

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**  
**FAMILY DIVISION**  
**MISCELLANEOUS APPLICATION NO. 0117 OF 2022**  
**(Arising from Miscellaneous Application No. 0451 of 2021)**  
**(Arising from Civil Suit No. 0138 of 2021)**

- 1. MUWANGA PAUL KIZITO**
- 2. MBWABWA ANDREW KIZITO**
- 3. MARGARET NABUGUZI KIZITO:.....: APPLICANTS**

**VERSUS**

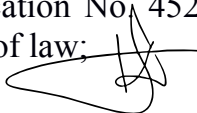
- 1. KIGONYA STEPHEN**
- 2. MUSOKE ROBERT**
- 3. NANSUBUGA MARY CLEOPHAS :.....: RESPONDENT**

Before: Lady Justice Ketrach Kitariisibwa Katunguka.

**Ruling**

1. Muwanga Paul Kizito, Mbwabwa Andrew Kizito, Margaret Nabuguzi Kizito Bring This Application Against Kigonya Stephen, Musoke Robert And Nansubuga Mary Cleophas; by way of Notice of Motion seeking orders that; the reference be allowed; the Ruling and Orders of the learned Deputy Registrar in Miscellaneous Application No. 451 of 2021 be set aside and costs of this reference be provided for.

2. The grounds of the Application are contained in the Affidavit in support deposed by Mr. Mbwabwa Andrew Kizito (the 2<sup>nd</sup> Applicant herein) with written authority from the 1<sup>st</sup> Applicant (Katende Med) and briefly are that; the Learned Deputy Registrar erred in law and fact when she delivered the ruling in Miscellaneous Application No. 451 of 2021 whose hearing had been stayed pending determination of the points of law which were raised in Miscellaneous Application No. 452 of 2021, and thus pre-empting the ruling on the said preliminary points of law;



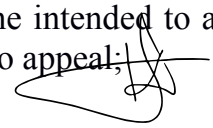
3. The Learned Deputy Registrar erred in law and fact when she delivered the ruling in Miscellaneous Application No. 451 of 2021 which was not pending ruling and whose hearing had been stayed thus denying the Applicants a hearing; it is in the interest of justice that this reference is allowed as prayed; the Respondents will not suffer any prejudice if this reference is allowed.

4. The Application is supported by: the authority granted to the Applicant by the 1<sup>st</sup> and 3<sup>rd</sup> Applicants, copies of the Plaintiff for the Civil Suit No. 138 of 2021 and Civil Suit No. 158 of 2021, copies of Miscellaneous Applications Nos. 450,451 and 452, copies of affidavits in opposition to the said applications, a copy of the ruling in Miscellaneous Application No. 451 of 2021 by HW Ajio, written submissions filed by the Applicants in opposition to Miscellaneous Application No. 452 of 2021;

5. The application was opposed by Kigonya Stephen who deposed that; court has all the powers to decide according to its wisdom which application it handles first; the submissions for Miscellaneous Application No. 451 of 2021 were filed on court record and there is nothing that would stop court from ruling on the same; the court even on its own and without any application whatsoever can consolidate suits if in fact, the suits raise common questions of law and fact like in the instant suits, that all relate to the estate of the late Urban Kato; Civil Suits No. 138 and 158 all relate to the estate of the late Urban Kizito and all the respective parties to the said suits are children and beneficiaries to the estate;

6. The applicants are only trying to mislead this honourable court that Miscellaneous Application No. 451 of 2021 was stayed pending the determination of the other applications; there is no such orders of court proving that indeed Miscellaneous Application No. 451 of 2021 was stayed and the applicants have not attached any court order to help this honourable court believe their averments; the Applicant's appeal is brought in bad faith as it does not seek to challenge the ruling of the court that ordered the two suits to be consolidated but rather is hinged on other Miscellaneous Applications that is No. 450 and 452 of 2021 which have never been determined by court;

