

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MUKONO
MISCELLANEOUS APPLICATION NO. 112 OF 2023
(ARISING FROM CIVIL APPEAL NO. 033 OF 2023)
(ARISING OUT OF MUKONO CHIEF MAGISTRATE'S COURT
MISCELLANEOUS CAUSE NO. 056 OF 2022)

1. MOSES SOLOMON MALE
2. SIRIM MABIRIZI MUTUMBA
3. MUHAMED MUTUMBA(JUNIOR)
4. FAISAL SEBATINDIRA MUTUMBA
5. SHAFIK NSEREKO MUTUMBA (NAJIB)
6. SARAH NAMALA MUTUMBA
7. REHEMA NABABI MUTUMBA
8. FARIDA NAMBALIRWA MUTUMBA
9. HAMEEM MUTUMBA
10. SOPHIE NASSOZI MUTUMBA ::::::::::::::: APPELLANTS

VERSUS

MALE H. MABIRIZI K. KIWANUKA ::::::::::::::: RESPONDENT

(Suing as a beneficiary to the Estate of
His late father Mohamed Bazinduse
Lulibedda Mutumba)

BEFORE: HONOURABLE JUSTICE DAVID MATOVU

RULING

Introduction

1. Moses Solomon Male, Sirim Mabirizi Mutumba, Muhamed Mutumba(Junior), Faisal Sebatindira Mutumba, Shafik

Nsereko Mutumba(Najib), Sarah Namala Mutumba, Rehema Nababi Mutumba, Farida Nambalirwa Mutumba Shameem Mutumba and Sophie Nassozi Mutumba (hereinafter referred to as the “Appellants”) being dissatisfied with the decision of His Worship Matyama Paul Magistrate Grade 1 Mukono in Mukono Chief Magistrate’s Court Miscellaneous Cause No. 056 of 2022 lodged Civil Appeal No. 33 of 2023 raising eight (8) grounds of Appeal.

2. Male H. Mabirizi K. Kiwanuka (hereinafter referred to as the “Respondent”) also lodged a Cross Appeal against the same decision cited herein above of His Worship Matyama Paul Magistrate Grade 1 and he raised three (3) grounds of appeal.
3. In the meantime, before the Civil Appeal and Cross Appeal could be fixed for hearing, the Respondent filed Civil Miscellaneous No.112 of 2023 against the Appellants seeking to strike out Civil Appeal No. 33 of 2023 with costs on several grounds.

Background facts

4. The Respondent filed Miscellaneous Cause No. 056 of 2022 against the Appellants in the Chief Magistrate’s Court of Mukono seeking the exhumation of the remains of Muhamed Bazinduse Lulibedda Mutumba who was buried on 21st June, 2022 in Mukono District.
5. The purpose of the exhumation was to extract samples from the deceased’s skeleton to be used for DNA tests with the Appellants and Respondent and any other biological children in order to

confirm the paternity of the parties to Miscellaneous Cause No. 056 of 2022.

6. The trial before the lower Court was basically by affidavit evidence and written submissions and the learned trial Magistrate in his ruling dated 5th June, 2023 declined to order for the exhumation of the late Muhamed Bazinduse Lulibedda Mutumba and instead ordered for a DNA test to be conducted amongst all “siblings” claiming to be children of the late Muhamed Bazinduse Lulibedda Mutumba at the cost of the deceased’s estate.
7. The Appellants hereinabove aggrieved by the decision of the learned Trial Magistrate in Miscellaneous Cause No.056 of 2022 lodged the instant Appeal No. 033 of 2022 seeking to set aside the orders of the lower court.
8. On the 10th July 2023 the Respondent herein also lodged a cross appeal challenging the decisions of the learned trial magistrate in his ruling delivered in Miscellaneous Cause No. 056 of 2022 delivered on 5th June, 2023.
9. On the same date of 10th July, 2023 the Respondent/Cross Appellant Male H. Mabirizi K. Kiwanuka filed High Court Miscellaneous Application No. 112 of 2023 seeking to strike out the Appellant’s Civil Appeal No. 033 of 2023 on grounds that it was argumentative, frivolous and or vexatious and the fact that the Appellants were estopped from challenging a decision of the lower Court where they opted not to file an affidavit in reply.
10. When Civil Appeal No. 33 of 2023 came up for hearing on 16th August, 2023 Counsel and the party agreed to file written

submissions covering the main appeal, cross appeal and Miscellaneous Application No. 112 of 2023 so that Court would deliver one (1) decision covering the entire dispute before it.

