THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISCELLANEOUS APPLICATION NO. 217 OF 2013

(Arising out of High Court Civil* Suit *No. 446 of 2007)

1. **NSEREKO SAMUEL**
2. **WAAKO FRED** **::**
   APPLICANTS

VERSUS

1. **SIRIVE MUSOKE MBIDDE**
2. **LUBOWA TADEWO**
3. **MULEME GEOFFREY**
4. **KAVUMA SSALONGO** **:::::::::::::::::::::::::::::::::::: RESPONDENT/PLAINTIFF**
5. **NAMAGEMBE DORAH**
6. **NAKIRANDA ROBINA**

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by Notice of Motion brought under Order 1 rule 13, Order 2 rule 1, Order 52 rules 1 & 2 of the Civil Procedure Rules (CPR) and section 98 of the Civil Procedure Act, for orders that:-

(a) The applicants be added as a party cum as defendants in HCCS No. 446 of 2007.
(b) The costs of this application be provided.

The application is supported by the affidavits of **Nsereko Samuel** and **Waako Fred** the applicants based on the grounds that:-

1. The applicant had on 26th October 2006 and 15th January 2007 bought land comprised in Kyaggwe Block 105 Plots 1737 and 1733 respectively from the 4th and 3rd respondents/defendants prior to the institution of this suit.
2. The said plots are subject matter in HCCS No. 446 pending before this court.
3. The applicants are in physical possession of the said plots which are the subject matter in HCCS No. 446 of 2007.
4. Any outcome in HCCS No. 446 of 2007 will directly reflect on the applicants.
5. The applicants be heard regarding their interest in the said land.
6. It is fair and in the interests of justice and or in the balance and fair administration of justice that the applicants be added as parties/defendants so that all matters can be dealt with once and for all.

The application was opposed by the 1st respondent, who was plaintiff in the main suit, who filed an affidavit in reply.

The facts are that 1st defendant in this application filed civil suit no. 446/2007 against the 1st, 2nd, 3rd, 4th & 5th defendants, now 2nd, 3rd, 4th, 5th & 6th respondents respectively in this application. The suit was for, among others, cancellation of the said defendants' names from the certificate of title to land and entry of the plaintiff's names on the same titles, a permanent injunction, plus eviction and demolition orders against the defendants or their agents or those claiming under them on the suit plots. Though the defendants filed a defence and a joint scheduling memorandum, the suit was heard *ex parte* under Order 9 rule 20 of the Civil Procedure Rules when they or their Counsel failed to appear at the hearing. The plaintiff and his witnesses gave sworn oral testimonies during the hearing. After closure of the plaintiff's case and submissions of Counsel, a date for delivery of judgement was set. The applicants then filed this application seeking to be added as parties to the civil suit. The application was heard on the date the judgement was, but for the application, to be delivered.

The applicants' affidavit evidence is that the 1st applicant purchased plot 1737 of Block 105 of the suit land from Namagembe Dorah the 4th defendant while the 2nd applicant purchased plot 1733 of Block 105 of the suit land from Kavuma Salongo the 3rd defendant. Both applicants aver that they took possession of the respective plots they bought and are still in occupation of the same, and that civil suit 446/2007, which they got to know of in January 2012, directly impacts on their respective plots. They aver that they have developments on the land. Each annexed to their respective affidavits photographs of the houses they erected on the land.

Learned Counsel Moses Kabega for the applicants, who had also been Counsel for the defendants in the main suit, relied on the evidence as deponed to in the affidavits in support by the two applicants. He submitted that the guiding test in applications of this nature is for court to inquire into whether the presence of the applicant is necessary to enable court to effectually and completely adjudicate on the issues before it. He contended that the applicants were seeking court's indulgence for protection of their right to property. He prayed that court allows the applicants to be heard in their defence of their right to property so that they are not condemned unheard. He cited **Gokaldaslaximidas Tanna V Sister Rose Muyinza Civil Suit No.707/87** to support his position.

The gist of the 1st respondent/plaintiff's affidavit evidence is that the applicants were fully aware of the main suit and even attended court several times but they took no steps to be added as parties. He averred that the applicants lied to court in their affidavits about when they got to know about the main suit. He attached annextures of correspondence collectively marked **CC** to prove it. The 1st respondent's Counsel submitted that the application was an abuse of court process caltulated to further frustrate the disposal of the main suit filed in 2007. He prayed that it be dismissed with costs.

Order 1 rule 13 of the CPR provides that any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by motion or summons or at the trial of the suit in a summary manner.

