after the mandatory scheduling conference, the suit shall automatically abate; and*

Sub rule provides: *'Where a suit abates under subrule (1) of this rule, the plaintiff may subject to the law of limitation bring a fresh suit.'*

21. The record shows that there have been diverse miscellaneous applications filed in this court all emanating from AC No.1304 of 2017, the estate of the deceased; some have been disposed of and others are still pending to wit; M.A No.298 of 2022 was filed on 12/4/2022; MA No.559 of 2022 was filed on 24/6/2022; M.A No.779 of 2022 filed on 18/8/2022; M.A No.141 of 2023 was filed on 20/2/2023 ; M.A No.528 of 2023 shows that it was filed on 17/5/2023; the aforesaid miscellaneous applications show that the parties to the instant applicant are either applicants or respondents; however, all the applications were filed when the mandatory 6 months period had lapsed even if they arose from the Civil Suit, which they did not.

22. The record shows that the defendants' witness statements were filed on 4/6/2021; there was no action on the file, till this application was filed on 16/9/2022; the 6 months mandatory timelines had lapsed on 4/12/2021; By then therefore the suit had abated since abatement is automatic and not by any order; the only recourse for the respondents /plaintiffs would have been filing a fresh suit subject to the law of limitation.

23. Having said as above and before taking leave of the matter the respondents filed High Court Civil No. 357 of 2019 for the revocation of letters of administration issued to the applicants; which by implication were revoked by the ruling of court in MA 298/2022; it would then mean that the estate has no subsisting letters of administration especially since there is no evidence that a fresh grant was issued; in which case the hinge on which HCCS 357/2019 would have collapsed.

In the premises, there is nothing to dismiss since the suit had abated.

Each party shall bear their own costs.



Ketrach Kitariisibwa Katunguka.

Judge.

31/08/2023

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