

1. TIMOTHY KYALIGONZA
2. DAINA KUSEMERERWA
3. NTEGEKA CAROL
4. TUSINGWIRE CAMILA
5. JAMES KWEBIHA
6. HARRIET ATUHAIRE
7. GLADYS KYALIGONZA BIHANGAMAISHO
8. CATHRYN BIRUNGI
9. RONNIE IRUMBA NKUMANYA
10. RACHEAL MIREMBE :::::::::::::::::::::::::::::::::::APPLICANTS
11. DOROTHY KISAKYE
12. JANE KYALIGONZA
13. SHEILA ATUIRWE

**1. DAMALIE MUKASA**  
**2. IVAN KYALIGONZA ::::::::::::::::::::::::::::::::::: RESPONDENTS**

- 1. This Honorable Court grants leave to the Applicants to be added as defendants to Civil Suit No. 525 of 2022.**
- 2. The applicants be allowed to file their defense out of time.**
- 3. Costs of this application be provided for.**

- 1.1 The grounds of this application are set out in the Notice of Motion explicated in the affidavits in support sworn by Timothy Kyaligonza (the 1<sup>st</sup> Applicant) and Katushabe Mable Kyaligonza (next friend to the 3<sup>rd</sup> and 4<sup>th</sup> Applicants) but in brief are that; the respondents filed Civil Suit No. 525 of 2022 against the named executors and a selected few beneficiaries of the estate of the late George Tibahwerwa Kyaligonza. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Applicants were added as plaintiffs without their knowledge and or consent yet gravely opposed the prayers in the head suit. The applicants are biological children and beneficiaries named under the will of the late George Tibahwera Kyaligonza that is currently being contested by the plaintiffs in HCCS No. 525 of 2022.
- 1.2 The orders made by this Honorable Court pertaining the said Will, will gravely affect the applicants and if not parties to the suit could be condemned unheard. In the absence of the administrators of the estate of the late George Tibahwerwa Kyaligonza all the beneficiaries should be added as parties to the suit.
- 1.3 On the other hand, the respondents opposed the application and filed an affidavit in reply sworn by Ivan Kyaligoza (the 2<sup>nd</sup> Respondent) with authorization from the 1<sup>st</sup> Respondent responding to each affidavit in support distinctively. 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 incompetent and incurably defective in respect of the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> respondents for having no supporting affidavits in respect of their case.

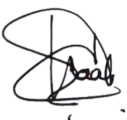


- b) The application is incurably defective as the two supporting affidavits are in support of chamber summons while the application is by Notice of Motion.
- c) The Affidavit Sworn by Katushabe Mable is riddled with falsehoods and ought to be struck out.
- d) The Application in respect of the 3<sup>rd</sup> and 4<sup>th</sup> Applicants is premature, irregular and an abuse of court process.
- e) The 11<sup>th</sup> Applicant has no locus standi to sue in the estate of the late George Kyaligonza.

1.4 In further answer to the affidavits of the applicants, the respondents averred that there is no sustainable cause of action against the 1<sup>st</sup> Applicant in Civil Suit No. 525 of 2022 as the rightful defendants in a suit for setting aside a Will are the named executors.

1.5 The respondents contended that the addition of the 1<sup>st</sup> applicant or any of the applicants as defendants has no relevance and shall not in any way help court to effectively and completely adjudicate the questions raised in the suit. Further that the orders of setting aside the Will of the late George Kyaligonza if made by this court shall not in any way affect the interests of the 1<sup>st</sup> Applicant or any of the applicants as all the beneficiaries already agreed to the appointment of administrators and doing away with executors of the Will in a family meeting held on 4<sup>th</sup> February, 2022. That the 1<sup>st</sup> applicant and the rest of the applicants are not necessary parties and prays the suit is dismissed with costs.

1.6 In addition to the above, the respondents further opposed the affidavit of Katushabe Mable stating that Civil Suit No. 525 of 2022 was filed with the knowledge and specific instructions of the deponent




Katushabe Mable who was in person at the then lawyers M/S Obed Mwebesa & Associated Advocates and gave instructions before filing the suit with photographic evidence to prove the customary marriage between herself and the late George Kyaligoza.

1.7 The respondents averred that the deponent Katushabe Mable and her children the 3<sup>rd</sup> and 4<sup>th</sup> Applicants are not mentioned in the Will of the deceased and that there is no sustainable cause of action against the 3<sup>rd</sup> and 4<sup>th</sup> applicants in Civil Suit No. 525 of 2022 as the rightful defendants in a suit for setting aside a Will are the named executors and not beneficiaries of the estate. Lastly that the 11<sup>th</sup> applicant is not a beneficiary of the estate of the late George Kyaligonza, she was a friend to the late Brian Kyaligonza who happened to be a son of the deceased.