Legal representation

11. Mr. Gabriel Byamugisha appeared as Counsel for the Appellants to Civil Appeal No. 33 of 2023 and Respondents to Miscellaneous Application No. 112 of 2023 while Male H. Mabirizi K. Kiwanuka appeared in person.

Duty of the first Appellate Court

12. This being the first appellant Court it is under a duty to review the evidence and materials before the trial Court and subject the same to fresh and exhaustive scrutiny and re appraisal before coming to its own conclusion. (See the cases of **Kifamunte Henry Versus Uganda** SCCA No. 1 of 1997 and **Father Narsensio Bagumisa and three others Versus Eric Tibebaga** SCCA No. 17 of 2000.

Evidence of the Appellants before the lower Court

13. According to the affidavit evidence of Moses Solomon Male filed in the lower Court on 6th January, 2023 he contended that this was not a proper case for exhumation of a dead body as Sections 4 and 5 of the Inquest Act are about the deceased's Cause of death and are only relevant in Criminal Proceedings.
14. He also stated that six (6) of the Respondents had not been served with the Notice of Motion and accompanying affidavit.
15. That the cost of a DNA tests for over nineteen (19) children is over Ug. Shs. 1, 000,000,000/= (One billion shillings) which is too high.

16. That the Late Mohammed Bazinduse Lulibedda Mutumba left a valid Will which expressly excluded the Respondent Male H. Mabirizi K. Kiwanuka and therefore a DNA test cannot assist the Respondent until the deceased's Will is revoked or nullified.
17. That the late Mohammed Bazinduse Lulibedda Mutumba disowned the Respondent Male H. Mabirizi K. Kiwanuka because of the conduct of the Respondent towards the deceased during his lifetime.

Evidence of the Respondent before the Lower Court.

18. In his affidavit evidence filed on the 15th November, 2022 in support of his application before the lower Court, the Respondent contended that he is a son of the late Mohammed Bazinduse Lulibedda Mutumba who died on 19th June, 2021.
19. That some of the Appellants had authored a document dated 3rd January, 2022 indicating that he was not a son of the deceased.
20. That on 10th and 11th September, 2022 all the Appellants had approved a Will purportedly made by the deceased in which Will the Respondent was not named as one of the sons of the deceased.
21. That he also doubted the paternity of the Appellants since their mothers were not honest with the deceased.
22. That unless otherwise scientifically proven the Respondent was the only surviving son of the deceased.
23. The Respondent also filed a lengthy affidavit in rejoinder on 17th January, 2023.

Legal arguments by Counsel for the Appellants before the lower Court

24. Counsel argued that the Respondent sought to exhume the body of their deceased's father and he did not have any specific claims against the Appellants and for this reason an affidavit by any one of the Plaintiff could suffice.
25. Counsel submitted that there was no proof of service of the application upon all the appellants.
26. Counsel argued that the affidavit in reply was not covered under the provisions of Section 2 of the stamp duty Act.
27. Counsel argued that since no single falsehood was pointed out in the affidavit in reply then the same can stand as an answer to the application.
28. Counsel argued that the provisions of sections 4 and 5 of the Inquest Act relate to an investigation report in Criminal proceedings as to the cause of death of a deceased person and therefore the Respondent's application seeking to exhume a dead body and conduct a DNA test on over thirty (30) children could not have been envisaged under Section 5(2) of the Inquest Act.
29. Counsel also argued that there is a Will of the deceased that expressly excluded the Respondent as a child or beneficiary to the estate of the deceased and until such Will is revoked or set aside the Respondent's application cannot stand.