7. The Applicant's lawyers M/s Orone & Co. Advocates are only conniving with M/s Luzige, Lubega, Kavuma & Co. Advocates to abuse court's process as the former lawyers do not have instructions in this matter; the applicants only instituted this Appeal when the learned Deputy Registrar informed the parties that the ruling vide Miscellaneous Application that is No. 450 and 452 of 2021 was ready and was about to be delivered; on the day Miscellaneous Application No. 451 of 2021 came up for ruling the learned Deputy Registrar asked the lawyer of the Applicants whether she intended to appeal the decision of court and she informed court that she was not going to appeal;



8. When the Deputy Registrar was just about to deliver the ruling in Miscellaneous Applications No. 450 and 452 of 2021 Counsel Amooti of M/s Orone & Co. Advocates dropped a letter from B. Edward Advocates and run away, forcing the court to suspend the ruling in the said applications; this Appeal lacks merit and should be dismissed with costs.

9. When the matter came up on the 17<sup>th</sup> August 2022, counsel Wanambugo informed court he had just been served with the affidavit in reply; counsel Wandera for the respondents apologised and informed court that he had points of law to raise; court stated that points of law do not stop any one from filing a reply in time to allow the other party time to respond or prepare submissions; Court then ordered the Respondents to file submissions including on the points of law and serve the Applicants by 1/09/2022; counsel for the Applicants was to file submissions in reply to the points of law and rejoinder by 20/10/2022, the Respondent was to file a rejoinder on the points of law by 31/10/2022; the ruling was to be delivered by 22/12/2022; I only see the respondents' written submissions filed on 9/09/2022 and an affidavit in rejoinder filed on 1/12/2022; I do not see any points of law raised by the respondents.

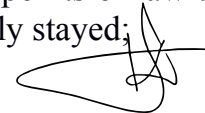
**10. Representation;**

The Applicants were represented by Mr. Innocent Wanambugo while the Respondents were represented by Mr. Wandera Ismail who filed submissions.

**The Case;**

11. Civil suit No. 138/2021 was filed on 7/5/2021 by the applicants; and MA 450/2021 arising from the said CS 138/2021, an application for temporary injunction was filed on 3/8/2021; CS No. 158/2021 was filed against the applicants on 27/5/2021 and MA 452/2021 arising from the said Cs No. 158/2021- an application for temporary injunction was filed on 3/8/2021; MA 451/2021 an application for consolidation for the said civil suits was filed on 3/8/2021 by the respondents herein; when the three applications came up on 28/10/2021, for mention a preliminary point of law was raised by the applicants and it was claimed that it had potential of disposing of the CS 158/2021 and all the attendant applications; before the point of law was determined a ruling was delivered in MA 451/2021 granting the prayer for consolidation of civil suit No. 138/2021 and CS Np. 158/2021; the applicants contend that they were denied the right to be heard;

12. The respondents in this application claim that there was no order of stay of the application for consolidation pending determination of the points of law so the learned Registrar had the right to determine which application and when; it is contended for the applicant that by allowing them to file written submissions on the points of law then the determination of the application for consolidation had been impliedly stayed;



13. Both counsel did not frame any issues but a look at the pleadings shows that the issues for determination are;

***1. Whether this application is properly before court and if so;***

***2. Whether by considering the application for consolidation and actually granting it court denied the applicant the right to be heard;***

***3. and whether if so, this application should be granted.***

#### **Determination.**

***Issue 1. Whether this application is properly before court;***

14. This application is brought under Article 28 of the Constitution of Uganda 1995, section 33 of the Judicature Act, section 79 of the Civil Procedure Act, Order 50 rule 8 and Order 52 rules 1 and 3 of the Civil Procedure Rules; the prayers sought are that this reference be allowed and the orders of the learned Deputy Registrar in MA 451/2021 be set aside and costs of this reference be provided for.

15. Reference is provided for under O. 50 rule 7 of the Civil Procedure Rules to wit: 'If any matter appears to the registrar to be proper for the decision of the High Court the registrar **may refer the matter to the High Court and a judge of the High Court** may either dispose of the matter or refer it back to the registrar with such directions as he or she may think fit'. (emphasis supplied).

