

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

AT KAMPALA (LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 1677 OF 2021

(Arising from Civil Suit No. 567 of 2021)

1. SENKONYO MOSES NOAH

2. SAMSON SENTUMBWE:.....APPLICANT

VERSUS

1. KATABOGOMA LOZIO

2. STEPHEN BUTERA

3. GAHIZI FRANCIS

4. KALUNGU STELLA:.....RESPONDENT

Before: Lady Justice Alexandra Nkonge Rugadya

R U L I N G:

Introduction:

This application is brought under **section 33 of the Judicature Act, Cap. 13, Order 1 r.10(2) & 13, and Order 6 rule 19 & 31 & Order 8 r.2, 8, and 9, Order 52 rule 1,2 & 3 of the Civil Procedure Rules(CPR)** for orders that the he 3rd & 4th respondents be added as counter defendants in the applicant's counterclaim in **Civil Suit No 567 of 2021**; leave to file an amended counterclaim be provided to cover the unlawful sale of land comprised in **Bululi Block 160 Plot 38 at Kyalweza**, between the 1st respondent as the vendor and the 3rd and 4th as the purchasers; and for the cost of this application to be provided for.

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Grounds of the application:

The grounds of the application are amplified in the affidavit of Mr. Senkonyo Noah, the 1st applicant. He depones the affidavit in support of the application on his own behalf and that of the 2nd applicant.

- 5 Briefly that the applicants are registered proprietors of land comprised in **Bululi Block 160 Plot 38 land at Kyalweza** as the administrators of the estate of the late Zekiya Sempa.

10 The 1st respondent, Mr. Lozio Katabogama filed **Civil Suit No.567 of 2021** against them applicants seeking orders that he is entitled to the land measuring 3 acres on land comprised in **Bululi Block 160 Plot 30 at Kyalweza** from which **plots 37 and 38** were mutated. The applicants filed a defence and a counter claim against the 1st and 2nd respondents but have now discovered that the 1st respondent who is the plaintiff in **Civil Suit No.567 of 2021** executed a sale agreement with the intended new parties, the 3rd and 4th respondent to whom the land comprised in **Bululi Block 160 Plots 37 & 38 land at Kyalweza** had been sold under a transaction in which the 1st respondent represented himself as the registered owner of the said land, whereas not.

15 That it is necessary to have the 3rd and respondents added as counter defendants in **Civil Suit No. 567 of 2021**, for the purposes of this court determining the real questions in controversy between the parties finally and conclusively and guard against multiplicity of suits, and also save court's time.

- 20 It is also their claim that the applicants' interest in the suit land is affected by both the sale between the 1st respondent and the 3rd and 4th respondents who have now forcefully entered on land comprised in **Bululi Block 160 Plot 38 at Kyalweza**, without the consent of the applicants as registered administrators of the estate of the late Zekiya Sempa. That any decision that may be reached by court in determining the counterclaim may affect the 3rd and 4th respondents, thereby making them necessary parties.

25 The applicants believe they have a good case in form of a counterclaim against the 1st, 3rd and 4th respondents, with likelihood of success. According to them therefore, the orders sought herein if granted will serve the interests of justice. *(Attached to the application is a copy of the proposed amended counterclaim marked annexure "E").*

- 30 Other than the 2nd respondent, the rest of the respondents did not file any response.



Reply by the 2nd respondent:

The 2nd respondent, Mr. Steven Buteera, (1st counter defendant), in his reply stated however that he entered into purchase agreement with Mr. Katete Paul and Ms Mukakatale Margaret on the 18th June, 2006 where he purchased 30 acres of land comprised in **Bululi Block 160 Plot 3 land at Kyalweza** village. (A copy of the purchase/agreement is attached and marked **A1/A2**).

That thereafter he took over and enjoyed quiet possession of the said land for some time. He later sold the land to the 1st respondent, who also took possession from him without any body claiming ownership. (Annexed a copy of the agreement allowing mutation from the applicants' land situated at **Bululi Block 160 Plot 11 at Kyalweza: annexures B1/B2**).

That the 1st respondent also purchased other 30 acres from Mr. Gahizi Francis and took possession of the same land. The applicants also acknowledged and agreed to give him a title of fifty four acres. (As per the copy of the agreement between the applicants and the 1st respondent marked **annexture C**).

He also referred to a copy of the letter by his lawyer, attached and **annexture D** indicating that the plaintiff/ 1st respondent had withdrawn the case against him arguing therefore that since the applicants' prayers mention only the 1st, 3rd and 4th respondents the implication was there was no claim against him, and his name should not have been included as a counter – defendant.

For those and other reasons as set out in his affidavit, he therefore opposed the grant of the orders sought and prayed that court dismisses the application with costs.

Representation

The applicant is represented by **M/s Anguria & Co. Advocates** while the 2nd respondent is represented by **Ms Mubiru & Aruho Associated Advocates**. Both parties filed written submissions, as directed by this court.

Objection by the 2nd respondent:

In the 2nd respondent's affidavit in reply, it is averred however that the application is time barred since it was served to his then lawyers **M/S Katongole & Co. Advocates** out of the time as stipulated in the court directives issued on the 24th September, 2021. The applicants had been directed to file and serve their submissions to the respondent on the 1st October, 2021. Instead they served him on 11th October, 2021, outside the time fixed by court.



The applicants in their reply and through the submissions by their counsel however referred to the difficulty encountered when they set out to effect service directly to the 1st respondent. Based on the affidavit of service dated 14th October, 2021 court process server, Kato Benson obtained the copies of the application as soon as they were issued on 23rd September, 2021.