Legal arguments by Respondent before the Lower Court

30. The Respondent who was the Applicant before the lower Court represented himself and he identified three (3) issues for determination as follows.
- i) Whether the Respondents failed to defend themselves against the Application.
 - ii) Whether it is in the interest of Justice that Court grants the Inquest Application.
 - iii) What remedies are available to the parties?
31. The Respondent contended that he had served Counsel for the Appellants who did not deny possession of instructions from all the Appellants but only opted to file an affidavit in reply on behalf of the 1st Appellant Moses Solomon Male.
32. This is why the Respondent sought to have Judgment entered against the 2nd to 10th Appellants in the lower Court for failure to file affidavits in reply.
33. The Respondent argued that even those Appellants who are abroad were expected to file their affidavits in reply.
34. The Respondent contended that the affidavit in reply by the 1st Appellant bore an attachment the same attracted stamp duty pursuant to Section 32(1) (...) which stamp duty was not paid hence barring Court from relying on such an affidavit.
35. The Respondent also argued that since the affidavit in reply contained information from 3rd parties such affidavit could only be entertained in Interlocutory matters and not such a final cause as Miscellaneous Cause No. 056 of 2022.

36. The Respondent contended that the 1st Appellant's affidavit in reply contained a lot of hearsay about a purported Will, the fact that the Respondent was disowned by the deceased in his life time and the existence of a dispute between the Respondent and the deceased in the Commercial Division of the High Court of Uganda.
37. The Respondent submitted that the affidavit of the 1st Appellant contained falsehoods but he did not specify the falsehoods referred to.
38. The Respondent stated that his application was grounded in Section 5(1) of the Inquest Act as it is in the interests of Justice that the body of any person which has been buried should be examined and in this case despite the fact that the Respondent has documents to move that he is a son of the deceased, the Appellants have made several claims that he is not.
39. The Respondent argued that despite the provisions of the Births and Deaths Registration Act, and the Registration of persons Act, 2015 which support his documents attached in support of his paternity the Appellants are challenging his paternity, it is only a DNA test that will conclusively settle this dispute.
40. The Respondent prayed for general, aggravated and exemplary damages whose total he put at Ug. Shs. 20,000,000/= (Twenty million shillings).

41. Court also read and considered the Respondent's submissions in rejoinder filed before the Lower Court on 9th May, 2023.

Arguments by Respondent (Applicant) in Miscellaneous Application No. 112 of 2023.

42. In his written submissions filed on 7th August, 2023 the Respondent framed the following five (5) issues for determination.

- i) Whether the Appellants' affidavit in reply is incurably defective and improperly before Court.
- ii) Whether the grounds of appeal are argumentative
- iii) Whether the grounds of appeal raise matters which were neither pleaded nor argued in the lower Court
- iv) Whether the appeal is frivolous, vexatious and an abuse of Court process.
- v) What remedies are available to the Parties?

43. The Respondent implored Court to consider the opening paragraph of the Memorandum of Appeal filed by the same Counsel who filed the affidavit in reply before the lower Court is the same lawyer who filed the Memorandum of Appeal where he contends that the Appellants hereby appeal the whole decision" and according to the Respondent this is an Indicator that Counsel is retained to represent all the Appellants.

44. The Respondent relied on the provisions of Order 3 Rule 4 of the Civil Procedure Rules to argue that service upon an Advocate is effective service upon the party and he sought to have the Appellants of the 1st, 4th, 9th and 10th Appellants struck

out and the other Appellant to be deemed to have conceded to the Application.

