

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.170 OF 2019

(ARISING FROM CIVIL SUIT NO.884 OF 2017)

1. SHEEBA STEVEN

2. NAKALEMA NANZUULA JUSTINE:.....APPLICANTS

(Administrators of the Estate of the late Nathan Kituuse)

VERSUS

COMMISSIONER FOR LAND REGISTRATION:.....RESPONDENTS

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

RULING

This application was brought by notice of motion under Section 98 of the Civil Procedure Act Cap 71, Section 33 of the Judicature Act Cap 13, O.52 rr1,2 & 3 of the Civil Procedure Rules SI 71-1 seeking for orders that;

1. A consequential order doth issue directing the Respondent to vacate the order of temporary injunctions issued against the Applicants in Misc. Application No.1785 of 2017 (arising out of the now dismissed HCCS No.884 of 2017), restraining the Applicants from transferring, selling, mortgaging, alienating, subdividing, construction or interfering in any way with the suit land comprised in Kyadondo Block 65 Plots 109, 135,37,38,166,230,232,233 land at Migadde from the register.

2. A consequential order doth issue directing the Respondent to vacate the caveats lodged by Nondo Muhamad on the suit land comprised in Kyadondo Block 65 Plots 109, 135, 37, 38, 166,230,232,233 land at Migadde.
3. A consequential order granting the Applicants vacant possession of the suit property comprised in Kyadondo Block 65 Plots 109, 135,37, 38, 166, 230, 232, 233 land at Migadde, in order to give effect to the ruling and decree of this Honourable Court in HCCS No.884 of 2017.
4. Costs of the application be provided for.

The grounds upon which the application is premised are;

1. That the Applicants are the current Administrators of the estate of the late Nathan Kituuse; their late father, who was the former registered proprietor of the suit land comprised in Kyadondo Block 65 Plots 109, 135,37,38,166,230,232, 233 land at Migadde, having acquired the same in 1974, by way of purchase from the then owner; the late Nakatanza.
2. That the Applicants are currently the registered on the suit land in their capacity as Administrators of the estate of the late Nathan Kituuse.
3. That the Applicants were subsequently sued by a one Nkambwe Christopher and Nondo Muhamad, claiming as the beneficiaries of the estate of the late Nakatanza Kyazze, vide HCCS No. 884 of 2017, claiming that the Applicant's late father had fraudulently got himself registered on the suit land.
4. That at the time of filing the suit, the Applicants had already transferred the land into their names as Administrators of the estate of the late Nathan Kituuse and with the intent on commencing the distribution of the estate to the various beneficiaries.

5. That upon filing the suit, the said Nkambwe Christopher and Nondo Muhamad also filed an application for a temporary injunction vide HCMA No.1785 of 2017 restraining the Applicants from transferring, selling, mortgaging, alienating, subdividing, constructing or interfering in any way with the suit land comprised in Kyadondo Blok 65 Plots 109,135,37,38,166,230,232,233 land at Migadde, until the final disposal of the main suit.
6. That the said Nondo Muhammad also lodged a caveat on the suit land vide Instrument No. WAK-00154010.
7. That when the suit came up for scheduling and hearing of the Plaintiff's case, the Plaintiff, who had been served with hearing notices did not show up, and neither did their Counsel. As a result of their absence, this Honourable Court dismissed the suit against the Applicants under O.9 r22 of the Civil Procedure Rules.
8. That unfortunately, notwithstanding the Ruling and Decree of Court dismissing the case against the Applicants. This Honourable Court was silent on the fate of the caveats lodged by Nondo Muhamad; one of the Plaintiffs in the head suit as well as the order of a temporary injunction subsisting against the Applicants and no further order was made granting the Applicants vacant possession of the suit land.
9. That all attempts by the Applicants whether through execution of the Court Decree or other lawful means to vacate the caveats and the temporary injunction and to exercise their powers and duties as Administrators of the estate of the late Nathan Kituuse, have been frustrated by the absence of any orders vacating the temporary injunction and caveats, and the Respondent has forwarded it as a reason to decline to vacate the said incumbrancers.
10. That unless the consequential orders sought herein are granted, the Decree will continue to be rendered nugatory as the Applicants cannot exercise their rights as registered Administrators of the estate of the late Nathan Kituuse, and they cannot enjoy their rights or perform their duties.

11. That the orders sought in this application are intended to give effect to the Ruling and Decree of the Court made specifically in favour of the Applicants.

12. That it is in the interests of justice that this Honourable Court be pleased to grant the consequential orders in the manner set out herein.

The application is supported by an affidavit sworn by the 1st Applicant wherein he reiterated the above grounds. I shall not labour to reproduce the same again, save to mention that the following documents were attached as annexures to the affidavit in proof of the averments;

1. A copy of Letters of Administration attached "A."
2. Copies of the certificates of title to the various plots of land attached as "B".
3. Copies of the plaint and written statement of defence to the main suit attached as "C1" & "C2".
4. A copy of the order granting the temporary injunction attached as "D".
5. A search letter showing the registration of both the temporary injunction and caveat attached as "E".
6. A copy of the Decree dismissing the main suit attached as "F".
7. A copy of a letter to the land registry requesting for the removal of the caveat attached as "G".

