

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]
MISC. APPLICATION NO. 1143 OF 2023
[ARISING FROM CIVIL SUIT NO. 2826 OF 2016 (FORMERLY 0491 OF 2012)]

AMIN VIRANI

APPLICANT / PLAINTIFF

V

1. ELEANOR BYARUHANGA

2. KEMBABAZI CATERING CENTRE LTD

RESPONDENTS / DEFENDANTS

BEFORE: HON. LADY JUSTICE P. BASAZA - WASSWA

R U L I N G

Representation:

Mr. Isingoma Esau for the Applicant / Plaintiff

Ms. Murangira Kasande Vennie for the Respondents / Defendants

Introduction:

[1] This is a Ruling arising out of an application brought by the Applicant: Mr. Virani, who is also the Plaintiff in the main suit vide **C/s No. 2826 of 2016 (formerly C/s No. 0491 of 2012)** (hereinafter referred to as '**the Head Suit**').

[2] In his application, brought under **Order 24 Rules 4 and 12 of the Civil Procedure Rules**¹, Mr. Virani seeks that the 2nd Defendant in the Head suit, whom he states is

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¹ S.I 71-1

now deceased, be substituted with her legal representatives; **Mr. Augustine Ishasha Bwankosya, Ms. Florence Bwankosya Lwanga, Ms. Kelvin Origye Byarugaba, Ms. Emily Nyakwezi Byarugaba and Mr. Peter Ainebyoona** to whom letters of Probate were granted by the High Court vide **HCT-00-FD- AC- 0762-2019**.

He also seeks *inter alia*, for an order for leave to amend the plaint in the Head suit to effect the changes that he proposes.

Background:

- [3] In the Head suit, Mr. Virani sued three (3) Defendants: **Mr. Wilson Byarugaba, Ms. Eleanor Byarugaba and M/s Kembabazi Catering Centre Ltd.** He sued the latter for alleged trespass on property comprised in **LRV 4333 Folio 3 Plot 89 at Katalima Road** (hereinafter referred to as; '**the suit property**'). He claims that the suit property belongs to him, and seeks for an order of demolition of a wall fence which he alleges; was unlawfully constructed on the suit property by the said Defendants.
- [4] He contends that the 1st and 2nd Defendants: **Mr. Wilson Byarugaba and Ms. Eleanor Byarugaba** are the registered proprietors of the land comprised in **LRV 4034 Folio 14, Plot 85 – 87 at Katalima Road**, that neighbours the suit property. He also seeks against them, for general damages, interest and costs of the suit.
- [5] In their joint defence to the Head suit, the 2nd and 3rd Defendants: **Ms. Eleanor Byarugaba and M/s Kembabazi Catering Centre Ltd**, *inter alia* deny the allegations of trespass levied against them, and aver that at all material times they have been in occupation of the suit property for over twenty – five (25) years, and that Mr.

Virani's title is subject to their alleged interest / right to occupy the same under the doctrine of adverse possession.

The Applicant's case:

[6] The gist of Mr. Virani's present application and supporting affidavits, is;

- i) That he instituted the Head suit against: **Mr. Wilson Byarugaba** as the 1st Defendant, **Ms. Eleanor Byarugaba** as the 2nd Defendant, and **M/s Kembabazi Catering Centre Ltd** as the 3rd Defendant.
- ii) That he recently learnt that **Ms. Eleanor Byarugaba** the 2nd Defendant, had passed on, and can no longer participate in the suit.
- iii) That on March 18, 2021 a grant of Probate for the estate of **the late Eleanor Byarugaba** was given to: **Augustine Ishasha Bwankosya, Florence Bwankosya Lwanga, Kelvin Origye Byarugaba, Emily Nyakwezi Byarugaba and Peter Ainebyoona**, a copy of which is attached as 'A' to the affidavit in support.
- iv) That it is proposed that the late **Eleanor Byarugaba** be substituted with the executors of her estate for purposes of the Head suit.