1.7. The applicants filed a rejoinder which has been considered in determination of this application.

## **2.0. Representation and Hearing**

2.1. When the matter came up for hearing on 17<sup>th</sup> October, 2023, the applicants were represented by Mr. Arthur Mwebasa and the Respondents were represented by Mr. Bikuri Rugolobi. During hearing Counsel for the Respondent prayed to cross examine Mable Katushabe and indeed she was cross examined and re-examined. 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 written submissions. I have taken into consideration the said pleadings and the submissions in determination of this application.



### **3.0 Preliminary Objection:**

3.1. Counsel for the Respondents raised Preliminary points of law. The application is incompetent and incurably defective in respect of the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> respondents for having no supporting affidavits in respect of their case.

### **4.0. Submissions by the Respondents**

4.1. The application is brought by 13 applicants, and it is only supported by only 2 affidavits. According to the supporting affidavits, there is nothing to show that any of the deponents swore their respective affidavits on behalf of the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> applicants as there is no written authority to that effect.

Order 1 Rule 12 of the Civil Procedure Rules, SI 71-1 is to the effect that authorization to act on behalf of anyone in the suit ought to be in writing and filed along with the application which in this case was never done.

**Eriast Sewava Salongo & 19 Ors Versus Richard Male Mukasa Revision Application No. 034 of 2018**, the application had been brought by 20 applicants but some of the applicants did not have supporting affidavits Hon. Justice Henry I. Kawesa observed as follows; *“.... The deponent to the affidavit in support swore the affidavit in this own capacity and did not purport to do so on behalf of the rest of the Applicants...”*

*“However, the rest of the applicants did not file any affidavit in support of the application, implying that they put themselves outside that ambit of the same. The application is therefore defective in their respect”.*



- 4.2. The respondents prayed that the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> applicants to be struck off the record with costs the respondents.

According to the applicants, in response to the above objection they submitted that, it is now settled law that if an affidavit is sworn by one of the many applicants with the same cause of action, it is not necessary to state that it is sworn on behalf of the others though it is preferable to do so, he prayed that the Preliminary Objection is overruled.

**5.0. Determination of Court:**

- 5.1. Order 1 Rule 12(2) the authority shall be in writing signed by the party giving it and shall be filed in the case.

The Courts, are called upon to deal with applications under Order 1 rule 12 (2) with caution and to bear in mind that the provisions therein are mandatory and not merely directory, for they are essential preconditions for trial of the case of appearance of one of several plaintiffs or defendants for others. Therefore all applicants either had to file their own affidavits or in the alternative save for the 3<sup>rd</sup> and 4<sup>th</sup> who sued through a next friend and swore an affidavit on their behalf, ought to have given written authority to the 1<sup>st</sup> applicant, Timothy Kyaligonza to act on their behalf by swearing the affidavit. Failure to do so meant that the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> applicants' application is incompetent since it is not supported. The applicants without affidavits supporting the application are therefore struck of the record.



**b) The application is incurably defective as the two supporting affidavits are in support of chamber summons while the application is by Notice of Motion.**

5.2. The respondents submitted on the format of the application that is by Notice of Motion under Order 51 Rule 1, 2, and 3 of the Civil Procedure Rules. The affidavits of the 1<sup>st</sup> Applicant Timothy Kyaligonza and Mable Katushabe are in the support of Chamber Summons. In response the applicants submitted that they recognized the error to wit they believed that it could be cured under Article 126(2) (e) of the Constitution of the Republic of Uganda.

#### **6.0. Determination of Court:**

6.1 Applications brought under Notice of Motion like this specific one differ in procedure. This particular application is presented under Order 52 rules 1, 2 and 3 of the Civil Procedure Rules. Meaning that the applicants ought not to have filed their affidavits under chamber summons. This matter was heard in open court not in chambers and the next friend was cross examined following an application by the respondents. Chamber Summons are Court documents that are notifying the parties of the matter to be heard by Judicial Officer at a specified time and date which are usually accompanied by an affidavit in support that lays down the grounds of the summons. Chamber Summons are heard by a Judge in Chambers. Therefore, they must be issued by a trial Judge.

6.2 Article 126 (2) (e) of the Constitution of the Republic of Uganda will not cure this, for it is the applicants duty to present their application correctly and avoid such carelessness as presented on the face of the



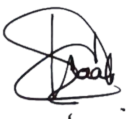
record. This therefore results into the Notice of Motion not being supported by any affidavits.