The application was not opposed by the Respondent despite being served with the same. It is trite law that where certain facts are sworn to in an affidavit, the burden to deny them is on the other

party and if he or she does not they are presumed to have been accepted. See *Samwiri Massa versus Rose Achen [1978] HCB 297; Makerere University versus St. Mark Education Institute Ltd. & Others (1994) KALR 26; Eridadi Ahimbisibwe versus World Food Programme & Others [1998] KALR 32; Kalyesubula Fenekansi* versus Luwero District *Land Board & Others, Miscellaneous Application No. 367 of 2011*. Considering these decisions, I find that the Respondent conceded to the facts deponed to in the affidavit.

That notwithstanding, one thing crucial to this application concerns the mode of procedure it was brought to Court I have realised that the Respondent was not a party to the dismissed suit upon which the Applicants seek consequential orders. I also note that the Applicants herein brought a counterclaim against the Respondents; Nkambwe Christopher and Nondo Muhamad (the Plaintiffs) wherein they claimed for reliefs such as an order for removal of a caveat, among others. The counterclaim has however not been heard up to now, neither has Court pronounced itself on its fate. Considering that under O.8 r7 of the Civil Procedure Rules, it is in itself a separate suit, it logically implies that all the orders sought therein are yet to be granted. Bearing in mind that a consequential order necessarily flows directly and naturally the decision of Court, it follows that no consequential orders can be granted on the counterclaim as such orders cannot flow from nothing decided: See **The Concise Oxford Dictionary 5th Edition, page 258**.

In reaching this, I am not saying that a consequential order cannot be made in favour of a Defendant (in this case the Applicant) simply because he or she has not proved (or filed) a counter-claim because; such an order can nevertheless be made in favour of a Defendant even where he or she has not proved his or her counterclaim [or counter-claimed at all], provided it flows from the evidence and more so if the justice of the case demands. This is by virtue of Section 98 of the Civil Procedure Act Cap 71 and Section 33 of the Judicature Act Cap 13. See also *Garba vs. University of Maiduguri (1986)1 N.W.L.R. (Pt.18) 550; The Registered Trustees of the Apostolic Church vs. Mrs. Emmanuel I. Olowoleni NSC 180/1988*.

What I was simply trying to illustrate is that the Respondent was only a party to the counterclaim, which is yet to be determined, and not a party to the dismissed suit upon which the Applicants seek the reliefs herein. Going ahead now, Counsel for the Applicant filed written

submissions but all authorities therein are not helpful regarding the competency of this application.

The cases cited by Counsel that is; *Gladys Nyangire Karumu versus Mohammed Kaliisa & Anor HCMA No. 731 of 2015, Kiir Deng Kiir versus The Administrator of the Estate of the Late James Katubale Kagudde Nukasa HCMA No. 67 of 2018, and Bassajabalaba Hides & Skins versus Bank of Uganda HCMA 738 of 2011*, are all distinguishable on the ground that consequential orders, upon the applications of a similar nature, were granted against the parties to the main suit.

As I understand, miscellaneous applications can only arise against parties to the main suit. See *Beeline Travel Care Ltd & Anor versus Finance Trust Bank & Anor HCMA No. 312 of 2018; and The Civil Justice Bench Book, 1st Edn. 2016 at page 32.*

Some of the cases I have reviewed concerning the office of the Respondent reveal that in situations where the Respondent was not a party to the main suit, consequential orders are obtained by way of Miscellaneous Causes.

See *Ssetuba Misairi versus Registrar of Titles HCMC No. 55 of 2011 Kampama versus Registrar of Titles HCMC No. 12 of 2013. In Basajabalaba Hides & Skins versus Bank of Uganda and Commissioner for Land Registration HCMA 738 of 2011*, a consequential order was sought against the 2nd Respondent who was not a party to the main suit but unfortunately, Court did not address itself on this after the prayer for that relief was abandoned by Counsel for the Applicant. That said, I am inclined to believe that the application could still not stand against the 2nd Respondent in that case.

In the circumstances, I find this application irregular on the ground of being brought against a person who was never a party to the main suit upon which the Applicant claims reliefs. That notwithstanding, **Article 128(2)(e) of the Constitution of the Republic of Uganda 1995**, enjoins this Court to administer substantive justice without undue regard to technicalities.

In the case before me, there is on record a Court Decree dismissing the main suit against the Applicants implying that the Plaintiffs to that suit were disentitled from claiming the suit land. There is also proof that one of the Plaintiffs in that suit lodged a caveat against the suit land, and

were (the Plaintiffs) also granted a temporary injunction by this Court; all of which were registered against the suit land.

Considering this application, Court would be giving effect to its Decree that the said Plaintiffs have no rights whatsoever in the suit land. Bearing in mind that this application was not opposed by the Respondent, I am inclined to consider the application so as to meet the ends of justice especially since no prejudice would be caused to the latter.

In the circumstances, I hereby;

- i. Grant the order of removal of the caveat,
- ii. An order of temporary injunction from the register against the Respondent.

- iii. Each party to bear its own costs

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Henry I. Kawesa

JUDGE

2/05/19

2/05/2019:

Natunda for the Applicant

Applicants present.

Respondents absent.

Court:

Ruling delivered in the presence of the parties above

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Henry I. Kawesa

JUDGE

2/05/19

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