45. The Respondent submitted that the Appellants' grounds of appeal in the Memorandum of Appeal argumentative in nature and offended order 43 Rule 1 (2) of the Civil Procedure Rules which is intended to ensure that Court adjudicates on specific issues complained of in the appeal and according to him grounds 1 to 7 were all argumentative in nature and ought to be struck out.
46. The Respondent submitted that the Appellants were attempting to raise new matters that were not argued before the lower Court and this is unacceptable.
47. The Respondent submitted that the instant appeal was frivolous, vexatious and an abuse of Court process and ought to be struck out with costs.

Legal arguments by Counsel for the Appellants (Respondents to Miscellaneous Application No. 112 of 2023).

48. In his written submissions filed on 10th August 2023 and Counsel submitted that their law firm accepted service on behalf of some of the Respondents whom they had represented before and that there was no effective service upon the Respondents.
49. Court finds it proper to first handle the issue of service of the Notice of Motion and accompanying affidavits in Mukono Chief Magistrates Court Miscellaneous Cause No. 56 of 2022 before delving into the merits of the appeal, cross appeal and even Miscellaneous Application No. 112 of 2023.

Decision of Court

50. The issue of service of Court process upon a party to any proceedings is very important and once it is raised in any pleading or by counsel or a party during the proceedings the Court is duty bound to carefully consider all evidence before it relating to the proper and effective service of court process upon all parties to the suit before proceeding to hear the merits of the dispute before court.
51. Where a court proceeds to hear a matter without notifying all or any of parties to the suit such conduct infringes on the right to a fair hearing as enshrined in Article 44 (c) of the Constitution of the Republic of Uganda. Article 44 (c) which provides that;
- “Notwithstanding anything in this Constitution, there shall be no derogation from enjoyment of the following rights and freedoms (c) the right to fair hearing.”**
52. The right to a fair hearing connotes the fact that a person must be given prior notice of allegations against him. The principles of a fair hearing to include *prior notice, adjournments, cross-examination, legal representation, disclosure of information* See *High Court Misc. Cause No. 042 OF 2016 Amuron Dorothy V LDC*
53. Court has perused the four (4) Pages which constitute record of Proceedings in Mukono Chief Magistrate’s Court Miscellaneous Cause No. 056 of 2022 and found that on 6th February, 2023 at 2:35 pm Mr. Male H. Mabirizi K. Kiwanuka appeared before the Learned Trial Magistrate and stated that he

was not able to file an affidavit of service but he insisted that all the Respondents were served on 25th January, 2023 and he went further to inform Court that Counsel in personal conduct of the Appellants' case would be in Makindye Court.

54. The learned trial Magistrate after listening to the submissions of Mr. Male H. Mabirizi K. Kiwanuka adjourned the matter to 13th February, 2023 at 11:00 am and ordered the Mr. Male H. Mabirizi K. Kiwanuka to cause service of the hearing notices upon the Respondents and he also issued a production warrant for Mr. Male H. Mabirizi K. Kiwanuka for the same date.
55. On 13th February, 2023 at 1:11 pm Mr. Male H. Mabirizi K. Kiwanuka appeared in court and made reference to two (2) affidavits of service on court record and he prayed to proceed *ex parte* as the Respondents had been duly served but were not in court and this is when the learned trial Magistrate found that there was effective service of court process upon the Respondents through their advocate and he rejected the application to proceed *ex parte* but directed the filing of written submissions by each party.
56. Court has perused the contents of Paragraphs 3 of the affidavit in reply filed by Moses Solomon Male on 6th January, 2023 and he categorically stated that the other six (6) Respondents were not resident in Uganda and were therefore never served with this application and this averment also appeared at page 2 lines 22 and 23 of the ruling of the learned trial magistrate.

57. The law relating to service of court process is set out in Order 5 of the Civil Procedure Rules and specifically Order 5 Rule 7 (a) of the Civil Procedure Rules provides that service of Court process is to be affected by: -

- i) **Any person for the time being duly authorized by the Court;**
- ii) **An advocate or an advocate's clerk who may be approved by the Court generally to effect service of process.**

58. Where there several people to be served Order 5 Rule 9 of the Civil Procedure Rules provides that where there is more than one (1) defendant service shall be effected on each defendant and such service must be on the defendant in person or on his or her agent as contained in Order 5 Rule 10 of the Civil Procedure Rules (also see the case of **Betty Owaraga Versus G.W Owaraga** HCCA No. 60 of 1992.