The Respondent's answer:

[7] In its affidavit in reply sworn by its Director; a one **Mr. Kelvin Byarugaba**, M/s Kembabazi Catering Centre Ltd opposed the application, and replied:

- i) That when Mr. Byarugaba looked at the plaint in the Head suit he noted that **Ms. Eleanor Byaruhanga** is not one of the Defendants, and that the averments in Mr. Virani's affidavit in support are thus falsehoods.

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- ii) That a one **Eleanor Byaruhanga** was never sued in the Head suit, and that the letters of Probate attached are not in respect of the estate of **Eleanor Byaruhanga**, and that the estate of **Eleanor Byaruhanga** is unknown to him.
- iii) That the affidavit in support of the present Application is incurably defective, and that the application is brought against a non-existent party, the 2nd Respondent.

The Applicant's Rejoinder:

[8] Mr. Virani re-joined:

- i) That the reference to the name: **Eleanor Byaruhanga** in his affidavit in support to substitute a party was a misnomer. That he intended to refer to the name **Eleanor Byarugaba** who was a party in the Head suit.
- ii) That his reference to **Eleanor Byaruhanga** was a clear misnomer, an innocent mistake and a drafting error, not calculated to mislead court.
- iii) That the 2nd Respondent's Director has not shown that if this application is granted, such grant would be prejudicial to the 2nd Respondent.

Submissions by Counsel

[9] Learned Counsel for each party made brief, but spirited oral submissions. For brevity, I will not reproduce their submissions here. Essentially they echoed the averments made in the affidavits of their respective clients, albeit in an amplified and argumentative way.

I have duly considered all their arguments.

Masiah Wanyu 11/6

Analysis by Court:

[10] The question to be determined in this application is: **'whether the description by Mr. Virani, throughout this present application, of the 2nd Defendant in the Head suit: Ms. Eleanor 'Byarugaba' as Eleanor 'Byaruhanga' was a mere Misnomer?**

[11] To determine this question, I will adopt the same test applied by the Justices of the Court of Appeal in J B Kohli and Ors v Bachulal Popatlal².

In that case, when faced with a similar question as to whether the description of the Defendant in the plaint as **'Haji Essa Adam'** and not as **'Haji Essa Adam & Son'**, the Court applied the test below:

'Whether a reasonable man reading all the documents in the proceedings, and having regard to all the circumstances, would entertain no doubt that 'Haji Essa Adam & Sons' were the Defendants intended to be sued by the Plaintiff? If he would have no doubt as to the person to be sued, it would be a case of misnomer.

[12] After applying the above test, the Court held in that J B Kohli case (supra) that the case was not one which the writ had been issued against a non-existent person, but rather one of a mere misnomer, for which the Court would allow an amendment.

[13] Upon applying the same test to this present application, with slight adjustment, to wit:

'Whether a reasonable person reading all the documents in the proceedings in this present application and in the Head suit from which it arose, and having regard to all the circumstances, would entertain no doubt that the name 'Eleanor Byarugaba', was the name intended by the Applicant, to be referred to throughout this present application? If a reasonable person would have no doubt as to the person referred to, it would be a case of misnomer.

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² [1964] 1 EA 219

I agree with the Applicant and his Counsel that the name 'Eleanor Byaruhanga' used throughout in the present application, rather than the name of 'Eleanor Byarugaba'; the 2nd Defendant sued in the Head suit, was simply a *bona fide* and inadvertent mistake, a misnomer. Also see Attorney General v Sabric Building and Decorating Contractors Ltd³.