Order 1 rules 10(2) & 13 of the CPR require that applications to add or strike out or substitute a plaintiff or defendant are to be made at any time before trial or at the trial of the suit in a summary manner. The court has the discretion to add or strike out a party under the said rules but this discretion is exercisable

during trial. The word "trial" is defined by **Black's Law Dictionary, 6th edition**, at page 1504 as a judicial examination and determination of issues between parties to an action, whether they be issues of law or fact, before a court that has jurisdiction.

In **Allah Ditta Quneshi V C. T. Patel [1951] EACA** an application was made to join a party by the plaintiff after the defence had closed their case. It was held that in refusing to amend, the Judge exercised his discretion judiciously under Order 1 rule 9 of the Kenya Civil Procedure Rules. This rule is equivalent to the Uganda Order 1 rules 10(2) & 13 of the CPR. In **Gulamabas V Ebrahimji & Others [1971] EA**, at page 22, where the substitution of a party was outside the 30 day period for filing an appeal, it was held that the inherent jurisdiction of court cannot be invoked where an express remedy is no longer available on account of limitation.

This application was filed after court had heard the evidence of the plaintiff's witnesses, listened to the submissions of the plaintiff's Counsel and given a date for judgement. This was after the trial proceeded *ex parte*, after the defendants and their Counsel failed to appear in court when the matter was called for hearing, despite being duly served.

That aside, the applicants'affidavit evidence that they got to know about the case in January 2012 is disproved by the 1st respondent's affidavit evidence. Annextures **CC** to the 1st respondent's affidavit in reply includes a complaint filed by the two applicants filed in this court contesting the manner in which the case was being handled. This correspondence, a copy of which is also on the court record, is dated 1st April 2011. It was received in this court on 5th April 2011. This date is earlier than the date of January 2012 which the applicants aver is when they came to know about the case.

There is also evidence on the court record that Counsel Musa Kabega who represented the defendants is the same Counsel who eventually represented the applicants. The 1st respondent's affidavit evidence that the two applicants actually appeared in court puportedly to represent the 3rd and 4th defendants has not been rebutted by the applicants. The record of proceedings of 25th May 2011 indicates that the applicants indeed attended court that day and claimed to be representing Nakiranda Robinah the 4th defendant and Namagembe Dorah the 5th defendant. The record of proceedings of 21st December 2011 also shows that on that day, the defendants' Counsel Musa Kabega, now representing the two applicants, attended this court and informed it that he had spoken to Wako and Nsereko (the two applicants) who were in possession of part of the suit land. He prayed court for an adjournment to have the matter settled with the 1st respondent and it was granted.

The above evidence apparent on the court record and as adduced from the 1st respondent's affidavit strongly suggest that the applicants and their Counsel were fully aware that the main suit was pending earlier than January 2012, contrary to their averrments. They even attended court several times but they took no steps to be added as parties. They could have applied to be joined as parties to the said suit earlier instead of waiting until the matter was heard and ready for judgement. In fact, even if they had actually got to know of the case in January 2012, which has been disproved though, they could still have been allowed to do so either before the trial, or, in a summary way, during the trial under Order 1 rule 3 of the Civil Procedure Rules. This is so since the hearing of the case started on 26th Febuary 2013. There is an affidavit of service on the court record that the defendants in that case, together with their lawyer Moses Kabega, were served by this court's process server. Thus, at least their Counsel, who represented their interests way back, was aware of the hearing date and could have filed the application before then, or at

least during the trial in a summary way. They instead chose to wait until the trial was over and a date for judgement was set.

I do not agree with the submissions of the applicants' Counsel, who all along was aware of the pending case as well as the applicants' interests on the suit land, that they were waiting for the negotiations between the plaintiff and the defendants to to be successful. Any prudent lawyer would apply to have his clients added as parties as soon as it becomes apparent that such parties' interests are at stake, as they were in this case, regardless of whether or not negotiations were going on.

I find the case of **Gokaldaslaximidas Tanna V Sister Rose Muyinza** not applicable to the instant situation. In that case the applicant applied orally in a summary way during the second hearing to be added as a defendant to a suit which had initially proceeded *ex parte*. This is unlike in the instant case where the case was already closed for hearing and due for judgement. The applicants could nevertheless pursue their claims on the land by separately proceeding against whoever they can establish a cause of action after the judgement in civil suit no. 446/2007 has been delivered/executed. Allowing the instant application would infer hearing the case afresh and lead to multiplicity of proceedings. This would be defeating the very purpose of Order 1 rule 10(2) of the Civil Procedure Rules which is to save or prevent multiplicities of suits. I find this to be a situation where the inherent jurisdiction of this court as well as its discretion cannot be invoked where an express remedy is no longer available to the parties on account of their delay in presenting it.

This application was clearly brought in bad faith and, given its background, to say the least, is a blantant abuse of the court process. It is dismissed with costs.

Dated at Kampala this 30th day of May 2013.

Percy Night Tuhaise.

JUDGE.