59. Due diligence must always be exercised by the process server before effecting service upon an agent of the party to be served or upon an adult member of the family see case of **Erukana Kavuma Versus Metha (1960) 1 EA 305**

60. A process server is obliged to file an affidavit of service pursuant to Order 5 Rule 16 of the Civil Procedure Rules and this affidavit must state when and the manner in which the summons was served and the name and address of the person, if any identifying the person served and witnessing the delivery of tender of the summons.

61. A valid affidavit of service should always contain the following: -

- i) A statement to the effect that the Deponent is a process server of the Court.**
- ii) A statement to the effect that the Defendant/Respondent was personally known to the process server at the time of effecting service.**
- iii) A statement to the effect that the Defendant/Respondent not being known to the process server, another person accompanied the process server and pointed out the person to be served.**
See case of **Wadamba David Versus Godfrey Mutasa & Others** HCCA No. 32 of 2015.

62. Now applying the above provisions of the law to the instant appeal, it was during the hearing of Miscellaneous Cause No. 056 of 2022 on the 13th February, 2023 that Mr. Male H. Mbirizi K. Kiwanuka made reference to two (2) affidavits of service on court record and this court has upon perusal of the lower Court record found the two (2) affidavits of service by Obwana Martin filed on court record on 17th January, 2023 and 9th February, 2023 and in the first affidavit of service filed on 17th January, 2023 the said Mr. Obwana Martin described himself as a legal Assistant to the Applicant in which capacity he made the affidavit of service and in the other affidavit of service filed on 9th February, 2023 the same Mr. Obwana Martin described himself as a Principal Legal Assistant of the Applicant Mr. Male H. Mbirizi K. Kiwanuka.

63. Court is left wondering as to what the proper designation of Mr. Obwana Martin could be because it seemed to be mutating in a very short period of time.
64. The other more important question that came to court's mind is whether this legal assistant or Principal Legal Assistant of Mr. Male H. Mbirizi K. Kiwanuka was duly authorized to serve court Process pursuant to Order 5 Rule 7 of the Civil Procedure Rules and it is the finding of this court that the learned trial Magistrate while handling Miscellaneous Cause No. 56 of 2022 ought to have investigated the status of Mr. Obwana Martin as to whether he was a person authorized to service court process before finding that there was effective service of court process upon all the Respondents.
65. The contents of Paragraphs 2 and 3 of the affidavit of service of Mr. Obwana Martin filed on 17th January, 2023 are very useful in determining whether there was effective service of Court process upon all the Respondents before the lower court and for this reason I will reproduce them as follows: -
- 2. On 15th December, 2022, I went to the offices of Byamugisha Gabriel & Co. Advocates who are known advocates of all the Respondents, to serve upon them the Notice of Motion and supporting affidavit.**
 - 3. On reaching the offices at Total Delux House Plot 29/33 Jinja Road, I served Counsel Gabriel Byamugisha who acknowledged receipt by signing and stamping my copy which I return to Court as proof of service. A copy of received and signed page is attached and marked "A".**

