

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

MISCELLANEOUS APPLICATION 143 OF 2023

(ARISING OUT OF DIVORCE CAUSE NO. 0002 OF 2018)

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- 1. JOHKA PRINT MACHINERY LTD**
- 2. JOHN KADDU BWABYE=====APPLICANTS**
- 3. KIGGUNDU ERICK**

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VERSUS

- 1. COMMISSIONER LAND REGISTRATION**
- 2. TEDDY KYEYUNE KADDU=====RESPONDENTS**

BEFORE: HON. LADY JUSTICE ALICE KOMUHANGI KHAUKHA

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RULING

Introduction

This is a Ruling in respect of an Application for Orders that:

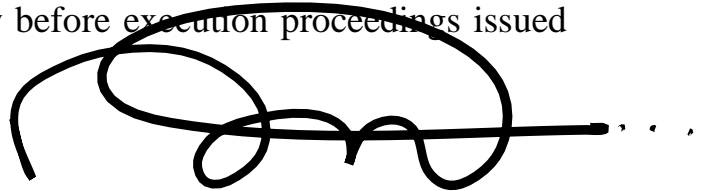
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(a) A declaration that the cancellation of the names of the 1st Applicant off the suit land comprised in Kyadondo Block 246 Plot 1635 land at Kyeitabye before execution proceedings issued was illegal, irregular and premature;

(b) A declaration that vacating the 3rd Applicant's caveat without notice to the caveator was unlawful;

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(c) An Order that the name of the 1st Applicant be reinstated on Certificate of Title for land comprised in Kyadondo Block 246 Plot 1635 land at Kyeitabye for having been cancelled prematurely before execution proceedings issued



pending the hearing and disposal of HCC No. 885 of 2021 before the High Court Land Division Kampala between all the parties to this Application;

(d) An Order that the 3rd Applicant's caveat on Certificate of Title for land comprised in Kyadondo Block 246 Plot 1635 land at Kyeitabye be reinstated;

5 (e) An Order that the Special Certificate of Title issued over the suit land comprised in Kyadondo Block 246 Plot 1635 land at Kyeitabye be cancelled because the 3rd Applicant has the Duplicate Certificate of Title; and

(f) The Respondents pay the Costs of this Application.

10 **Representation**

When the Application came up for hearing, the Applicants were represented by Ms. Judith Tumusiime of Katende Ssempebwa & Co. Advocates while the 2nd Respondent was represented by Ms. Lydia Tamale Nakamalira of Tamale & Co. Advocates. The 1st Respondent did not appear in the Court and was also not
15 represented. Both Counsel filed written submissions for Court's consideration.

Background of the Application

This Application arises from Divorce Cause No.0002 of 2018 which I handled and the Advocates in this Application were the very same Advocates in the Divorce
20 Petition. While writing the Judgment in the Divorce Petition, I labored to give a detailed background because of the peculiar circumstances of the case which were essentially brought about by Counsel for the Respondent Ms. Judith Tumusiime. I will reproduce the said background in this ruling too and it is as follows:

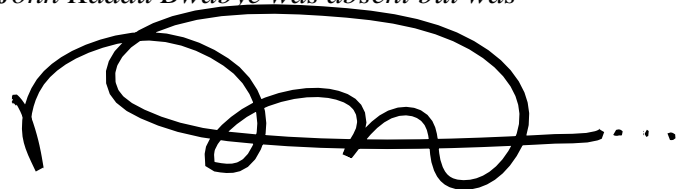
25 *"I have found it necessary to give a very detailed background to the Petition/ Cross Petition because of its unique circumstances. The facts are that Mr. John Kaddu Bwabye and Ms. Teddy Kyeyune Kaddu got married on the 14th of December 1996 at All Saints Cathedral Kampala and have two "children" who are now adults. A copy of the Marriage Certificate was produced in*

Court and admitted as PEX I while the Birth Certificates for the two “children” were admitted and marked as PEX 2(a) and (b) respectively. They have both been staying and working in the United Kingdom. Mr. John Kaddu Bwabye petitioned for Divorce on the grounds of cruelty by Mrs. Teddy Kyeyune. In the Petition, Mr. John Kaddu Bwabye stated that he and his wife owned
5 a residential house in Muyenga comprised in Block 244 Plot 6127 and registered in their joint names and was being rented out. He prayed that the marriage be dissolved and the property be shared out equally.