- 5 Upon instructions by counsel Isaac Mr. Tusiime gave him the phone numbers for the 2nd and 3rd respondents asking him to call and serve each with the application, order and submissions the 2nd respondent. When the process server however called the 2nd respondent, he told him he was in Nakasongora and was expecting to return to Kampala on Friday, 8th October, 2021.

- 10 On that day when he was called again by the court process server he was still away and told him that he did not know when he would return. He then later referred him to **M/s Katongole & Co. Advocates**. Being a Friday, it was not until Monday 11th October, 2021 that the process server was able to effect service to the said firm which acknowledged receipt of the documents on that day.

- 15 While I cannot condone the late service, I note that the directives were received on the 23rd September, 2021 immediately after they were issued. The server took his time and only called him on 4th October, 2021.

- 20 The 2nd respondent did not avail himself for personal service until 8th October, 2021 the date he said he would be back from Nakasongora, but where he remained despite his promise that he would return to receive the documents in person. Service was eventually effected to him through another firm, which information could not have readily been within the knowledge of the applicants or the process server for that matter.

- 25 Within that equation, I cannot see where the applicants faulted. The 2nd respondent partly shouldered the blame for the service partly delayed by the court process server implying therefore that the applicants were not entirely to blame for the late service of this application, bearing in mind also the fact that counsel for the applicants had even taken the trouble to inform this court about the reasons for the delay, as per their letter filed 15th October, 2021. (**Annexure A**)

The request for fresh directives may be made by letter as indeed happened in this case. The letter was not however brought to the attention of this court, and accordingly there was no response from this court, accepting or rejecting the request.

- 30 By virtue of **order 5 rule 1(2) of the CPR** which is applicable to directives of court, time may be enlarged if sufficient reasons are shown. I would accordingly overrule the objection by the 2nd

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respondent, given the circumstances as highlighted and also given the fact that the 2nd respondent did not show how he had been prejudiced by the delay, partly attributable to his delayed response.

Now for the merits of the application.

5 **Order 1 r.10 (2) CPR** which provides that;

10 ***"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 defendant, 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."***[underlined for emphasis].

The procedure for bringing such an application is provided for under **Order 1 r.13** CPR that;

15 ***"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 mention or summons or at the trial of the suit in summary manner."***

20 Clearly, under **Order 1 r.10 (2) (supra)** not only can the parties avail themselves of the provisions of the rule but the court can also on its own motion join any party as plaintiff or defendant if in court's opinion such joinder would facilitate effectively and completely the determination of the suit. See: **Kololo Curing Co. Ltd. v. West Mengo Co-op Union Ltd. [1981] HCB 60.**

25 The power to add or strike off a party to pleadings therefore lies within the discretion of court which must however be exercised judiciously based on sound principles. See: **Yahaya Kariisa v. Attorney General & A'nor, S.C.C.A. No.7 of 1994 [1997] HCB 29**, The main purpose of joining parties is to enable the court to deal with matter brought before it and to avoid multiplicity of pleadings.

30 It is a fundamental consideration that before a person can be joined as party, it must be established that the party has high interest in the case. In addition, it must be clearly demonstrated that the orders sought in the main suit would directly or legally affect the party seeking to be added.

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These considerations have been amplified by the Supreme Court of Uganda in the case of the **Departed Asians Property Custodian Board v. Jaffer Brothers Ltd [1999] I.E.A 55**, wheret it is desirable to have that person joined to avoid multiplicity of suit, or where it is found that the defendant could not effectually set up a desired defence unless that person was joined or an order made that would bind that other person. (See also: **Gokaldas Laximidas Tanna v. Store Rose Muyinza, H.C.C.S No. 7076 of 1987 [1990 – 1991] KALR 21**).

Section 33 of the Judicature Act (Cap.13) stipulates that as far as possible all matters in controversy between the parties should be completely and finally determined and all multiplicities of legal proceedings concerning any of the matters be avoided.

Since it is claimed that 1st respondent who is the plaintiff in the main suit executed a land sale agreement with the 3rd and 4th respondents wherein land comprised in **Bululi Block 160 Plot 37 & 38** in which the applicants claim interest;, and that 3rd & 4th respondents have forcefully entered the suit land without the applicants' consent as registered proprietors, it would serve the interest of justice that all matters touching and concerning the subject matter of the suit in the instant case be determined finally and completely to avoid re-litigation over the same.

With all due respect to the argument by the 2nd respondent that the applicants have no claim against the 2nd respondent, it is not tenable for this becomes a triable matter under the counter claim following the subdivisions made over time, making it necessary therefore imperative for the court to give an ear to each party whose interests may be affected by its orders.

A counterclaim is considered to be a separate action from the main suit. The fact that on 20th October, 2021 the 2nd respondent had been withdrawn as a party from the main suit by the 1st respondent/plaintiff did not mean that the counter claimant was thereafter barred from making him party to the claim. A party is free to pursue his/her rights in an action if it can be shown *prima facie* that he/she has a cause of action against the person.

It is therefore the finding of this court that:

1. The addition of Mr. Gahizi Francis and Ms. Kalungi Stella, the 3rd and 4th respondents, respectively, as parties to the counter claim would serve the interests of justice and that the 2nd respondent would not be prejudiced by that order.

2. The rest of the matters raised in this application are triable issues, to be dealt with in a full trial.



3. **Accordingly:**

- a. *the applicants are directed to serve the amended counterclaim to all counter defendants, within 7 days of the delivery of this ruling;*
- b. *The counter defendants to serve their counter defences within 15 days after being served with the counter claim (as amended.)*
- c. *The counter claimants to serve a rejoinder with 7 days upon being served with the respective counter defences.*
- d. *No orders made as to costs.*

.....
Alexandra Nkonge Rugadya

JUDGE

19th February, 2022

Delivered via email
Alexandra Nkonge Rugadya
J 19/2/2022