66. Court is not aware of any register or directory where potential litigants indicate their preferred Advocates and in any case given the recent trends of specialization by legal practitioners a litigant should be at liberty to engage any advocate with the requisite specialities to handle their cases and therefore Court faults Mr. Obwana Martin for not disclosing his source for the averment that M/s Byamugisha Gabriel and Co. Advocates are known advocates of all the Respondents and Court finds this failure to disclose the source of such vital information as fatal to the process of service and the learned trial magistrate ought to have satisfied himself that indeed Mr. Gabriel Byamugisha was the advocate for Respondents before him before proceeding to entertain the merits of Miscellaneous Cause No. 56 of 2022.
67. Fortunately for Mr. Obwana Martin he was proved right to some extent as M/s Byamugisha Gabriel & Co. Advocates filed an affidavit in reply on 6th January, 2023 on behalf of the 1st, 3rd 8th and 9th Respondents which affidavit expressly indicated that the remaining six (6) Respondents were not in Uganda and were not served with the application.
68. Court is left wondering how the learned trial magistrate opted to ignore such information in the pleadings which was part of the Court record and only opted to rely on the affidavit of service dated 9th February, 2023 to satisfy himself that all Respondents had been duly served through their Advocate.
69. Considering the kind of orders sought in Miscellaneous Cause No. 056 of 2022 for the exhumation of the remains of the

late Mohamed Bazinduse Lulibedda Mutumba and also the conduct of a DNA paternity test as against all the Respondents as very sensitive and emotional orders which court could only issue after listening to all Respondents, I find that the six (6) Respondents in this case were not accorded a fair hearing by the learned trial magistrate as they were not served with any court process and were therefore condemned unheard.

70. As a matter of fact, the learned trial Magistrate exposed Mr. Gabriel Byamugisha to an action for professional misconduct to wit representing a party without instructions which is Contrary to Regulation 2 (1) of the Advocates (Professional Conduct) Regulations S.1 267-2 which provides;

"No advocate shall act for any person unless he or she has received instructions from that person or his or her duly authorised agent."

71. The learned trial Magistrate did not properly scrutinize the affidavits of service on court record especially the most relevant one filed on 17th January, 2023 relating to the service of the Notice of Motion and supporting affidavit. If the learned trial Magistrate had read the affidavit in reply by Moses Solomon Male filed on 6th January, 2023 he would have realized that the issue of service of the Notice of Motion and affidavit in support were rather a contentious one and he would have put more attention to this issue before satisfying himself on 13th

February, 2023 and later on 5th June, 2023 issuing orders for a DNA test on all those presumed to be children of the late Mohamed Bazinduse Lulibedda Mutumba at the expense of the estate without hearing from the six (6) Respondents.

72. Perhaps if the learned trial magistrate had properly addressed his mind to the contents of the affidavits of service and the affidavit in reply all before him he would have directed the Applicant to proceed under Order 5 Rule 24 of the Civil Procedure Rules by seeking leave of court to serve the notice of Motion in this case out of the jurisdiction of the court but unfortunately the learned trial Magistrate opted to believe that Counsel Gabriel Byamugisha represented all the Respondents a fact which counsel Byamugisha vehemently denies.

73. Court finds that there was no fair hearing as against the six (6) Respondents before the lower Court and they could not be condemned to a DNA paternity test without hearing from their side.

74. As a result, Court finds that all proceedings that followed the 13th February, 2023 when the learned trial magistrate erroneously found that there was effective service of court process upon all Respondents through their advocate are hereby declared null and void as such proceedings were conducted in the absence of six (6) Respondents who were never served with the notice of motion and affidavit in support in this case and these proceedings and subsequent ruling of 5th June, 2023 are hereby set aside.

75. Court hereby orders that Mukono Chief Magistrates Court Miscellaneous Cause No. 056 of 2022 be heard afresh before the Chief Magistrate Mukono who should ensure that all parties are effectively served with court process before proceeding with the hearing of this cause.

76. Court will not condemn any one to pay costs at this stage because Mr. Male H. Mabirizi K. Kiwanuka was actually in prison at the time as shown in the various production warrants on the lower court record for his appearance before Court to prosecute this matter and perhaps this explains this apparent lapse of service of Court process in this cause and similarly, the ten (10) Respondents cannot be condemned to pay costs for an issue where they raised a red flag in their affidavit in reply but for some reason their red flag was ignored by the learned trial magistrate.

Dated this^{26th}.....day of^{October}.....2023.



David Matovu
JUDGE