On the other hand, Mrs. Teddy Kyeyune Kaddu filed a Reply and a Cross-Petition in which she
10 also alleged cruelty and adultery by the husband. She further stated that in addition to the Muyenga property, the couple also jointly acquired land at Bukasa, Kyeitabya, Makindye Division, Kyadondo Block 246 Plot 1635 measuring approximately 0.1030 Hectares (suit property). She stated that the land was purchased from her sister Hellen Namirimu Kyeyune at UGX 32,000,000 (Uganda Shillings Thirty-Two Million) between 2007 and 2008. The suit property has since been
15 transferred to Johka Print- Machinery Ltd where Mr. John Kaddu Bwabye held 98% shares while his brother Isaac Sebaduka held 2% shares. Mr. John Kaddu Bwabye later transferred 93% shares to one William Kabuye. In his pleadings, Mr. John Kaddu Bwabye contended that the suit land was bought by Johka Print Machinery Ltd and not by the couple and is therefore not matrimonial property.

20 On 9th August 2018 the parties entered into a partial Consent Settlement and a Decree Nisi was entered. In paragraph 10 of the partial Consent Settlement, the parties agreed that the suit property comprised in Block 246 Plot 1635 land at Kyeitabya shall be resolved in Court.

On 16th May 2019, Mrs Teddy Kyeyune Kaddu filed Miscellaneous Application No. 265 of 2019
25 to amend the Cross Petition. Mr. John Kaddu Bwabye did not file any Affidavit in reply despite having been given an opportunity to do so. The Affidavit of Service on the file deponed by Owange Levy of Tamale & Co. Advocates indicates that when he went to serve Barenzi & Co. Advocates (lawyers for Mr. John Kaddu Bwabye), he was informed that they no longer had instructions to represent him. However, they received the Application and promised to notify him accordingly.
30 The record indicates that the Application came up for hearing before the then Learned Trial Judge Hon. Justice Godfrey Namundi on 4th July 2019 and Mr. John Kaddu Bwabye was absent but was

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represented by Ms. Kisaka Mable who informed Court that she had not filed an Affidavit in reply because the Affidavits were sent to their client for signature but the same had not been signed.

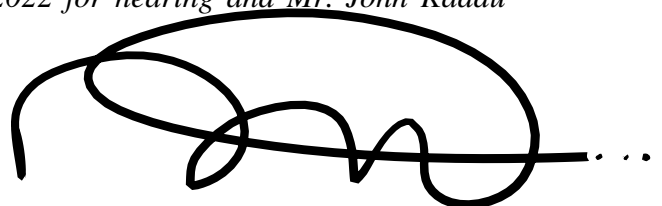
The matter was adjourned to 10th October 2019 for hearing and on that date, still Mr. John Kaddu Bwabye was absent but Ms. Nyachio Mary appeared for him and she informed Court that she had just received instructions that morning and had not been able to file an Affidavit in reply. Still, no Affidavit in reply had been filed as at that time.

The then Learned Trial Judge noted that there was even no Notice of change of instructions filed by Ms. Mary Nyachio. He proceeded to hear the Application as unopposed and allowed the prayer for amending the Cross Petition. He further ordered Mrs. Teddy Kyeyune Kaddu to file the amended Cross Petition and serve Mr. John Kaddu Bwabye who was ordered to file his response within the prescribed time limits.

On 11th October 2019, Mrs. Teddy Kyeyune Kaddu filed the amended Cross Petition and served it on Barenzi and Co. Advocates on the same day. According to the Affidavit of Service on record deponed by Owange Levy, when he went to serve Mr. Barenzi, he still indicated that he no longer had instructions to represent Mr. John Kaddu Bwabye and when he checked with the court clerk to find out whether Ms. Mary Nyachio had filed a Notice of change of instructions, there was none.