**c) The Affidavit Sworn by Katushabe Mable is riddled with falsehoods and ought to be struck out. ( Preliminary Objection 3)**

6.3. According to the Respondent, paragraph 4 of the affidavit in support of the Application sworn Mable Katushabe has falsehoods as she deposes that herself together with her children the 3<sup>rd</sup> and 4<sup>th</sup> applicants are named in the last will of the late George Kyaligonza whereas not. Counsel relied on the case of **Bet City (U) Ltd & Anor Versus SWANG Avenue (U) Ltd** with approval of the decision of **Joseph Mulega Vs Photo Focus (U) Ltd (1996) VI KALR 19** where it was held that “where an affidavit in support of an application contained obvious falsehoods, such falsehoods rendered the entire affidavit suspect and an application based on such an affidavit must fail, court observed as follows; “ *the applicant’s affidavit is support contains falsehood that are central to the applicant’s case, the affidavit is thus disregarded*”.

6.4. The respondent submitted that the Will in issue was purportedly executed by the late George Kyaligoza on 15<sup>th</sup> April, 2007 and Mable Katushabe had not been married to the deceased and her children had not been sired with the deceased yet there is no codicil to the said Will hence literally the deponent together with her children are not beneficiaries to the estate of the late George Kyaligoza.

6.5. In response to this objection, the applicants referred to the provisions of clause XII of the Will which state that; “*I direct the residential house at Namuwongo Low Cost Housing Project, Plot No. 123 shall continue to be rented and the proceeds therefrom put on the Education Account for*





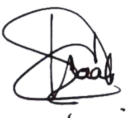
*the education of all my children, and after all the children have completed their education, the proceeds therefrom shall go to the Kyaligonza Estate Account but the property shall perpetually be registered in the names of the Registered Trustees and shall not be transferred to any single owner”.*

6.6. During cross examination Mable Kyaligonza was referred to her affidavit in support dated 4<sup>th</sup> June, 2023 and she testified that she did not remember ever signing it. On 12<sup>th</sup> October, 2023 she signed an affidavit in rejoinder and confirmed that the signature is the same. She could not read English and she does not know how to read unless a document is read to her. She is the mother of the 3<sup>rd</sup> and 4<sup>th</sup> Applicants but the content of her affidavit are incorrect as per paragraph 4 of the affidavit in support of the Notice of Motion. She does not remember, where she signed the document from nor does she remember who brought the document for her. The document dated 12<sup>th</sup> October, 2023 she signed it in the lawyer’s office on Kampala Road near Parliament she was not sure where Parliament is located. Nor could she remember who gave her the document since he wasn’t present in court and does not remember the name of the law firm.

Upon reexamination she stated that the 3<sup>rd</sup> and 4<sup>th</sup> Applicants are known to her and they are her children.

6.7. The advocates orally submitted on the affidavit in support sworn by Mable Katushabe. The submissions of both counsel have been taken into consideration in determination of the matter.

In the case of **Meddie Ddembe Maji Marefu vs. Nalongo Namusisi HCMA No.35/2002** Hon. Lady Justice Stella Arach Amoko (*as she*



*then was*) held that an affidavit which contains a deliberate falsehood cannot be relied on. She relied on the case of **Bitaitama Vs. Kanamura [1977] HCB 34**, whereof it was held that; (i). The inconsistencies in affidavits cannot be ignored however minor since a sworn affidavit is not a document to be treated lightly. If it contains an obvious falsehood then it naturally becomes suspect, (ii). An application supported by a false affidavit is bound to fail because the applicant in such a case does not come to court with clean hands. That the blatant falsehood in the affidavit of the applicant cannot be ignored, and the application would fail for that reason.

The defect of an affidavit on account of falsehood is treated more seriously than other defects because it affects the credibility of the evidence given by way of that affidavit. It would therefore, have the effect of rendering the affidavit incurably defective. To that end, court will be inclined to find so in this case if it is proved that the affidavit in support of the application and rejoinder contain falsehood.

- 6.8. I have perused the Will of the late George Kyaligonza attached by the applicants and it has come to my attention that the Will was executed on 15<sup>th</sup> April, 2007 and in the said will there is no mention of the 3<sup>rd</sup> and 4<sup>th</sup> applicant together with the next friend Mable Katushabe hence her affidavit has falsehoods. Mable Katushabe, the next friend to the 3<sup>rd</sup> and 4<sup>th</sup> Applicants averred under paragraph 6 and 7 of her affidavit in support of chamber summons that the respondents have ill intentions to disenfranchise the applicants of what was duly bequeathed to them under the will and the orders made by this court pertaining the said will affect the 3<sup>rd</sup> and 4<sup>th</sup> applicants under the will if not added as a party. I mentioned earlier that there is no mention of



the 3<sup>rd</sup> and 4<sup>th</sup> Applicants in the deceased will. The affidavit of Mable Katushabe is contains falsehood and it is therefore stuck out.