This application seeking reference can not be competently be before this court unless it has been referred by the registrar;

16. However Order 50 rule 8 of the Civil Procedure Rules under which this application is brought provides instead for appeal to wit: '*Any person aggrieved by any order of a registrar may appeal from the order to the High Court. The appeal shall be by motion on notice*'.

Order 52 rules 1 and 3 provides for applications to be by notice of motion; The application having been brought under O 50 rule 8 therefore is an appeal not a reference.

***Issue 2. Whether by considering the application for consolidation and actually granting it court denied the applicant the right to be heard;***

17. Order 6 rule 28 of the Civil Procedure Rules provides; 'Any party shall be entitled to raise by his or her pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing.

18. Blacks Law Dictionary defines a point of law as **a term for a matter of law in a case that will depend on existing statutes and not from a matter of fact.**..A



preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit (see *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696*).

19. Court has discretion to dispose of the preliminary objection immediately or defer its ruling until after hearing the whole case (see *The Attorney General v. Major General David Tinyefunza, S. C. Constitutional Appeal No. 1 of 1997*). Such deferment if done would be determined by the facts of each case; where a point of law is pleaded and claims that it has potential of disposing off the main suit it ought to be determined first; and at what point the point of law should be considered is at the discretion of the judicial officer; (see *Yaya v Obur and Ors (Civil Appeal 81 of 2018) [2020] UGHC 165 (30 October 2020)*);

20. I have considered the affidavit in reply in MA 452/2021; at paragraph 3 it states that the advocates shall raise *'a preliminary point of law to the effect that the application is barred by the statute, incompetent, frivolous and/or vexatious and a blatant abuse of court process'*; the affidavit in rejoinder to the respondent's affidavit in reply at paragraph 2 states that the applicants therein shall *'raise a preliminary objection as to the competence of the respondents' affidavit in reply as it was filed 22 days out of time....'*

21. I have considered the submissions by both counsel; the applications came up on the same day and the court directed the parties to file submissions on the points of law in MA 452/2021; if the application had a bearing on CS 158/2021 then its competence depends on the main suit itself; in this case the points of law raised by the respondents appeared to challenge the competence of the main suit and therefore the application itself; there does not appear to be an order of stay of MA 451/2021 where both suits would be consolidated; It would appear to me that if the preliminary objections had been determined first it would inform the decision as to whether to consolidate or not; if the points of law are determined afterwards it would appear as if the concerns of the applicants in this case/ respondents in MA 452/2021 have been decided without them being heard;

22. A rule of law must be determined the moment it is raised especially if it is stated to possibly dispose of the main suit; it is contended by the applicants that the suit subject of consolidation abetted so there was nothing to consolidate; if there is nothing to consolidate then even the applications arising from the civil suit would have no basis.

23. While it is up to the judicial officer to determine when to consider the preliminary point of law, the possible outcome to the case should be the guiding factor; in this case



since the application for consolidation in my view depended on the outcome of the preliminary points of law; if the parties were allowed to file submissions court ought have held on to the ruling in MA 451/2021 because by determining that the civil suits ought to be consolidated court recognised CS 158/2021 yet its existence was being challenged through the preliminary points of law yet to be determined;

It is my considered view that in this case the points of law ought to have been determined first.

24. In the premises I would agree with counsel for the applicant that hearing and disposing off the preliminary objections first would accord the applicants the right to be heard considering the propriety of MA 452/2021 in view of MA 451/2021 and CS No. 158/2021 and would avoid multiplicity of suits.

Issue 2 is answered in the affirmative; and by implication issue 3 is also answered in the affirmative

It is hereby ordered as follows:

- 1.The application succeeds;
- 2.The order of consolidation in MA 451/2021 is hereby set aside;
- 3.Let the Learned Deputy Registrar first determine the preliminary points of law raised in MA 452/2021 before MA 451/2021 can be determined.
- 4.The costs shall stay in the cause.



Ketrah Kitariisibwa Katunguka

Judge

2/1/2023

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