Mr. John Kaddu Bwabye did not file a reply to the amended Cross Petition and on 19th November 2019 Tamale & Co. Advocates filed an Application for a default judgment under Section 30 of the Divorce Act and Order 8 Rule 11 (1) and (3) of the Civil Procedure Rules which was however not entered.

On 30th November 2021 when the matter first came up before me, Mr. John Kaddu Bwabye was absent but Ms. Mary Nyachio Maganda holding brief for Mr. Mutalya Ronnie appeared for him. Ms. Nyachio then informed Court that Mr. John Kaddu Bwabye was out of the country and Mr. Mutalya had also received instructions that morning (as earlier noted, while handling Miscellaneous Application No. 0265 of 2019, Ms. Nyachio Mary who had appeared for Mr. John Kaddu Bwabye on 10th October 2019 informed Court that they had received instructions that morning). The matter was adjourned to 17th February 2022 for hearing and Mr. John Kaddu Bwabye was instructed to file his documents.

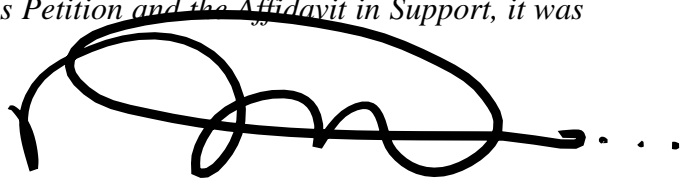
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On 10th March 2022, the matter came up again and Ms. Judith Tumusiime of Katende, Ssempebwa & Co. Advocates appeared for Mr. John Kaddu Bwabye. She also filed the Notice of change of instructions on the same date. She informed the Court that she had received instructions on 17th February 2022 and she was unable to file a reply to the Cross Petition because her client lives out of the country. She contended that failure to file the reply was a mistake of Counsel which should not be visited on the client. She prayed for enlargement of time within which to file a reply. This was amidst vehement contestation from Ms. Lydia Nakamalira Tamale who argued that Mr. John Kaddu Bwabye had failed to file a reply for three years and he kept on changing lawyers who did not file Notice of Change of Instructions and in this he intended to delay the trial.

I also noted that if indeed Katende, Ssempebwa received instructions on the 17th February 2022 as claimed by Ms. Judith Tumusiime, as at 10th March 2022, a reply should have been filed. However, considering that she had informed Court that Mr. John Kaddu Bwabye resided out of the country, in the interest of justice, I allowed to enlarge time within which to file a reply up to the 28th March 2022.

On 17th March 2022, Katende, Ssempebwa & Co. Advocates filed a reply to the Cross Petition. On 28th March 2022 when the matter came up for hearing, neither Mr. John Kaddu Bwabye nor his lawyer Ms. Judith Tumusiime, were present. Ms. Judith Tumusiime had filed a letter in this Court to the effect that she was appearing in another matter in the Court of Appeal. Ms. Lydia Nakamalira Tamale for Mrs. Teddy Kyeyune Kaddu contended that Ms. Judith Tumusiime's absence was unjustified because the date was agreed upon with her consent and given the size of the Law Firm, there should have been someone to appear in the Court in this matter. She further attacked the propriety of the reply to the Cross Petition. She argued that the reply was not verified by Mr. John Kaddu Bwabye and he also did not swear an Affidavit in Reply to the Affidavit of Mrs. Teddy Kyeyune Kaddu which supported the Cross Petition. She concluded that the reply was not proper in law and invited Court to strike it off the record.

Upon perusal of the reply filed on behalf of Mr. John Kaddu Bwabye, I also confirmed that indeed whereas the reply purported to respond to the Cross Petition and the Affidavit in Support, it was

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drawn and signed by Counsel and Mr. John Kaddu Bwabye did not sign anywhere. Counsel purported to give facts which are expected to be within the possession /knowledge of the client and went ahead to sign as if it was Mr. John Kaddu Bwabye. I therefore agreed with Ms. Lydia Nakamalira Tamale that the reply was not proper and I accordingly struck it off. I also noted that
5 Counsel for Mr. John Kaddu Bwabye had been given time to get in touch with the client so as to file a reply and her failure to do that but instead purported to sign on his behalf was an abuse of the leniency of the Court. Since there was no reply, I then entered a Default Judgment and the matter was set for formal proof hearing.