**d) The Application in respect of the 3<sup>rd</sup> and 4<sup>th</sup> Applicants is premature, irregular and an abuse of court process.**

6.9. I will not resolve this preliminary objection for to do so will only amount to moot. I have already resolved preliminary objection 2 and 3. There is no affidavit in support of this application and therefore no basis is need to address the nature of application of the 3<sup>rd</sup> and 4<sup>th</sup> Applicants since their application is not supported. The application automatically fails.

**e) The 11<sup>th</sup> Applicant has no locus standi to sue in the estate of the late George Kyaligonza.**

7.0. Having resolved issue No. 1 that the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 13<sup>th</sup> applicants have no supporting affidavits, the 11<sup>th</sup> applicant's application is not supported by an affidavit in support having failed to file one or to give written authority to the 1<sup>st</sup> applicant to act on her behalf. In this case her application has no leg to stand on in support of her application it is unsustainable and therefore fails.

**Issue No. 1 Application of Timothy Kyaligonza the 1<sup>st</sup> applicant to be added as a defendant.**

7.1. In paragraph 3 of his affidavit in support, the 1<sup>st</sup> Applicant clearly avers that he is a biological son to the late George Kyaligonza and is a named beneficiary under the Will and this is demonstrated that any orders made under HCCS No. 525 of 2022 that seeks to invalidate the will in which he is a beneficiary shall affect him and the other beneficiaries



named under the same will that are not party to the suit. (Paragraph 4).

7.2. According the 1<sup>st</sup> applicant, the effect of court making orders as to validity or invalidity of the Will shall directly affect the applicants who may be disenfranchised in the event of an order invalidating the said will and would suffer the effect of being condemned unheard contrary to his constitutional rights to fair hearing.

7.3. In response, the respondents submitted that the interests of all the beneficiaries in a testate estate are vested and represented by the named executors and therefore there is no need to have all the beneficiaries of an estate to be added as parties in a case like this one.

7.4. In addition, the respondents submitted that the 1<sup>st</sup> Applicant in response to his affidavit in support the respondents gave evidence that the family and beneficiaries of the estate of the late George Kyaligonza in a meeting held on 4<sup>th</sup> February, 2022, agreed to do away with the Will and suggested administrators of the estate. The setting aside of the Will shall therefore not affect any of the applicants' interests since it was agreed already. Lastly, the orders sought in Civil Suit No. 525 of 2022 are not to declare that the applicants are not beneficiaries of the estate of the late George Kyaligonza.

#### **8.0. Determination by Court:**

8.1. I have already noted that the affidavit in support of this application of the 1<sup>st</sup> Applicant is defective in form. Be it as it may following the submissions of both parties, Order 1 rule 10 (2) of the CPR provides that; “ *the court may at any stage of the proceedings either upon or*



*without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendants, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.*

8.2. The application to add could be by any of the parties or done by the Court on its own motion. **Kilolo Curing Co. Ltd Vs West Mengo Co-op Union Ltd (1991) HCB 60.** The application could even be made by any person whose legal right will be directly affected by the grant or the relief claimed in the action and can show that his presence is necessary to enable court effectively and completely adjudicate and settle the suit before it.

8.3. The aim is to bring or record all persons who are parties relating to the subject matter before court so that the dispute may be determined in their presence and that the same time without any prostration, inconvenience and to avoid multiplicity of proceedings. See **Ally Route Ltd Vs Uganda Development Bank Ltd HCT MA 59 of 2007.**

8.4. It is a fundamental consideration that before a person is joined as a party, it must be established that the party has high interest in the matter. It must be clearly demonstrated that the orders sought in the main suit would directly legally affect the party seeking to be added. The decision of **Supreme Court of Uganda in Departed Asians Property Custodian Board Vs Jaffer Brothers Ltd [1999] 1 EA 55,** that for a party to be joined on ground that his presence is necessary



for the effective and complete settlement of all questions involved in the suit, it is necessary to show either that the orders sought would legally affect the interest of that person and that it is desirable to have that person joined to avoid multiplicity of suit, or that the defendant could effectually set up a desired defence unless that person was joined or an order made that would bind that other person. This is expounded in the case of **Gokaldas Laximidas Tanna Vs Store Rose Muyinza HCCS No, 7076 of 1987 [1990-1991] KALR 21.**

8.5. I find that the 1<sup>st</sup> Applicant has failed to demonstrate how he will be directly legally affected in case he is not added as a defendant in Civil Suit No. 525 of 2022 and such I do not find it justifiable to add him as a defendant in this case.

#### **9.0. Conclusion.**

9.1. In conclusion, Miscellaneous Application No. 649 of 2023 is hereby dismissed and costs awarded to the Respondents.

I so order.

***Dated, signed and delivered by email this 21<sup>st</sup> day of November, 2023.***



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**CELIA NAGAWA  
JUDGE**