- [14] Be that as it may, importantly, I hasten to add that it was improper for the Applicant to join the deceased: 'Eleanor Byarugaba' as a party to this present application. It was sufficient for the Applicant to have only named the existing Defendants as the Respondents.
- [15] It is trite law that a deceased person is non-existent and cannot be sued. A suit brought against a non-existent person cannot stand against such non-existent person, although an improper joinder of a non-existent person with another, or other Defendants or Respondents is not fatal to the action. Such improperly joined non-existent person can simply be removed by Order of Court. See Order 1 Rule 10 (1) & (2) of the Civil Procedure Rules.
- [16] That said, it is my considered view that in the body of this present application and supporting affidavits, although the Applicant: Mr. Virani wrongly referred to 'Byarugaba' as 'Byaruhanga', I find that, that mistake does not change the fact that the named 2nd Defendant in the Head suit remains 'Byarugaba', albeit now deceased.

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³ HCMA 299 of 2012

- [17] I further find that the said mistake does not also change the fact that letters of probate to the estate of **Eleanor Byarugaba** were granted to: **Augustine Ishasha Bwankosya, Florence Bwankosya Lwanga, Kelvin Origye Byarugaba, Emily Nyakwezi Byarugaba and Peter Ainebyoona**, by the High Court vide **HCT-00-FD- AC- 0762-2019**. Reference is made to a copy of that grant attached as 'A' to the affidavit of the Applicant. This Court takes Judicial notice of that fact. (**Secs. 55 & 56 of the Evidence Act**⁴ applied).
- [18] A sheer mistake such as the above mistake is not fatal, the correct name can be deemed to have been referred to, rather than the erroneous name. Courts are enjoined not to pay undue regard to technicalities, but rather, to adjudicate cases on the basis of substantive Justice. (**Art. 126 (2) (e) of the Constitution**⁵, applied).
- [19] I have considered that in his affidavit in reply, **Mr. Kelvin Byarugaba** did not dispute the fact that he is among the holders of the grant of probate to the estate of the late 'Eleanor **Byarugaba**. And nor did he dispute the fact that 'Eleanor **Byarugaba** was named as the 2nd Defendant in the Head suit.
- [20] I have also considered that **Mr. Kelvin Byarugaba** did not show that the grant of the present application would occasion any injustice to the existing parties in the head suit, or to the intended holders of the said letters of probate.

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⁴ Cap. 6 of the Laws of Uganda.

⁵ 1995 Constitution of the Republic of Uganda.

Decision of Court:

[21] In the final result, this application succeeds.

[22] Pursuant to section 33 of the Judicature Act⁶, and to sections 2 (x) and 98 of the Civil Procedure Act⁷, and to Order 1 Rule 10 (1) and (2) and Order 24 Rule 4 of the Civil Procedure Rules, in order to completely and finally determine the real questions in controversy between the parties in the Head suit, and to avoid a multiplicity of legal proceedings, I order as follows:

1. The name of the deceased 2nd Defendant: **Eleanor Byarugaba** in the Head Suit No. 2826 of 2016 (formerly C/s No. 0491 of 2012) is hereby substituted with the names of her legal representatives; **Augustine Ishasha Bwankosya, Florence Bwankosya Lwanga, Kelvin Origye Byarugaba, Emily Nyakwezi Byarugaba and Peter Ainebyoona**, who were appointed as such, by the High Court vide letters of Probate in **HCT-00-FD- AC- 0762- 2019** dated March 18, 2021. The said five legal representatives now become parties to the Head suit.
2. Leave is granted to the Applicant / Plaintiff to amend the Head suit for purposes only of reflecting the substitution granted in Clause 1 above. Such amendment shall be made within ten (10) days from the date of this Ruling.
3. The name: **'Eleanor Byaruhanga'** improperly joined as a party to the present application is hereby removed.

Macabali J. 14/6

⁶ Cap 13 of the Laws of Uganda

⁷ Cap 71 of the Laws of Uganda

4. The costs of this application shall abide the outcome of the Head suit.

I so order,

P. Basaza Wasswa 14/6.

P. BASAZA - WASSWA
JUDGE

June 14, 2023

Ruling delivered via email to the parties, and uploaded on the Judiciary ECCMIS Portal.