10 Ms. Nakamalira who had earlier on informed Court in writing that she intended to proceed by way of Affidavits and did not intend to call the witnesses, reiterated her prayers and sought to file written submissions. I ordered for the physical appearance of Mrs. Teddy Kyeyune Kaddu and Ms. Hellen Namirimu to be cross examined by Court. The witnesses who ordinarily reside out of the country physically appeared in Court and were accordingly examined by the Court.

15 The matter was fixed for Judgment but before Judgment could be delivered, Katende, Ssempebwa & Co. Advocates filed Miscellaneous Application No. 0426 of 2022 for leave to Appeal against the Order for the Default judgment. When the Application came up for hearing, Ms. Lydia Nakamalira Tamale raised an objection to the effect that the Application indicated Teddy Kyeyune
20 Kaddu as the Applicant and John Kaddu Bwabye as the Respondent. She argued that her client Mrs. Teddy Kyeyune Kaddu has never instructed Ms. Katende, Ssempebwa & Co. Advocates to file that Application. She contended that the Application was incurably defective and invited Court to strike it off. Ms. Judith Tumusiime who appeared for Mr. John Kaddu submitted that it was a mistake of Counsel (herself) which should not be visited onto the client. I agreed with Ms. Lydia
25 Nakamalira Tamale that the Application was incurably defective and I struck it off the record.”

The matter was heard on its merits and I made Orders in respect of the property comprised in Kyadondo Block 246 Plot 1635 land at Kyeitabye hence this Application. [See: **John Kaddu Bwabye Versus Teddy Kyeyune Kaddu Divorce**
30 **Cause No. 0002 of 2018 (unreported)**].

When this Application came up for hearing, Ms. Judith Tumusiime made an Application for my recusal on allegations of bias. However, in a detailed Ruling, I declined to recuse myself because I am not biased at all.

5 **The Application**

This Application is supported by the Affidavit of the 3rd Applicant, Mr. Kiggundu Erick on behalf of the other Applicants while the same is opposed by the Affidavit in Reply of the 2nd Respondent, Ms. Teddy Kyeyune Kaddu. The gist of the Affidavit in Support of the Application is that the 3rd Applicant bought the suit property from
10 the 1st Applicant (Johka Print Machinery Ltd) after conducting a search in the Land Registration Office and it was free from encumbrances. However, later when he went to have the same transferred into his name, he found a caveat of one Teddy Kyeyune Kaddu (2nd Respondent). He also filed a caveat on the same property as he made inquiries as to why the property had been caveated. He was informed by the
15 1st Applicant that the caveator was a wife of one of the Directors of the company and there were marital problems between them. The 3rd Applicant also avers that he wanted to file a suit against the 1st Applicant and the caveator but he learnt that Ms. Teddy Kyeyune Kaddu had already sued him vide HCCS NO. 885 of 2021 in the Land Division. He was later surprised to establish that the 1st Respondent vacated
20 his caveat without giving him notice and the Certificate of Title has since been transferred into the name of the 2nd Respondent.

On the other hand, the 2nd Respondent avers that this Court declared the suit property as matrimonial property and that the 1st Applicant was a sham incorporated for
25 purposes of defrauding the 2nd Respondent of her interest in the property. She stated that Court made a finding that the 1st Applicant did not have a good Title to pass onto the 3rd Applicant.

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Applicants' Affidavit and failure to give notice of the Motion to the 1st Respondent.

I have noted that the Affidavit in support of the Application is not signed by the purported deponent. I find this to be a defect because I am unable to confirm that the 3rd Applicant who is purportedly the author is actually the author. However, Courts have previously guided that defects like failure to sign and putting a date on the Affidavit are curable. (See: **Kasaala Growers Cooperative Society versus Kakooza & Anor Civil Application No. 19 Of 2010**). I would therefore ignore the defect and proceed to determine the Application.

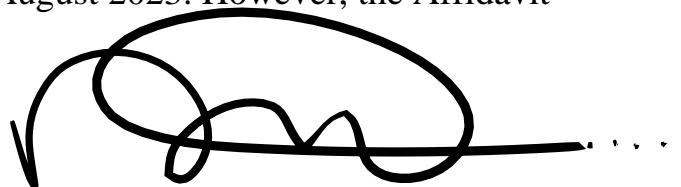
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However, as already observed, the 1st Respondent did not appear in the Court and there was no evidence that he/she had been given Notice of the Motion. The Application was fixed for hearing on 23rd August 2023 and when it came up for hearing on that day, only the 2nd Respondent had filed an Affidavit in Reply. The 1st Respondent had not filed an Affidavit in Reply and there was no Affidavit of Service to indicate that the 1st Respondent had been served with the Notice of Motion. Ms. Judith Tumusiime then assured the Court of her commitment to serve the 1st Respondent with the Motion. Court then directed her to serve the 1st Respondent with the Motion not later than that day (23/08/2023).

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Court proceeded to give schedules for written submissions and the date for the Ruling. As at the time of this Ruling, there is no Affidavit in Reply from the 2nd Respondent. I have considered the Affidavit of Service filed in this Court on 7th September 2023 by Counsel for the Applicants and I find that it is lacking in material particulars. As already noted, Counsel for the Applicants was directed by the Court to serve the 1st Respondent not later than 23rd August 2023. However, the Affidavit

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of Service indicates that the Application was served on 26th August 2023 but the Received stamp indicates that the Application was received on 28th August 2023.

Clearly, this was in total defiance and disobedience of the Court's directives which this Court cannot be seen to condone and validate. This Court therefore makes a finding that the 1st Respondent was not properly served. This is further aggravated by the fact that Counsel for the Applicants purported to serve a Notice of Motion for hearing on 23rd August 2023 on 26th or 28th August 2023. The schedules for service on the 1st Respondent and filing of the Affidavit in Reply and submissions were given on 23rd August 2023. Counsel the Applicants would have been prudent enough to extract the schedules so that they are attached on the Notice of Motion which had earlier been fixed for hearing on 23rd August 2023. In that way, 1st Respondent would have been adequately notified. This was however not done and the 1st Respondent must have been at a loss as to what he/she was expected to do with an Application fixed for 23rd August 2023 and served on him/her on 28th August 2023. It is therefore my finding that the 1st Respondent was not sufficiently notified of the Motion.

Order 52 Rule 4 of the Civil Procedure Rules provides that:

"If upon the hearing of any motion or other application, the court is of the opinion that sufficient notice has not been given or that any person to whom notice has not been given ought to have had the notice, the court may either dismiss the motion or application or adjourn the hearing of it in order that the notice may be given upon such terms, if any, as the court may think fit to impose."

Whereas Counsel for the Applicants should have duly served both Respondents by the 23rd August 2023 (the date when the Application first came up for hearing), the same was not done and this court adjourned the hearing and directed Counsel for the Applicants to give notice to the 1st Respondent which was not done. This Court is therefore compelled to dismiss the case against the 1st Respondent for want of notice

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in accordance with Order 52 Rule 4 of the Civil Procedure Rules. Consequently, this Application is dismissed against the 1st Respondent.

5 Having dismissed the Application against the 1st Respondent, I am left to determine whether the Motion will survive against the 2nd Respondent alone. I have carefully reviewed the Orders sought in this Application and I find that they all affect the 1st Respondent and not the 2nd Respondent. The Orders sought relate to cancellation of Certificate of Title, removal of the caveat without notice to the 3rd Applicant, issuance of a Special Certificate of Title and reinstatement of the 1st Applicant on
10 the Certificate of Title. I find that the orders sought have nothing to do with the 2nd Respondent and this Application cannot survive against her alone. This Application is therefore equally dismissed against the 2nd Respondent.

15 In conclusion, this Application fails and is accordingly dismissed with costs to the 2nd Respondent.

I so order.

Dated at Kampala this 11th day of October 2023.

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Alice Komunangi Khaukha

JUDGE

11/10/2023S